BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 11-1146

AMERICAN ELECTRIC POWER
SERVICE CORPORATION, ET AL.

PETITIONERS,

V.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

RESPONDENTS.

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Parties.

All parties appearing in this Court are listed in petitioners' brief.

2. Rulings under review.

Implementation of Section 224 of the Act, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240 (2011) (J.A. __).

3. Related cases.

The order on review has not previously been before this Court or any other court. We are not aware of any related cases pending in this Court or in any other court.

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GLOSSARY

Amicus Br.	Brief of Amicus Curiae Edison Electric Institute in Support of Petitioners
EEI	Edison Electric Institute
ILEC	Incumbent local exchange carrier
Int. Br.	Brief of Intervenor Consumers Energy Company *et al*. in Support of Petitioners
LEC	Local exchange carrier
NCTA	National Cable & Telecommunications Association
Pet. Br.	Brief of Petitioners
USTA	USTelecom

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JURISDICTION

The Federal Communications Commission (Commission or FCC) published a summary of the order on review in the *Federal Register* on May 9, 2011. 76 Fed. Reg. 26620. Petitioners filed their petition for review on May 18, 2011. This Court's jurisdiction rests on 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

INTRODUCTION AND QUESTIONS PRESENTED

Pole attachment rates are the charges that owners of utility poles, including electric utility companies, assess when cable television operators,

telecommunications carriers, and others attach their lines to existing utility poles. In the Communications Act, Congress directed the FCC to ensure that pole-attachment rates are "just and reasonable." 47 U.S.C. § 224(b). Congress also has directed the FCC to "encourage the deployment . . . of advanced telecommunications capability to all Americans" by removing barriers to infrastructure development. 47 U.S.C. § 1302(a).

In the order on review,[1] the Commission took three steps to promote broadband deployment by improving access to utility poles at just and reasonable rates. First, the Commission revised its formula for calculating the maximum pole-attachment rate that utilities may impose on telecommunications carriers, reducing that rate to minimize the disparity between it and the maximum rate that may be imposed on cable operators. *Order* ¶¶ 126-198 (J.A. __). Second, the Commission concluded that it may regulate pole attachments by incumbent local exchange carriers (ILECs) to ensure that the rates, terms, and conditions applicable to their attachments are just and reasonable. *Order* ¶¶ 199-213 (J.A. __). Third, the Commission allowed the prevailing party in a pole-attachment dispute to obtain a refund

[1] *Implementation of Section 224 of the Act*, 26 FCC Rcd 5240 (2011) (*Order*) (J.A.__).

extending back "as far as the applicable statute of limitations allows." *Order* ¶ 110 (J.A. __).

Petitioners, a group of electric utilities subject to § 224's obligation to allow third parties to attach wires, cables, and other equipment to their poles, now petition for review.

The questions presented are:

(1) Whether the Commission lawfully exercised its rate-setting authority under 47 U.S.C. §§ 224(b) and (e) when it modified a formula it previously had used for computing the "cost" of providing space on a pole for purposes of establishing a just and reasonable rate for telecommunications attachments.

(2) Whether the Commission acted within its discretion in concluding that ILECs are "provider[s] of telecommunications service" under 47 U.S.C. § 224(a)(4), such that the agency may regulate the rates, terms, and conditions of their pole attachments pursuant to § 224(b).

(3) Whether the Commission acted within its discretion under 47 U.S.C. § 224(b) in concluding that a successful pole-attachment complainant is entitled to refunds from the date specified in the applicable statute of limitations and is not limited to refunds due from the date on which its complaint was filed.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the appendix to this brief.

COUNTERSTATEMENT

I. THE COMMISSION'S AUTHORITY TO REGULATE POLE ATTACHMENTS

A. Regulation Prior to the 1996 Act

Utility poles provide a convenient and often essential means for communications providers to deploy the lines, wires, and other network equipment they need to reach potential customers. Concerned that owners of utility poles – generally electric utilities or ILECs – were abusing their market power by charging cable television companies "monopoly rents" to attach cable television wires to their poles, *see Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co*., 534 U.S. 327, 330 (2002), Congress in 1978 added § 224 to the Communications Act, 47 U.S.C. § 224. That provision granted the Commission the authority to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and

reasonable" and to "hear and resolve complaints concerning such rates, terms, and conditions." 47 U.S.C. § 224(b)(1).[2]

As originally enacted, § 224 applied only to attachments by cable operators. Pub. L. No. 95-234, § 6, 92 Stat. 33, 35 (1978). In § 224(d)(1), which continues to govern cable attachments used "solely to provide cable service," 47 U.S.C. § 224(d)(3), Congress specified two alternative cost-based standards for computing what is generally referred to as the "cable rate" (*i.e.*, the pole attachment rate paid by cable operators solely to provide cable service). At the upper bound, that rate cannot be more than "the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole" multiplied by "the percentage of the total usable space" occupied by the attachment. 47 U.S.C. § 224(d)(1). At the lower bound, the cable rate cannot be "less than the additional costs of providing pole attachments." *Ibid.* In other words, § 224(d)(1) establishes a "range of reasonableness" for the cable rate that is between the cable operator's share of the "fully allocated cost of construction and operation of the pole" (at the upper end) and the

[2] The Commission's pole-attachment rules do not apply in 20 states and the District of Columbia because those jurisdictions regulate pole attachments pursuant to 47 U.S.C. § 224(c). *See Order*, App. C. (J.A. __).

"marginal costs of attachments" (at the lower end). *FCC v. Florida Power Corp.*, 480 U.S. 245, 253 (1987).[3]

In a series of orders, the Commission implemented a formula that cable-television-system attachers and utilities could use to determine a maximum just and reasonable pole attachment rate – referred to as the "cable-rate formula" – and procedures for resolving rate complaints.[4] The formula "focus[es] on the upper end of the statutory range," *i.e.*, the fully-allocated-cost limit. *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, 2 FCC Rcd 4387, 4394 ¶ 53 (1987) (*1987 Order*). "[B]y definition, fully allocated costs encompass all pole-related costs," *id.* at 4397 ¶ 74, including the utility's operating expenses (*i.e.*, administrative and maintenance costs), as well as its capital costs for the entire pole (*i.e.*, depreciation expenses, a return on investment, and taxes), *id.* at 4388 ¶ 5. Operating expenses and capital costs are also called "carrying

[3] The cable rate has long been held to provide adequate compensation to pole owners under the Fifth Amendment. *See Florida Power Corp.*, 480 U.S. at 254; *Alabama Power Co. v. FCC*, 311 F.3d 1357, 1370-1371 (11th Cir. 2002), *cert. denied*, 540 U.S. 937 (2003).

[4] *See*, *e.g.*, *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 68 FCC 2d 1585 (1978) (*First Report and Order*), *on recon.*, 72 FCC 2d 59 (1979), *on further recon.*, 77 FCC 2d 187 (1980), *rev. denied*, *Monongahela Power Co. v. FCC*, 655 F.2d 1254 (D.C. Cir. 1981).

charges," or, when expressed as a percentage of pole investment, the "carrying charge rate." *Id.* at 4388 ¶ 6.[5]

The Commission has not adopted a formula for calculating the minimum cable rate – the "additional costs of providing pole attachments," 47 U.S.C. § 224(d)(1). *See 1987 Order*, 2 FCC Rcd at 4399 ¶ 87. If an attachment imposes any "non-recurring costs" on the pole owner – including, for example, costs for "make-ready"[6] – those costs are "directly reimbursable" by the cable operator. *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 72 FCC 2d 59, 72-73 ¶¶ 29-30 (1979). Make-ready costs are reimbursed in addition to the periodic charges (akin to rent) recovered through the cable rate. *See id.* at 62-63 ¶¶ 8-9.

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[5] Under the Commission's formula, the fully allocated cost of a pole is the product of the utility's pole investment (called the "net cost of a bare pole") and the carrying charge rate. This product is multiplied by a "space factor" that represents the portion of total usable space occupied by the cable attachment. Thus, the maximum cable rate equals:

> *Space Factor* × *Net Cost of a Bare Pole* × *Carrying Charge Rate*
>
> Where *Space Factor = Space Occupied by Attachment ÷ Total Usable Space*

47 C.F.R. § 1.1409(e)(1). The "total usable space is the space on the utility pole above the minimum grade level that is usable for the attachment of wires, cables, and related equipment." *Amendment of Rules and Policies Governing Pole Attachments*, 12 FCC Rcd 7449, 7453-7454 ¶ 7 (1997).

[6] " 'Make-ready' generally refers to the modification of poles or lines or the installation of guys and anchors to accommodate additional facilities." *Order* n.42 (J.A. __).

B. Regulation After the 1996 Act

As part of its broader effort to promote infrastructure investment and competition, Congress expanded the reach of § 224 of the Communications Act in the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. 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 under § 224. 47 U.S.C. §§ 224(a)(4), (b)(1). Three aspects of the 1996 Act are relevant to this case.

1. *The telecom rate*. The 1996 Act added a new provision – § 224(e) – to govern attachments "used by telecommunications carriers to provide telecommunications services." 47 U.S.C. § 224(e)(1). For such attachments, Congress instructed the Commission to "prescribe regulations" to "ensure that a utility charges just, reasonable, and nondiscriminatory rates for pole attachments." *Ibid.* Section 224(e) provides for the determination of pole-attachment rates based on the "cost" of providing space on a pole. 47 U.S.C. § 224(e)(2), (3). The statute directs how the costs should be allocated between the pole owner and attacher, but does not specify how such costs should be computed before allocation among the parties. Thus, § 224(e)(2) provides that the "cost of providing space on a pole . . . other than the usable space" is to be apportioned among "all attaching entities" so that each entity

is allocated two-thirds of the *pro rata* cost of such unusable space. Section 224(e)(3) states that the "cost of providing usable space" is to be apportioned "among all entities according to the percentage of usable space required for each entity."

In constructing a new "telecom rate" formula in the wake of the 1996 Act, the Commission built upon its preexisting cable-rate formula (which Congress left in place to govern attachments used "solely to provide cable service," 47 U.S.C. § 224(d)(3)). Accordingly, the measure of cost used to calculate the maximum cable rate – fully allocated cost – became the measure of cost used to calculate the telecom rate. *See Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd 6777, 6822-6823 ¶¶ 99-102 (1998) (*1998 Order*), *aff'd*, *Gulf Power*, 534 U.S. 327; *Order* ¶ 157 (J.A. __).

As initially implemented, the telecom-rate formula generally resulted in higher pole rental rates than the cable-rate formula. The historical discrepancy between the two rates largely stemmed from the different way in which the two statutory formulas "allocate the costs associated with the *unusable* portion of the pole" – *i.e.*, the space on the pole (including the portion underground) that "cannot be used for attachments." *Order* n.397 (J.A. __) (emphasis added). While the cable-rate formula allocates such costs

"based on the fraction of the usable space that an attachment occupies," the telecom-rate formula apportions those costs based on the number of attachers. *Order* n.397 (J.A. __).[7] Thus, before the *Order* on review modified the telecom-rate formula, this difference typically resulted in a higher telecom rate except in instances involving an exceptionally high number of attachers on a pole.

2. *ILEC attachments*. The 1996 Act also amended § 224's definitions of "pole attachment" and "utility," and added a new definition of "telecommunications carrier." "Pole attachment" was redefined to include attachments not only by a cable operator but also a "provider of telecommunications service." 47 U.S.C. § 224(a)(4). The term "utility" was modified to mean, with certain exceptions, a "local exchange carrier" or public utility that "owns or controls poles . . . used, in whole or in part, for any wire communications." 47 U.S.C. § 224(a)(1). "For purposes of" § 224,

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[7] "Under the telecom rate . . . , 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." *Order* n.397 (J.A. __). The space factor (which apportions both usable and unusable space) for the telecom rate is:

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

47 C.F.R. § 1.1409(e)(2)(i).

the "term 'telecommunications carrier' " – which is otherwise defined as "any provider of telecommunications services," 47 U.S.C. § 153(51) – "does not include any incumbent local exchange carrier," *id.* § 224(a)(5).

In implementing the 1996 amendments, the Commission understood that it had authority to regulate all "pole attachment[s]" as defined in § 224(a)(4). *1998 Order*, 13 FCC Rcd at 6793 ¶ 30. In considering whether to regulate attachments by ILECs, however, the Commission initially concluded that, because ILECs are "utilit[ies] but [are] not . . . telecommunications carrier[s]," they do not have rights "as pole attachers." *Id.* at 6781 ¶ 5. As we explain below, the Commission revisited that conclusion in the *Order* on review.

3. *Pole attachments and broadband policy*. The 1996 Act was designed to "accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition." H.R. Conf. Rep. No. 104-458, at 1 (1996). Consistent with that goal, § 706(a) of the 1996 Act (later codified at 47 U.S.C. § 1302(a)) requires the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing . . . regulating methods that remove barriers to infrastructure investment." If the FCC finds

that such "broadband" capability is not being sufficiently deployed, the statute mandates that the FCC "shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market." 47 U.S.C. § 1302(b).

Even before the 1996 Act, the Commission, with this Court's approval, had held that cable operators that offer broadband services along with cable service do not lose the protection of the regulated cable rate. *See Texas Utils. Elec. Co. v. FCC*, 997 F.2d 925, 936 (D.C. Cir. 1993). In implementing the 1996 Act, the Commission concluded that its rate-setting authority under § 224(b) applies to all pole attachments by cable operators, *1998 Order*, 13 FCC Rcd at 6793-94 ¶ 30, even if the attachment itself is not used "solely to provide cable service," 47 U.S.C. § 224(d)(3).

The Supreme Court affirmed the Commission's analysis in *Gulf Power*, 534 U.S. 327. The Court explained that the cable- and telecom- rates are not the "exclusive rates allowed" under § 224, *id*. at 335, and for attachments that fall outside those specific standards, "the FCC must prescribe just and reasonable rates" under § 224(b) "without necessary reliance upon a specific statutory formula devised by Congress," *id*. at 336. The Court rejected the argument that "the straightforward language of

[§ 224's] subsections (d) and (e) directs the FCC to establish two specific just and reasonable rates [and] no other rates are authorized." *Id.* at 335 (internal quotation marks omitted). The Court found the Commission's decision to regulate cable attachments used to provide broadband services to be "more sensible" than the utilities' view, under which a cable operator "subjects itself to monopoly pricing" if it "attempts to innovate at all and provide anything other than pure television." *Id.* at 339. The utilities' position, the Court recognized, "would defeat Congress' general instruction to the FCC to 'encourage the deployment' of broadband Internet capability and, if necessary, 'to accelerate deployment of such capability by removing barriers to infrastructure investment.' " *Ibid.* (quoting 47 U.S.C. §§ 1302(a) & (b)).

II. THE *ORDER* ON REVIEW

A. In November 2007, the Commission issued a notice of proposed rulemaking "to consider comprehensively the appropriate changes, if any," to the pole-attachment regime in light of "nearly a decade of experience" since the 1996 Act. *Implementation of Section 224 of the Act*, 22 FCC Rcd 20195, 20196 ¶ 2 (2007) (*NPRM*) (J.A. __). In May 2010, the Commission issued a further notice of proposed rulemaking to consider actions that would "lower the costs of telecommunications, cable, and broadband deployment and to promote competition, as recommended in the National Broadband Plan."

Implementation of Section 224 of the Act, 25 FCC Rcd 11864, 11865 ¶ 1 (2010) (*FNPRM*) (J.A. __).[8] The Commission sought comment on "reinterpret[ing] the section 224(e) telecom rate so as to yield pole rental rates that reduce disputes [about which rate applies] and investment disincentives." *Id.* ¶ 122 (J.A. __). Although the *FNPRM* did not "propose specific rules" for regulating ILEC attachments (an issue raised by the initial *NPRM*), it asked commenters to "refresh the record" on that issue. *Id.* ¶¶ 143 (J.A. __). The *FNPRM* also proposed to revise 47 C.F.R. § 1.1410(c). That provision, since its adoption in 1978, had permitted successful pole-attachment complainants to obtain refunds only as far back as the filing of the pole-attachment complaint. The Commission proposed to eliminate that limitation and, instead, provide relief that accrues on the date specified by the relevant statute of limitations. *FNPRM* ¶ 88 (J.A. __).

[8] The National Broadband Plan was developed pursuant to the American Recovery and Reinvestment Act of 2009 (Recovery Act), Pub. L. No. 111-5, 123 Stat. 115, which required the FCC to develop a "national broadband plan" for "ensur[ing] that all people of the United States have access to broadband capability." *Id.* § 6001(k), 123 Stat. at 515-516. In addressing the issue of access to infrastructure, the Plan found that "[a]pplying different [pole attachment] rates based on whether the attacher is classified as a 'cable' or a 'telecommunications' company distorts attachers' deployment decisions," and "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)." National Broadband Plan 110 (available at http://www.broadband.gov/plan/).

B. On April 7, 2011, the Commission released the *Order* on review. As relevant here, the *Order* established a new just and reasonable telecom rate based upon a revised definition of "cost," applied § 224(b) to ILEC attachments, and extended the refund period.

1. *Telecom rate*. Citing Congress's directive under 47 U.S.C. § 1302(b), the Commission explained that the *Order* was "designed to promote competition and increase the availability of robust, affordable telecommunications and advanced services to consumers throughout the nation." *Order* ¶ 1 (J.A. __). The Commission pointed out that "different interpretations" of the ambiguous term "cost" in section 224(e) "yield a range of rates from the existing fully allocated cost approach at the high end to a rate closer to incremental cost at the low end." *Id.* ¶ 8 (J.A. __); *see also id.* ¶¶ 156-159 (J.A. __). Balancing the statutory goal of accelerating broadband deployment against "the interest in continued pole investment," the Commission adopted "a definition of cost that yields a new 'just and reasonable' telecommunications rate" that "generally will recover the same portion of pole costs as the current cable rate." *Id.* ¶ 8 (J.A. __).

The Commission found that "pole rental rates play a significant role in the deployment and availability of voice, video, and data networks." *Order*

¶ 172 (J.A. __). The original telecom rate, the Commission explained, was "sufficiently high that it hinder[ed these] important statutory objectives," and "lowering the telecom rate[] 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." *Id.* ¶ 147 (J.A. __). 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." *Id.* ¶ 126 (J.A. __). "Removing these barriers to telecommunications and cable deployment," the Commission explained, "will enable consumers to benefit through increased competition, affordability, and availability of advanced communications services, including broadband," while still enabling pole owners to earn a fair return when they provide access. *Ibid.*

To that end, the Commission rejected continued use in the telecom formula of the fully-allocated-cost approach it had imported from the cable-rate formula. Under the *Order*, the new telecom-rate formula adopts two alternative measures of cost, with utilities receiving the benefit of the measure that produces the higher rate.

First, the Commission recognized that telecommunications attachers have historically contributed to the capital costs of the pole network (beyond those costs recovered through make-ready fees), and it did not want the new telecom rate to "unduly burden [utility] ratepayers." *Order* ¶ 149 (J.A. __). Balancing that concern against the statutory goal of promoting broadband deployment, the Commission decided to "allow the pole owner to charge a monthly pole rental rate that reflects some contribution to capital costs" (in addition to those recovered through make-ready fees), while also reducing the telecom rate so that it "will, in general, approximate the cable rate." *Ibid.* Heeding Congress's direction that pole-attachment formulas should be " 'simple and expeditious,' " the Commission settled on an approach that defines costs "in terms of a percentage of the fully allocated costs" of the pole – specifically, 66 percent of fully allocated costs in urban areas and 44 percent in non-urban areas. *Ibid.* (quoting S. Rep. No. 95-580, at 21 (1977)).[9] This measure of cost produces a rate that "will, in general, approximate the

[9] This approach sets the telecom rate equal to:

> *Space Factor* × *Cost, where Cost:*
>
> *in Urbanized Service Areas* = 0.66 × (*Net Cost of a Bare Pole* × *Carrying Charge Rate*)
>
> *in Non-Urbanized Service Areas = 0.44* × (*Net Cost of a Bare Pole* × *Carrying Charge Rate*)

Order, App. A (J.A. __).

cable rate," thereby promoting network investment and broadband deployment. *Ibid.*

Second, although the measure of cost discussed above will produce a higher telecom rate "in most cases," *Order* ¶ 149 (J.A. __), the Commission established an alternative measure of cost that utilities may use if it benefits them to do so. The alternative approach is based on the principle of "cost causation," under which the "customer – the cost causer – pays a rate that covers" the costs for which it is "causally responsible." *Order* ¶ 143 (J.A. __). Under this approach, a pole owner may recover its administrative and maintenance costs through the telecom rate, but not capital costs other than those associated with make-ready expenses (which are recovered directly from the attacher).[10] Administrative and maintenance expenses were included because "it is likely that an attacher is causally responsible" for at least some of those costs. *Id.* ¶ 145 (J.A. __).[11] The Commission also noted

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[10] This approach sets the telecom rate equal to:

> *Space Factor* × *Net Cost of Bare Pole* × *Administrative and Maintenance Carrying Charge Rate*

Order, App. A (J.A. __).

[11] The Commission recognized that an attacher "might not be the cost causer with respect to all" administrative and maintenance costs. *Order* ¶ 145 (J.A. __). As the agency explained, however, a pure cost-causation approach (which would define costs as marginal costs) would be difficult to administer and, because of § 224(e)'s apportionment rules, could produce a telecom rate

that capital costs caused by a telecommunications attacher have long been recovered through make-ready charges, *id.* ¶ 143 (J.A. __), which "the utility itself sets" without regard to "any mandatory rate formula set by the Commission," *id.* ¶ 185 (J.A. __). The agency determined that other capital costs (*i.e.*, rate of return, taxes, and depreciation) are properly excluded under a cost-causation approach because the pole owner would have incurred those costs "regardless of the demand for attachments." *Id.* ¶¶ 143-144 (J.A. __).

2. *ILEC attachments*. In concluding that it has authority under § 224(b) to regulate ILEC attachments, the Commission focused on the definition of "pole attachment" in § 224(a)(4), as amended by the 1996 Act. That definition, the Commission noted, encompasses "any attachment by a . . . provider of telecommunications service to a pole." *Order* ¶ 209 (J.A. __). "Because incumbent LECs are 'providers of telecommunications service,' 'pole attachment' as defined in section 224(a)(4) includes attachments of incumbent LECs." *Id.* ¶ 211 (J.A. __). The Commission acknowledged that the definition of "telecommunications carrier" in § 224(a)(5) excludes ILECs, but it explained that the relevant term "provider of telecommunications

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below marginal cost. *See Order* ¶¶ 142-143 & n.428 (J.A. __). By contrast, administrative and maintenance expenses associated with a pole are easily ascertainable from existing regulatory accounts and include costs exceeding the marginal cost of providing space to an attacher. *See Order* ¶ 145 & n.435 (J.A. __).

service" is a "distinct" phrase that should be given its own interpretation. *Id.* ¶¶ 210 (J.A. __).

The Commission also noted significant changes in "market realities" since it had concluded in 1998 that ILECs were not pole attachers entitled to reasonable rates under § 224(b), which further supported the agency's rejection of its prior interpretation in the *1998 Order*. *See Order* ¶¶ 206, 208 (J.A. __); *see also* page 11, *supra*. The Commission observed that ILECs "as a whole" now "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." *Order* ¶ 206 (J.A. __). This disparity may leave ILECs in "an inferior bargaining position," in contrast with their approximate parity with electric utilities as a historical matter, preventing "market forces and independent negotiations" from producing just and reasonable rates for ILEC attachments to electric poles. *Id.* ¶ 199 (J.A. __). The Commission concluded that regulating ILEC attachments in this circumstance would "promote competition," *id.* ¶ 206 (J.A. __), and encourage broadband deployment by "reduc[ing] input costs" and "expand[ing] opportunities for investment," *id.* ¶ 208 (J.A. __).

The Commission recognized that "the issues related to rates for pole attachments by [ILECs] raise complex questions" because of ILECs' status as

pole owners and their historical use of "joint use" and other agreements to obtain access to other utility poles. *Order* ¶ 214 (J.A. __). The Commission accordingly declined to develop a rate formula for ILEC attachments. Instead, the agency explained that it will evaluate pole-attachment complaints brought by ILECs on "a case-by-case basis" to determine whether the rates, terms, and conditions imposed on ILEC attachments are consistent with § 224(b). *Ibid.*

3. *Refund period.* Finally, the Commission adopted its proposal to extend the refund period from the date on which the complaint is filed to the date determined by the applicable statute of limitations. *Order* ¶ 111 (J.A. __). The Commission rejected the argument that attachers would "attempt to maximize their monetary recovery" by delaying the filing of a complaint, finding no basis for concluding that attachers have "more incentive than any other plaintiff to delay filing a complaint in order to make additional over-payments that will later need to be refunded." *Ibid.*

C. On June 7, 2011, petitioners sought a stay pending judicial review of the new telecom-rate formula. This Court denied the stay motion on August 5, 2011.

SUMMARY OF ARGUMENT

I. Congress delegated authority to the FCC to implement and interpret § 224, and granted the agency broad discretion to develop a methodology for establishing just and reasonable pole-attachment rates. The Commission reasonably exercised that discretion when it modified the telecom-rate formula by interpreting the unadorned – and inherently ambiguous – term "cost" in § 224(e) to develop a cost methodology that promotes federal policy goals.

Contrary to petitioners' contentions, §§ 224(e)(2) and (3) do not compel use of fully allocated cost in the telecom rate. In contrast with § 224(d), which specifies two alternative definitions of cost for purposes of the cable-rate formula, § 224(e) does not contain any definition of cost. Sections 224(e)(2) and (3), by their terms, address the *apportionment* of costs among attaching entities, but not the *calculation* of costs to be apportioned.

Petitioners make no attempt to show that the new telecom rate is confiscatory or otherwise falls outside a range of reasonableness. That is fatal to their claim. The Commission acted reasonably in allowing utilities to recover a portion of their fully allocated cost from telecommunications attachers in the majority of cases where doing so benefits the utility. The Commission reasonably balanced the competing policies of promoting

competition and broadband deployment, and protecting utility ratepayers from undue costs. The Commission also acted reasonably in establishing specific percentages of fully allocated cost in urban and non-urban areas so as to cause the telecom rate to generally approximate the cable rate.

Petitioners attack the Commission's decision to rely on cost-causation principles in setting the alternative cost measure for the telecom rate, but the Commission explained why the "cost of providing" space on a pole need not include capital costs that the pole owner would incur even in the absence of pole attachments. To the extent a pole owner incurs any capital costs in providing space, the Commission explained that such costs have long been directly recoverable in full from the attaching entity through make-ready fees.

II. The Commission reasonably concluded that it has authority under 47 U.S.C. § 224(b) to regulate ILEC pole attachments on electric utility poles. Section 224(a)(4) defines "pole attachment" to include attachments by a "provider of telecommunications service." ILECs are "provider[s] of telecommunications service," so their attachments to utility poles are "pole attachment[s]" for purposes of § 224.

Contrary to petitioners' argument, the exclusion of ILECs from § 224(a)(5)'s definition of "telecommunications carrier" does not require the Commission to interpret the term "provider of telecommunications service"

to exclude ILECs. Congress used both terms in § 224, and, consistent with basic canons of statutory construction, the Commission reasonably interpreted the two distinct statutory terms to carry distinct meanings.

The Commission also provided sound policy reasons for its decision to regulate ILEC attachments. The agency found that an increasing disparity in pole ownership between ILECs and other pole owners could affect ILECs' ability to negotiate just and reasonable attachment rates, which in turn could frustrate federal competition and broadband deployment goals. Substantial record evidence supports the Commission's action, and its adoption of a case-by-case approach ensures that regulation will be applied only where necessary to ensure just and reasonable rates.

III. Petitioners likewise fail in their challenge to the Commission's extension of the refund period to the date determined by the applicable statute of limitations. Petitioners' challenge to the agency's statutory authority is waived (because it was never raised before the agency) and, in any event, meritless. Section 224 confers on the Commission expansive authority to fashion "necessary and appropriate" procedures for resolving pole attachment complaints, 47 U.S.C. § 224(b)(1), and the statute's silence regarding the triggering date for refunds authorizes the agency to "fill [that] gap[]," *Gulf Power*, 534 U.S. at 339. The new refund rule encourages pre-complaint

negotiations, and thus represents a reasonable exercise of the Commission's statutory authority to adjudicate pole-attachment disputes.

ARGUMENT

I. THE *ORDER* IS SUBJECT TO DEFERENTIAL STANDARDS OF REVIEW

Judicial review of the Commission's interpretation of the Communications Act is governed by *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron*, if the intent of Congress is clear, "the court, as well as the agency, must give effect to [that] unambiguously expressed intent." *Id.* at 842-843. If, however, "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. The agency's "view governs if it is a reasonable interpretation of the statute – not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts." *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498, 1505 (2009); *see also AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999) ("[T]he 1996 Act is not a model of clarity. It is in many important respects a model of ambiguity or indeed even self-contradiction. . . . But Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency.").

Under the Administrative Procedure Act, the Commission's analysis must be upheld unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "[T]he ultimate standard of review is a narrow one," and the "court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). Judicial deference to the Commission's "expert policy judgment" is especially appropriate where, as here, the "subject matter . . . is technical, complex, and dynamic." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1002-1003 (2005) (internal quotation marks omitted).

II. THE COMMISSION LAWFULLY MODIFIED THE TELECOM-RATE FORMULA

To "significantly reduce the marketplace distortions and barriers to the availability of new broadband facilities and services that arose from disparate rates," *Order* ¶ 151 (J.A. __), the Commission revised the telecom-rate formula so that the telecom rate more closely approximates the cable rate. In place of the fully allocated cost of utility poles, the Commission adopted two alternative measures of cost to calculate a just and reasonable telecom rate under 47 U.S.C. § 224(e), and explained that pole owners are entitled to a telecom rate defined by whichever of the two measures is more favorable to them. *Order* ¶ 161 (J.A. __).

Petitioners' challenges to the new telecom-rate formula fall short. Judicial review of the FCC's rate-setting decisions is highly deferential, and petitioners have not come close to demonstrating that the Commission has abused its broad discretion in this case.

A. The Commission Has Broad Rate-setting Authority Under § 224

Section 224(e)(1) requires the Commission to adopt a telecom rate that is "just, reasonable, and nondiscriminatory." To achieve that result, §§ 224(e)(2) and (3) describe how the Commission is to apportion among attaching entities the "cost of providing usable space" (47 U.S.C. § 224(e)(3)) and the "cost of providing space on a pole . . . other than the usable space," 47 U.S.C. § 224(e)(2). Section 224(b)(2) also authorizes the Commission to "prescribe by rule regulations to carry out the provisions of" § 224. These provisions vest in the Commission broad discretion to establish a methodology for determining a just and reasonable rate that takes account of important objectives of federal communications policy, including the congressional mandate to promote broadband deployment to all Americans.

"Under the statutory standard of 'just and reasonable,' it is the result reached not the method employed which is controlling." *Federal Power Comm'n v. Texaco Inc.*, 417 U.S. 380, 388 (1974) (internal quotation marks omitted). So long as the rate produced falls within a "zone of

reasonableness," "the Commission's determination must be upheld." *Nader v. FCC*, 520 F.2d 182, 192 (D.C. Cir. 1975). Moreover, "[b]ecause agency ratemaking is far from an exact science and involves 'policy determinations in which the agency is acknowledged to have expertise,' [judicial] review thereof is particularly deferential." *Time Warner Entm't Co., L.P. v. FCC*, 56 F.3d 151, 163 (D.C. Cir. 1995) (internal quotation marks omitted)).

As the Commission explained, although § 224(e) describes how "[a] utility shall *apportion* the cost of providing space" on a pole, it does not define the term "cost." *Order* ¶ 156 (J.A. __) (emphasis added). Absent a specific definition, "the word 'cost' . . . is a chameleon, . . . a virtually meaningless term" whose use signifies an intent to "give rate-setting commissions broad methodological leeway," but "say[s] little about the method employed to determine a particular rate." *Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 500-501 (2002) (internal quotation marks and citation omitted). Thus, when the unadorned term "cost" is an element "in the calculation of just and reasonable rates," "regulatory bodies required to set rates expressed in these terms have ample discretion to choose methodology." *Id.* at 499-500 (internal quotation marks omitted).

The structure of the statute confirms that Congress intended to authorize the FCC to use its expertise in developing a cost methodology

under § 224(e). In sharp contrast with § 224(d), which explicitly mandates two alternative measures of cost for purposes of the cable rate (*see* 47 U.S.C. § 224(d)(1), (3)), § 224(e) leaves "cost" undefined, thereby leaving it to the FCC to "fill [the] gap[] where the statute[] [is] silent," *Gulf Power*, 534 U.S. at 339. *See Russello v. United States,* 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (brackets and internal quotation marks omitted).

B. The New Telecom-Rate Formula Represents a Reasonable Exercise of the FCC's Rate-setting Authority

In developing the new telecom-rate formula, the Commission sought to balance multiple policy goals. Contrary to petitioners' suggestion (Pet. Br. 15, 52-53), that is precisely what administrative agencies are supposed to do when interpreting ambiguous statutory provisions. *See Brand X*, 545 U.S. at 980 ("[f]illing [statutory] gaps . . . involves difficult policy choices that agencies are better equipped to make than courts"); *see also New York v. EPA*, 413 F.3d 3, 25 (D.C. Cir. 2005) ("This policy choice, which reconciles conflicting interests in accuracy and efficiency, based on years of regulatory experience, is entitled to deference under *Chevron* Step 2"). Petitioners deride this task as "results-oriented." Pet. Br. 48. But the "result" is the one

Congress sought: to "encourage the deployment . . . of advanced telecommunications capability to all Americans . . . by utilizing . . . regulating methods that remove barriers to infrastructure investment." 47 U.S.C. § 1302(a). Indeed, "Congress has *directed* the FCC to make the major policy decisions and to select the mix of regulatory and deregulatory tools the Commission deems most appropriate in the public interest to facilitate broadband deployment and competition." *Ad Hoc Telecomms. Users Comm. v. FCC*, 572 F.3d 903, 908 (D.C. Cir. 2009) (emphasis added). The Commission thus may implement § 224 in light of "Congress' general instruction to the FCC to 'encourage the deployment' of broadband Internet capability." *Gulf Power*, 534 U.S. at 339 (quoting 47 U.S.C. § 1302(a)).

Consistent with its congressionally assigned mission, the Commission found that, because "pole rental rates play a significant role in the deployment and availability of voice, video, and data networks," a new telecom rate was necessary to "promote competitive and technological neutrality, and hence more effective competition, resulting in more efficient investment, innovation, and service provision." *Order* ¶¶ 172-173 (J.A. __). As the Commission explained, "cable operators have been arbitrarily deterred from offering new, advanced services" because of the "financial impact" that could result from application of a higher telecom rate. *Id.* ¶ 174 (J.A. __). The

Commission also found that "implementing a low and more uniform rate" will "eliminate competitive disadvantages that [telecommunications] carriers" face, *id.* ¶ 176 (J.A. __), and will in turn "enable more efficient investment decisions in network expansion and upgrades, most notably in the deployment of modern broadband networks," *id.* ¶ 181 (J.A. __).

At the same time, the Commission took account of the "legitimate concerns of pole owners and other parties" (*id.* ¶ 6 (J.A. __)), by ensuring that the new telecom rate adequately compensates pole owners (*id.* ¶¶ 182-198 (J.A. __)), preserves "appropriate incentives" for them "to invest in poles" (*id.* ¶ 151 (J.A. __)), and avoids imposing an undue burden on utility ratepayers, *id.* ¶ 149 (J.A. __).

Petitioners make no attempt to show that the new telecom-rate formula produces a rate that is confiscatory or otherwise falls outside the "zone of reasonableness" for a just and reasonable rate. *See*, *e.g.*, *WorldCom, Inc. v. FCC*, 238 F.3d 449, 461-462 (D.C. Cir. 2001) ("The relevant question is whether the agency's numbers are within a zone of reasonableness, not whether its numbers are precisely right.") (internal quotation marks omitted). To the extent petitioners challenge the manner in which the Commission balanced competing policy interests, they fail to overcome the deference due to the Commission's policymaking judgment. *See Ad Hoc Telecomms. Users*

Comm., 572 F.3d at 908 ("[I]n matters such as this, which implicate competing policy choices, technical expertise, and predictive market judgments," the Court's review of the FCC's policymaking decisions is "particularly deferential.").

1. Petitioners take issue with the Commission's decision to allow utilities to recover a portion (66% for urban areas and 44% for non-urban areas) of their fully allocated costs in the majority of cases where it benefits the utility to do so. *See* Pet. Br. 40-42. The Commission provided sound reasons for its decision to rely on a percentage of fully allocated costs. The agency explained that "permitting recovery of 100 percent of apportioned, fully-allocated costs . . . could undermine furtherance of important statutory objectives," *Order* ¶ 148 (J.A. __), and is not statutorily required, *id.* ¶¶ 155-166 (J.A. __). At the same time, however, the telecom rate should permit some recovery of capital costs to minimize any undue burden on utility ratepayers. *Id.* ¶ 149 (J.A. __). "Defining cost in terms of a percentage of fully allocated costs" thus offered a "readily administrable approach" for balancing these competing considerations, while honoring "Congress's direction that the Commission's pole attachment rate regulations be 'simple and expeditious' to implement." *Id.* ¶ 149 (J.A. __).

For similar reasons, petitioners' attack on the specific percentages used in the telecom-rate formula fails. Pet. Br. 49-51. The FCC adequately explained the rationale for the specific numbers it chose: those percentages "provide a reduction in the telecom rate" that will "in general, approximate the cable rate" in both urban and rural areas. *Order* ¶ 149 (J.A. __). Applying the urban rate to non-urban areas, by contrast, would impose greater burdens on "providers of broadband and other communications services" in such areas and would fail to account for the "increased challenges" those areas face in terms of broadband deployment. *Id.* ¶ 150 (J.A. __) (finding that "cost characteristics [in rural areas] can be different," and "the availability of, and competition for, broadband services tends to be less today [in rural areas] than in urban areas."). The Commission also observed that the cable rate had not produced a "shortage of pole capacity," and, therefore, approximating that rate in the telecom formula likely would not diminish pole owners' "incentives to invest in poles." *Id.* ¶ 151 (J.A. __). The Commission's line-drawing to balance "congressional policies" is "necessarily entitled to substantial deference," *Nat'l Ass'n of State Util. Consumer Advocates v. FCC*, 372 F.3d 454, 461 (D.C. Cir. 2004), and its selection of percentages falls well within the agency's discretion. *See*, *e.g.*, *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 776-777 (1968) (because

"legislative discretion implied in the rate making power . . . embrac[es] the method used in reaching the legislative determination as well as that determination itself," "[i]t follows that rate-making agencies are not bound to the service of any single regulatory formula.").

2. Petitioners next challenge the alternative measure of the telecom rate, which is based upon a cost-causation approach. Pet. Br. 49. They argue that Congress would have used § 224(d)'s "additional cost" standard had it "intended the Telecom Rate to be based on a cost causation theory." Pet. Br. 46. That argument "overlooks the obvious difference between a statutory *requirement* . . . and a statutory *authorization*." *Alaska Dept. of Envtl. Conservation v. EPA*, 540 U.S. 461, 491 (2004). A "congressional mandate in one section and silence in another often suggests not a prohibition but simply a decision *not to mandate* any solution in the second context, *i.e.*, to leave the question to agency discretion." *Catawba County, N.C. v. EPA*, 571 F.3d 20, 36 (D.C. Cir. 2009) (internal quotation marks omitted). Here, the Commission explained that the cost-causation approach provides a reasonable basis for determining the "cost of providing" space on a pole, because it excludes those costs (*i.e.*, capital costs not recovered through make-ready

fees) that "would have been incurred regardless of the demand for attachments." *Order* ¶¶ 143-144 (J.A. __); *see also id.* ¶ 185 (J.A. __).[12]

Consumers Energy protests that "space is available on the pole to provide to the attacher *because* the utility made the necessary capital investment and incurred the necessary capital costs." Int. Br. 22. In *Verizon*, the Supreme Court rejected the argument that an entity's past investment in creating an asset must be considered part of the cost of providing that asset to others. At issue in *Verizon* was a provision that required ILECs to provide competitors access to elements of their networks at rates that were based on the "cost . . . of providing the . . . network element." 47 U.S.C. § 252(d)(1). The ILECs argued that such cost "must be calculated using the incumbent's past investment in the element and the means of providing it." *Verizon*, 535 U.S. at 498. The Court made clear, however, that the term " 'cost' has no such clear implication," *ibid.*, but allows the Commission to develop a rate

[12] Amicus Edison Electric Institute (EEI) contends that the Commission's reading of § 224(e) is undermined by the statute's use of the definite article ("*the* cost") in describing the cost of providing space. Amicus Br. 21. Not so. The *Order* adopts two *alternative measures* of cost; under either measure, the Commission's methodology computes "the cost" of providing space for purposes of the telecom-rate formula. For similar reasons, EEI is wrong in suggesting (*id.* at 22) that the new telecom-rate formula produces a "range" of rates; rather, the formula produces a single telecom rate based on whichever of the two alternative measures of cost results in a higher rate – an approach that *benefits* the utility.

methodology without "reference to historical investment," *id.* at 501. As the Commission explained in this case, "a pole owner recovers the entire capital cost of a new pole through make-ready charges from the new attacher when a new pole is installed to enable the attachment." *Order* ¶ 143 (J.A. __). Consistent with *Verizon*, the Commission reasonably concluded that it was not required to include other capital costs – not caused by the pole attachment – in establishing its alternative measure of cost under the telecom rate.

3. Petitioners' contention that the Commission did not "meaningfully link[]" the rule change with "broadband deployment decisions," Pet. Br. 48, ignores ten paragraphs in the *Order* extensively addressing that question. *Order* ¶¶ 172-181 (J.A. __). As the Commission explained, the record showed that "reducing the current disparity in cable and telecom rates, which distort investment decisions for telecommunications carriers and cable operators, represents the most effective means of promoting broadband deployment." *Id.* ¶ 174 (J.A. __) (internal quotation marks omitted). For instance, the National Cable and Telecommunications Association provided evidence that rate differences could "amount to approximately $90 million and $120 million per year, which could ultimately affect subscribers and future infrastructure investment, including broadband deployment." *Id.* ¶ 175 (J.A. __). The record also contained evidence that the new telecom rate "will

reduce disputes and costly litigation about" the rate formula that applies to broadband. *Id.* ¶ 174 (J.A. __). The Commission found, moreover, that "implementing a low and more uniform rate" will "eliminate competitive disadvantages that [telecommunications] carriers" face, *id.* ¶ 176 (J.A. __), thereby "enabl[ing] more efficient investment decisions in network expansion and upgrades, most notably in the deployment of modern broadband networks," *id.* ¶ 181 (J.A. __).[13]

C. Section 224(e) Does Not Require Use of a Fully Allocated Cost Measure

1. Petitioners attempt to dismiss Congress's policy goals as irrelevant because §§ 224(e)(2) and (3) speak of the "cost of providing" usable and unusable space on a pole. Nothing in the text of § 224(e), however, requires the ambiguous term "cost" to be interpreted as "fully allocated cost." Indeed, as shown above, the statutory scheme strongly suggests the opposite: Congress chose to "incorporat[e] a fully allocated cost methodology" (*Order*

[13] EEI incorrectly asserts that the Commission ignored the view of its experts that setting rates based on cost-causation principles would have little effect on broadband deployment. EEI Br. 29-30. As noted, the new telecom formula will, in most cases, generate a rate that is higher than the rate produced by the cost-causation approach. *See* page 18, *supra*. Moreover, EEI's own experts conceded that "setting 'uniform' rates can enhance economic efficiency" by "allow[ing] the competitors to compete with one another strictly on their own merits." Reply Comments of the Edison Electric Institute and the Utilities Telecom Council, WC Docket No. 07-245 (Oct. 4, 2010), Exh. A, Declaration of Jonathan Orszag and Allan Shampine at 5 ¶ 8 (J.A. __).

¶ 159 (J.A. __)) into the maximum cable rate by referring to the "operating expenses and actual capital costs of the utility attributable to the entire pole." 47 U.S.C. § 224(d)(1). By contrast, § 224(e) uses the undefined term "cost."

Nor does the word "space" in § 224(e) advance petitioners' argument. *See* Pet. Br. 42-43, 45. In petitioners' view, by establishing rules for apportioning the "costs of providing" both "usable space" and "other than usable space" (47 U.S.C. §§ 224(e)(2) & (3)), Congress expressed an intent that the "costs associated with the *entire* pole," including capital costs, be included in the telecom rate. Pet. Br. 42, 45, 47. Sections 224(e)(2) and (3), however, speak only to the apportionment of costs, not the computation of costs. *See Order* ¶ 161 (J.A. __). The computation of costs under § 224(e) is an antecedent question that the statute leaves to the Commission's policymaking discretion.

Petitioners further maintain that Congress must have expected the telecom-rate formula to use fully allocated cost because the cable-rate formula did so when § 224(e) was enacted. *See* Pet. Br. 43-44; *see also* Int. Br. 18-19, Amicus Br. 28. As noted above, nothing in the statutory language compels that conclusion. The Commission, moreover, comprehensively canvassed the legislative history of the 1996 Act, yet found no indication that Congress intended to limit the Commission's discretion to utilize a different

measure of cost in the telecom rate. *See Order* ¶¶ 162-166 (J.A. __). "[M]ost telling," the Commission pointed out, "is that no express language requiring fully allocated costs was made part of the final statute." *Order* ¶ 163 (J.A. __).

2. Petitioners contend that the telecom rate always must be higher than the cable rate. Pet. Br. 36-38; *see also* Int. Br. 24-25, Amicus Br. 25-27. As the Commission explained, the new telecom rate "could, in some circumstances, be higher than the cable rate." *Order* ¶ 168 (J.A. __).[14] Conversely, the new telecom rate could be lower than the cable rate (*ibid.*) – a fact that also was true of the old rate formula, because "the rate for any single

[14] As petitioners point out (Pet. Br. 38-39, 44), the Commission occasionally made statements suggesting that this result flowed from the statute. In the *Order* on review, however, the Commission explained that these statements "were not based on any actual statutory analysis" and are "more properly understood as flowing simply from the fact that, as the Commission initially had implemented [§] 224(e), it generally resulted in a higher rate." *Order* n.527 (J.A. __) (citing *1998 Order*, 13 FCC Rcd at 6795-96 ¶ 34)). The Commission "reject[ed]" any contrary "*dicta* in prior Commission decisions" as inconsistent with the statutory text. *Order* ¶ 171 (J.A. __).

For similar reasons, Petitioners read too much into the Eleventh Circuit's observation in *Alabama Power* that the telecom rate " 'provided in 47 U.S.C. § 224(e) yields a higher rate for telecommunications attachments than the Cable Rate provides for cable attachments.' " *See* Pet. Br. 37-38 (quoting *Alabama Power Co.*, 311 F.3d at 1371 n.23). That observation merely reflected that, under the Commission's regulations at the time, the telecom rate established in section 224(e) generally yielded a higher rate for telecommunications attachments than the cable rate provided for cable attachments. The Eleventh Circuit did not suggest that the statute unambiguously *compels* different rates.

'attaching entity' varies inversely with the total number of attachers." *Southern Co. v. FCC*, 313 F.3d 574, 580 (D.C. Cir. 2002); *see also Order* ¶ 171 ("even as initially implemented, the telecom rate theoretically could be higher *or lower* than the cable rate"). Nothing in the statutory text compels the Commission to adopt a cost measure for the telecom rate that produces a rate that will *always* exceed the cable rate. *See Order* ¶ 168 (J.A. __).

Searching for support for their position, petitioners look to 47 U.S.C. §§ 224(d)(3) and (e)(4). Together, those provisions apply the cable rate to telecommunications attachments for the first five years after passage of the 1996 Act (47 U.S.C. § 224(d)(3)) and then, for the next five years, require a phase-in period for "[a]ny increase in the rates for pole attachments," 47 U.S.C. § 224(e)(4). As the Commission explained, the term "any increase" simply covers those scenarios in which the resulting telecom rate in fact is higher than the cable rate; Congress would not have referred to "any" increase if such increases were *invariably* mandated. *See Order* ¶ 168 (J.A. __). Indeed, the Commission's rules have always "recognized that the telecom rate could go down as well as up," and thus sensibly provided that "[t]he five year phase-in is to apply to rate increases only," while "[r]ate

reductions are to be implemented immediately." *Order* ¶ 168 (J.A. __) (quoting 47 C.F.R. § 1.1409(f)).[15]

III. THE COMMISSION HAS AUTHORITY UNDER § 224(b) TO REGULATE POLE ATTACHMENTS BY ILECS

Section 224(b) 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." A "pole attachment," in turn, is "any attachment by a cable television system or provider of telecommunications service to a pole . . . owned or controlled by a utility." 47 U.S.C. § 224(a)(4). The Commission reasonably concluded that it may regulate pole attachments by ILECs under § 224(b) because ILECs indisputably are "provider[s] of telecommunications service."

[15] Petitioners argue that the National Broadband Plan suggested that only Congress can remedy the disparity between the cable rate and the telecom rate. *See* Pet. Br. 52. That is incorrect. In fact, the Plan recommended that "*[t]he FCC* should establish rental rates for pole attachments that are as low and close to uniform as possible, consistent with Section 224 . . . to promote broadband deployment." National Broadband Plan 110 (emphasis added); *see id.* at 110-111 (Recommendation 6.1). The Plan separately called for congressional action with respect to distinct pole-attachment issues: the statutory exemptions for poles "in states that adopt their own system of regulation" and for "poles owned by co-operatives, municipalities and non-utilities." *Id.* at 112.

A. The Commission Reasonably Determined That § 224 Authorizes the FCC to Regulate ILEC Attachments

In *Gulf Power*, the Supreme Court addressed the scope of the Commission's regulatory authority under § 224. At issue in that case were two types of pole attachments – attachments by cable television systems that offer "comingled" video and broadband services and attachments by wireless carriers. The Court held that the Commission has the authority to regulate both types of attachments. In addressing cable attachments, the Court explained that "what matters under the statute" is that the term "pole attachment" is expressly defined to cover "an attachment 'by a cable television system.' " 534 U.S. at 333. As the Court explained, the definition of "pole attachment" in § 224(a)(4) delineates "the theoretical coverage of [§ 224] as a whole." *Id*. at 336.

Looking to the definition of "pole attachment" for the "dispositive text," the Court also held that "[a] provider of wireless telecommunications service is a 'provider of telecommunications service,' so its attachment is a 'pole attachment.' " 534 U.S. at 340. The Court rejected the utilities' attempt to limit the scope of "pole attachment" by "seek[ing] refuge in other parts of the statute," in particular, the definition of "utility" in 47 U.S.C. § 224(a)(1). *Ibid.* That definition, the Court explained, "concerns only whose poles are covered, not which attachments are covered," by § 224. *Ibid.*

In challenging the Commission's authority to regulate ILEC pole attachments, petitioners ignore *Gulf Power* and, consequently, repeat the same errors the utilities made in that case. In particular, petitioners attempt to limit the scope of "pole attachment" by "seek[ing] refuge in other parts of the statute." *Gulf Power*, 534 U.S. at 340. That effort fails.

1. A "telecommunications service" is the "offering of telecommunications for a fee directly to the public." 47 U.S.C. § 153(53). ILECs indisputably provide telecommunications services. Therefore, under the "dispositive text" of § 224(a)(4), which delineates the "coverage of [§ 224] as a whole," an ILEC "is a 'provider of telecommunications service,' so its attachment is a 'pole attachment' " subject to § 224. *Gulf Power*, 534 U.S. at 336, 340.

In an effort to escape this logic, petitioners focus on the definition of "telecommunications carrier." Pet. Br. 21. For most purposes, a "telecommunications carrier" is defined as "any provider of telecommunications services." 47 U.S.C. § 153(51). "For purposes of [§ 224]," however, "the term 'telecommunications carrier' (as defined in [§ 153]) does not include" ILECs. 47 U.S.C. § 224(a)(5). In petitioners' view, the undefined term "provider of telecommunications service" by implication *must* also be read to exclude ILECs.

"The short answer" to petitioners' argument "is that Congress did not write the statute that way." *Corley v. United States*, 129 S. Ct. 1558, 1567 (2009) (internal quotation marks omitted). "When a statute does not define a term, we typically give the phrase its ordinary meaning." *FCC v. AT&T Inc.*, 131 S. Ct. 1177, 1182 (2011) (internal quotation marks omitted). The ordinary meaning of "provider of telecommunications service" encompasses ILECs, which is precisely why Congress found it necessary to exclude ILECs from the definition of "telecommunications carrier" for purposes of § 224, when it intended that exclusion.

Had Congress wanted to broadly exclude ILEC attachments from § 224, "it easily could have written" the definition of "pole attachment" to refer to any attachment by a "telecommunications carrier." *Burgess v. United States*, 553 U.S. 124, 130 (2008). Indeed, Congress elsewhere in § 224 made clear that it was conferring certain rights on "telecommunications carrier[s]" rather than "provider[s] of telecommunications service." Thus, Congress limited application of the telecom rate to attachments used by "telecommunications carriers to provide telecommunications services." *See* 47 U.S.C. § 224(e)(1). Likewise, Congress conferred a statutory right to nondiscriminatory access to utility poles on "cable televisions system[s]" and "telecommunications carrier[s]," but not on ILECs, which are typically pole

owners themselves. 47 U.S.C. § 224(f)(1); *see* page 46, *infra*. Congress's decision to use both "provider of telecommunications service" and "telecommunications carrier" in § 224 to delineate separate statutory rights and obligations should not be "ascribe[d] . . . to a simple mistake in draftsmanship." *Corley*, 129 S. Ct. at 1567 (2009) (internal quotation marks omitted); *see also Recording Indus. Ass'n of Am., Inc. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229, 1235 (D.C. Cir. 2003) ("Where different terms are used in a single piece of legislation," the courts "presume that Congress intended the terms have different meanings.") (brackets and internal quotation marks omitted).[16] The Commission reasonably interpreted the two terms to have distinct meanings.

Petitioners mention in passing that ILECs that own poles fall within the definition of "utility" in § 224(a)(1), Pet. Br. 20, 24, but they do not develop any argument based on that definition. That is understandable. Although the Commission once assumed that ILECs could not be both attaching entities

[16] Petitioners wrongly assert that "numerous court decisions" foreclose the Commission's interpretation of § 224(a)(4). Pet. Br. 21-22. None of the three cases petitioners cite holds that "providers of telecommunications service" and "telecommunications carrier" *must be* construed as synonymous terms for purposes of § 224. Indeed, one of those cases makes clear that "[o]nly a judicial precedent holding that the statute *unambiguously forecloses* the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction." *Brand X*, 545 U.S. at 982-983 (emphasis added). As shown above, that is not the case here.

and "utilities," *see* page 11, *supra*, *Gulf Power* has since made clear that "utility" defines "only whose poles are covered, not which attachments are covered." 534 U.S. at 340.

2. Petitioners incorrectly claim that regulating ILEC attachments conflicts with other provisions of the statute.

a. Petitioners argue that it is "arbitrary" (Pet. Br. 35; *see also* Int. Br. 11, Amicus Br. 13) to regulate ILEC attachments because ILECs are not entitled to "nondiscriminatory access" to utility poles under 47 U.S.C. § 224(f)(1). As the Commission explained, however, the regime that petitioners contend is arbitrary is the same one that applied to cable operators before the 1996 Act: "a regime of regulated rates without a statutory right of access." *Order* ¶ 212 (J.A. __); *see also Florida Power*, 480 U.S. at 251. Petitioners have not shown that this congressionally and judicially approved framework for regulating pole attachments was irrational. As the Commission noted, moreover, regulating attachments in the absence of statutory access rights makes sense in the context of ILEC attachments. Given ILECs' "continued pole ownership," denying them a statutory right of access "ensure[d] the continued incentives of [ILECs] to negotiate with other utilities with respect to access to its poles." *Order* ¶ 212 (J.A. __).

Petitioners nonetheless assert that regulating ILEC attachments under § 224(b) "contradict[s]" (Pet. Br. 35) a portion of the *Order* that is not challenged in this case, which interprets § 224(b) to require pole owners to provide access to their poles on just and reasonable terms. *See Order* ¶ 93 (J.A. __). In petitioners' view, § 224(b) "mean[s] something very different for ILECs" because ILECs do not have § 224(f)(1) access rights and thus do not benefit from this particular interpretation of § 224(b). Pet. Br. 35. Petitioners contend that the resulting difference in treatment renders the agency's decision to regulate ILEC attachments arbitrary.

The Court need not decide this claim because it was not raised before the Commission and therefore is not properly before this Court. *See* 47 U.S.C. § 405(a); *BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1182 (D.C. Cir. 2003). In any event, the claim is meritless. The "generality" of terms such as "just" and "reasonable" "opens a rather large area for the free play of agency discretion." *Orloff v. FCC*, 352 F.3d 415, 420 (D.C. Cir. 2003), *cert. denied*, 542 U.S. 937 (2004). Accordingly, the Commission can apply the just-and-reasonable standard to impose different requirements in different contexts. *See ibid.* (holding that carriers subject to competitive forces may be regulated differently from other carriers under the "unjust" and "unreasonable" standard of 47 U.S.C. § 202). The Commission reasonably denied ILECs the

right to demand access to utility poles on just-and-reasonable terms because ILECs do not have statutory access rights. That other attachers with such access rights may demand just and reasonable terms does not indicate inconsistent treatment, but rather a rational tailoring of the just and reasonable standard to the particular circumstances involved.

b. Amicus EEI calls it "absurd" that ILEC attachments may be regulated even though they "do not fall within the very specific rate formula for attachments by telecommunications carriers" in § 224(e). Amicus Br. 13; *see also* Int. Br. 11. That argument cannot be reconciled with *Gulf Power*, which held that the §§ 224(d) and (e) rates are not "the exclusive rates allowed" under § 224 (534 U.S. at 335) and that the Commission may "prescribe just and reasonable rates" in other cases "without necessary reliance upon a specific statutory formula devised by Congress," *id.* at 336.

EEI further contends that regulation of ILEC attachments is inconsistent with 47 U.S.C. § 251(b)(4), which imposes a duty on local exchange carriers to "afford access to [their] poles . . . to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224." EEI argues that, if ILECs are viewed as "providers of telecommunications services," § 251(b)(4) would grant access rights to ILECs that § 224(f)(1) does not. Amicus Br. 14. The Commission

made clear, however, that ILECs "cannot use section 251(b)(4) as a means of gaining access to the facilities or property" of a local exchange carrier because the agency has long interpreted the "more general access provisions" of § 251(b)(4) in light of "the specific denial of access under section 224." *Order* n.643 (J.A. __) (internal quotation marks omitted). Accordingly, EEI is incorrect to characterize § 251(b)(4) and § 224(f)(1) as "inconsistent with each other." Amicus Br. 14.

3. Finding nothing in the text of § 224 to support their argument, petitioners resort to the statute's legislative history and its "essential purpose." Pet. Br. 24; *see also* Amicus Br. 15-16. That argument fares no better. Notably, petitioners do not cite *any* legislative history that "compels (or even suggests) the conclusion that Congress intended to limit" the Commission's authority to regulate ILEC attachments. *Consumer Electronics Ass'n v. FCC*, 347 F.3d 291, 298-299 (D.C. Cir. 2003). Instead, they contend that the legislative history generally reveals an intent to provide only "new entrants" with access to utility poles at regulated rates. Pet. Br. 25-26; *see also* Amicus Br. 15. The Supreme Court rejected a similar argument in *Gulf Power*, holding that the "economic rationale" of regulating poles solely to the extent they are a "bottleneck facility" found "no support in the text" of the statute and, hence, could not limit the Commission's

regulatory authority. 534 U.S. at 341. The Court's analysis is consistent with the general understanding that "statutes often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Public Citizen v. Carlin*, 184 F.3d 900, 904 (D.C. Cir. 1999) (internal quotation marks omitted). Accordingly, even if petitioners had provided support for their reading of the legislative history (and they have not), the ordinary meaning of the term "provider of telecommunications service" does not distinguish between new providers and old, and the meaning of that term "is what matters under the statute." *Gulf Power*, 534 U.S. at 333.

B. The Commission Adequately Explained its Change in Policy

In concluding that § 224 covers ILEC attachments, the Commission acknowledged that it was departing from its previous interpretation of the statute. *See Order* ¶ 208 (J.A. __). Such "change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency." *Brand X*, 545 U.S. at 981 (internal quotation marks omitted). The Commission must explain the reasons for the change, 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." *Nat'l Cable & Telecomms. Ass'n v. FCC*, 567 F.3d 659, 669 (D.C. Cir. 2009) (quoting *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009)).

The Commission provided a sufficient reason for its "decision to change from a narrow to a broader definition" of "provider of telecommunications service," namely, that "the broader definition better serve[s] the goals of the Act." *Southern Co.*, 313 F.3d at 581. As the Commission explained, ILECs may no longer "be in an equivalent bargaining position with electric utilities in pole attachment negotiations" as they typically were in the past. *Order* ¶ 206 (J.A. __). The Commission found that ILECs now "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." *Ibid.* As a result, the Commission reasonably concluded that "market forces and independent negotiations may not be alone sufficient to ensure just and reasonable rates, terms and conditions" for ILEC attachments to electric poles. *Order* ¶ 199 (J.A. __).

The Commission also predicted that regulating ILEC attachments would advance the goal of "promot[ing] competition," particularly with

respect to "new services," such as video and broadband services, that ILECs have begun to offer "subsequent to the 1996 Act." *Order* ¶¶ 206, 208 (J.A. __). Specifically, ensuring that ILECs can obtain just and reasonable pole-attachment rates would "reduce input costs, such as pole rental rates, [which] can expand opportunities for investment" in broadband services. *Order* ¶ 208 (J.A. __).

Recognizing, however, that "the issues related to rates for pole attachments by [ILECs] raise complex questions," the Commission proceeded cautiously. *Order* ¶ 214 (J.A. __). It noted that "not all incumbent LECs are similarly situated in terms of their bargaining position relative to other pole owners," *id.* ¶ 215 (J.A. __), and it "question[ed] the need to second guess the negotiated resolution of arrangements entered into [in situations where the parties have] relatively equivalent bargaining power," *id.* ¶ 216 (J.A. __). Accordingly, the Commission sensibly concluded that it would "proceed on a case-by-case basis," *id.* ¶ 214 (J.A. __), which would allow it to consider evidence of particular ILECs' "inferior bargaining position," *id.* ¶ 215 (J.A. __), and other relevant evidence in evaluating whether the rates, terms, and conditions for an ILEC attachment are just and reasonable.

1. Petitioners question the existence of a growing gap in pole ownership, Pet. Br. 28, but substantial record evidence supports the

Commission's findings. The Commission cited evidence by ILECs that showed a significant disparity in pole ownership. *See Order* ¶ 206 & n.617 (J.A. __); *see also* Comments of Verizon, WC Docket No. 07-245 (Aug. 16, 2010), Att., Declaration of James Slavin and Steven R. Frisbie, at 4 ¶ 13 (J.A. __) ("The number of poles that are solely owned by electric utilities in municipalities continues to grow faster than the number of poles that are solely owned by Verizon."); Comments of AT&T, Inc., WC Docket No. 07-245 (Aug, 16, 2010), at 18 (J.A. __) ("the ownership of poles is roughly 25-30% ILEC" and 70-75% electric company.).

Indeed, even utility companies acknowledged the increasing disparity in pole ownership since the mid-1990s. For example, petitioners Florida Power & Light and Tampa Electric informed the Commission that "actual relative ownership percentages with all ILECs are 69% FPL and 31% ILEC," with "ILEC pole ownership . . . declin[ing] slightly" since 1994 in Florida Power's territory at an average of "less than 1/2% per year." Initial Comments of Florida Power & Light and Tampa Electric regarding ILECs and Pole Attachment Rates, WC Docket No. 07-245 (Mar. 7, 2008), at 7 (J.A. __). Notably, petitioners fail to identify any record evidence contradicting the Commission's finding of a significant and growing disparity in pole ownership nationwide.

The Commission's cautious case-by-case approach answers petitioners' concerns that "circumstances can vary considerably from location to location," Pet. Br. 28 (quoting *Order* ¶ 215 (J.A. __)), and that ILECs may not lack bargaining power in all circumstances (in which cases petitioners question the need for regulation), *id*. at 29-30. Further, petitioners miss the mark when they argue that ILECs will always have equal bargaining power to electric utilities because electric utilities need access to ILEC poles. Pet. Br. 29-30 (citing *Order* nn. 618 & 655 (J.A. __)). As the Commission explained in the *Order*, the effect of disparity in pole ownership manifests itself, not in the likelihood that the two sides will fail to reach agreement on access, but in the potential that the rates, terms, and conditions upon which ILECs obtain access to poles may not be just and reasonable. *See Order* ¶ 206 & n.618 (J.A. __).

2. Petitioners also dispute the Commission's prediction that ensuring just and reasonable rates for ILEC attachments will benefit consumers and encourage broadband deployment. Pet. Br. 30-32. They face a high hurdle, because "to the extent that the FCC's decision is based upon a predictive judgment, the court's review is particularly deferential." *BellSouth Corp. v. FCC*, 162 F.3d 1215, 1222 (D.C. Cir. 1999) (citation and internal quotation marks omitted). "[I]t is within the scope of the agency's expertise to

make . . . a prediction about the market it regulates, and a reasonable prediction deserves [judicial] deference notwithstanding that there might also be another reasonable view." *Constellation Energy Commodities Group, Inc. v. FERC*, 457 F.3d 14, 24 (D.C. Cir. 2006) (internal quotation marks omitted).

In this case, the Commission had a sound basis for predicting that regulating ILEC attachments would benefit consumers. Although petitioners dismiss the "*ex parte* letter from USTA" (Pet. Br. 30) that the Commission cited (*Order* ¶ 208 (J.A. __)), that letter (filed on behalf of USTelecom's many ILEC members) confirms that "one of the major hurdles facing ILECs is access to the capital necessary to meet the competitive challenges presented by next generation broadband networks that have been deployed by cable companies who enjoy the benefit of lower attachment rates today." Letter from Walter B. McCormick, Jr., USTelecom, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245 (Mar. 31, 2011), at 6 (J.A. __). The letter shows (and petitioners do not dispute) that ILECs pay significantly more for pole attachments than their cable competitors – in the aggregate between "$320 to $350 million [more each year] than they would pay at the

cable rate." *See Order* ¶ 208 (J.A. __).[17] The Commission explained that such substantial differences may affect "the extent to which investment and deployment choices by such providers, and competition more generally, are distorted based on regulatory classifications." *Order* ¶ 181 (J.A. __); *see also Order* ¶ 208 & n.629 (J.A. __). Moreover, the Commission explained that "reduc[ing] input costs, such as pole rental rates, can expand opportunities for investment" in broadband services. *Order* ¶ 208 (J.A. __); *see also id.* ¶ 179 (J.A. __). The "broader definition" of "provider of telecommunications service" is thus "justified because it limits the financial burden on telecommunications providers and therefore encourages growth and competition in the industry." *Southern Co.*, 313 F.3d at 581. This sort of prediction "regarding the actions of regulated entities" is "precisely the type of policy judgment[] that courts routinely and quite correctly leave to administrative agencies." *Public Citizen, Inc. v. NHTSA*, 374 F.3d 1251, 1260-1261 (D.C. Cir. 2004) (internal quotation marks omitted).

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[17] Petitioners mistakenly claim that the Commission ignored comments by the National Cable & Telecommunications Association (NCTA) that regulating ILEC attachments would harm consumers. Pet. Br. 31. In fact, NCTA's comments were directed at an unadopted proposal in the FCC's *NPRM* to increase the cable rate – a proposal that NCTA believed would unduly benefit ILECs *as pole owners* and thereby harm broadband deployment. *See* Comments of the National Cable & Telecommunications Association, WC Docket No. 07-245 (Mar. 7, 2008), at ii (J.A. __).

IV. PETITIONERS' CHALLENGE TO THE COMMISSION'S DECISION TO EXTEND THE REFUND PERIOD IS MERITLESS

Petitioners contend that awarding refunds predating the filing date of a pole-attachment complaint violates § 224 because the Commission's authority to adjudicate disputes is triggered by the filing of the complaint. Pet. Br. 53-54. This argument, like petitioners' claim of conflict under § 224(b) and (f)(1) (*see* page 47, *supra*), is barred by 47 U.S.C. § 405(a) because petitioners did not raise it before the agency. *BDPCS, Inc.*, 351 F.3d at 1182.

Even if not waived, the argument fails. Section 224(b) grants the Commission broad authority to "adopt procedures necessary and appropriate to hear and resolve complaints" concerning pole-attachment rates, terms, and conditions, and "enforc[e] any determinations resulting from complaint procedures" by "tak[ing] such action as it deems appropriate and necessary." 47 U.S.C. § 224(b)(1). Section 224(b) is silent on how the Commission is to carry out those responsibilities by fashioning remedies (including providing for refunds), and "agencies have authority to fill gaps where the statutes are silent." *Gulf Power*, 534 U.S. at 339. The ability to award refunds has been a critical – and lawful – component of the Commission's implementation of

§ 224 since its inception. *See First Report and Order*, 68 FCC 2d at 1599-1600 ¶ 44.

Moreover, even assuming the premise of petitioners' argument that the Commission's "jurisdiction" can only be "trigger[ed]" by the filing of a complaint (Pet. Br. 53-54), it does not follow that the Commission's authority to award redress is constrained by the date of such a filing. For example, a district court's jurisdiction is typically also triggered by the filing of a complaint, but it has never been thought that a court may award relief only for post-complaint damages. As the Commission concluded, "[t]here does not appear to be a justification for treating pole attachment disputes differently." *FNPRM* ¶ 88 (J.A. __).[18]

Petitioners' claim that the new refund rule is arbitrary is likewise baseless. According to petitioners, the Commission failed to support its conclusion that the date-of-complaint limitation on refunds acted as a "disincentive to engage in pre-complaint negotiation." Pet. Br. 55 (quoting *Order* n.345 (J.A. __)). The original rule itself, however, was premised on

[18] Contrary to petitioners' claim that the legislative history suggests an intent "to grant only prospective regulatory authority," Pet. Br. 54, the Senate Report on which petitioners rely merely states that the Commission's jurisdiction over electric utility companies – "entities not otherwise subject to FCC jurisdiction" – is "strictly circumscribed" in that it does not extend to matters unrelated to pole attachments. S. Rep. No. 95-580, at 15.

the policy of "encourag[ing] *early filing* [of complaints] when rates are considered objectionable." *First Report and Order*, 68 FCC 2d at 1600 ¶ 45 (emphasis added). It was reasonable for the Commission to conclude that a policy of encouraging early filing of complaints may, in practice, create a disincentive for "pre-complaint negotiation." *Order* n.345 (J.A. __); *see also* Comments of Time Warner Cable, Inc., WC Docket No. 07-245 (Aug. 16, 2010), at 28 (J.A. __) (new rule "will facilitate informal dispute resolution and reduce litigation before the Commission, because attachers will not be compelled immediately to file a complaint in order to preserve their damages claims.").

Finally, petitioners contend that extending the refund period is unnecessary because the 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" (*Order* ¶ 119 (J.A. __)) – will obviate any pre-complaint refunds. Pet. Br. 55-56. That argument is barred by § 405(a) because petitioners did not raise it before the agency. In any event, the sign-and-sue approach is unlikely to be followed by every pole-attachment complainant; to the extent an aggrieved attacher has made unjust or unreasonable payments

prior to the filing of its complaint, the Commission's new refund rule is necessary "to make injured attachers whole." *Order* ¶ 110 (J.A.__).

CONCLUSION

For the foregoing reasons, the petition for review should be denied.

Respectfully submitted,

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February 17, 2012

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN ELECTRIC POWER SERVICE CORPORATION, ET AL. PETITIONERS, v. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS.	NO. 11-1146

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying Brief for Respondents in the captioned case contains 13,097 words.

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February 17, 2012

STATUTORY AND REGULATORY APPENDIX

Contents

AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

Act of 1934 [this section] which are pending on the date of the enactment of this Act [Dec. 8, 1983] within ninety days of such date of enactment.''

§ 224. Pole attachments

(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[1] 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).

(June 19, 1934, ch. 652, title II, § 224, as added Pub. L. 95–234, § 6, Feb. 21, 1978, 92 Stat. 35; amended Pub. L. 97–259, title I, § 106, Sept. 13, 1982, 96 Stat. 1091; Pub. L. 98–549, § 4, Oct. 30, 1984, 98 Stat. 2801; Pub. L. 103–414, title III, § 304(a)(7), Oct. 25, 1994, 108 Stat. 4297; Pub. L. 104–104, title VII, § 703, Feb. 8, 1996, 110 Stat. 149.)

[1] So in original. Probably should be ''nondiscriminatory''.

AMENDMENTS

1996—Subsec. (a)(1). Pub. L. 104–104, § 703(1), inserted first sentence and struck out former first sentence which read as follows: ''The term 'utility' means any person whose rates or charges are regulated by the Federal Government or a State and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for wire communication.''

Subsec. (a)(4). Pub. L. 104–104, § 703(2), inserted ''or provider of telecommunications service'' after ''system''.

Subsec. (a)(5). Pub. L. 104–104, § 703(3), added par. (5).

Subsec. (c)(1). Pub. L. 104–104, § 703(4), inserted '', or access to poles, ducts, conduits, and rights-of-way as provided in subsection (f) of this section,'' after ''conditions''.

Subsec. (c)(2)(B). Pub. L. 104–104, § 703(5), substituted ''the services offered via such attachments'' for ''cable television services''.

Subsec. (d)(3). Pub. L. 104–104, § 703(6), added par. (3).

Subsecs. (e) to (i). Pub. L. 104–104, § 703(7), added subsecs. (e) to (i).

1994—Subsec. (b)(2). Pub. L. 103–414 substituted ''The Commission'' for ''Within 180 days from February 21, 1978, the Commission''.

1984—Subsec. (c)(3). Pub. L. 98–549 added par. (3).

1982—Subsec. (e). Pub. L. 97–259 struck out subsec. (e) which provided that, upon expiration of 5-year period that began on Feb. 21, 1978, provisions of subsec. (d) of this section would cease to have any effect.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–549 effective 60 days after Oct. 30, 1984, except where otherwise expressly provided, see section 9(a) of Pub. L. 98–549, set out as a note under section 521 of this title.

EFFECTIVE DATE

Section effective on thirtieth day after Feb. 21, 1978, see section 7 of Pub. L. 95–234, set out as an Effective Date of 1978 Amendment note under section 152 of this title.

§ 225. Telecommunications services for hearing-impaired and speech-impaired individuals

(a) Definitions

As used in this section—

(1) Common carrier or carrier

The term ''common carrier'' or ''carrier'' includes any common carrier engaged in interstate communication by wire or radio as defined in section 153 of this title and any common carrier engaged in intrastate communication by wire or radio, notwithstanding sections 152(b) and 221(b) of this title.

(2) TDD

The term ''TDD'' means a Telecommunications Device for the Deaf, which is a machine that employs graphic communication in the transmission of coded signals through a wire or radio communication system.

(3) Telecommunications relay services

The term ''telecommunications relay services'' means telephone transmission services that provide the ability for an individual who has a hearing impairment or speech impairment to engage in communication by wire or radio with a hearing individual in a manner that is functionally equivalent to the ability of an individual who does not have a hearing impairment or speech impairment to communicate using voice communication services by

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sions of this chapter, or relating to the enforcement of any of the provisions of this chapter. The Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this chapter, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had, excepting orders for the payment of money.

(June 19, 1934, ch. 652, title IV, § 403, 48 Stat. 1094.)

§ 404. Reports of investigations

Whenever an investigation shall be made by the Commission it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made.

(June 19, 1934, ch. 652, title IV, § 404, 48 Stat. 1094.)

§ 405. Petition for reconsideration; procedure; disposition; time of filing; additional evidence; time for disposition of petition for reconsideration of order concluding hearing or investigation; appeal of order

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided*, That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

(b)(1) Within 90 days after receiving a petition for reconsideration of an order concluding a hearing under section 204(a) of this title or concluding an investigation under section 208(b) of this title, the Commission shall issue an order granting or denying such petition.

(2) Any order issued under paragraph (1) shall be a final order and may be appealed under section 402(a) of this title.

(June 19, 1934, ch. 652, title IV, § 405, 48 Stat. 1095; July 16, 1952, ch. 879, § 15, 66 Stat. 720; Pub. L. 86–752, § 4(c), Sept. 13, 1960, 74 Stat. 892; Pub. L. 87–192, § 3, Aug. 31, 1961, 75 Stat. 421; Pub. L. 97–259, title I, §§ 122, 127(c), Sept. 13, 1982, 96 Stat. 1097, 1099; Pub. L. 100–594, § 8(d), Nov. 3, 1988, 102 Stat. 3023.)

CODIFICATION

''Reconsiderations'' substituted in text for ''Rehearings'' as the probable intent of Congress, in view of amendment by section 127(c)(1) of Pub. L. 97–259, which substituted ''reconsideration'' for ''rehearing'' wherever appearing in this section.

AMENDMENTS

1988—Pub. L. 100–594 designated existing provisions as subsec. (a), substituted ''section 155(c)(1)'' for ''section 155(d)(1)'' in two places, and added subsec. (b).

1982—Pub. L. 97–259 substituted ''reconsideration'' for ''rehearing'' wherever appearing and ''the Commission gives public notice of the order, decision, report, or action complained of'' for ''public notice is given of orders disposing of all petitions for rehearing filed with the Commission in such proceeding or case, but any order, decision, report, or action made or taken after such rehearing reversing, changing, or modifying the original order shall be subject to the same provisions with respect to rehearing as an original order''.

1961—Pub. L. 87–192 provided for petition for rehearing to the authority making or taking the order, decision, report, or action, substituted references to report and action for requirement, wherever else appearing, and inserted references to proceeding by any designated authority within the Commission, wherever appearing.

1960—Pub. L. 86–752 substituted ''any party'' for ''and party'' in first sentence, and inserted sentence dealing with disposition of petitions for rehearing.

1952—Act July 16, 1952, provided for taking of newly discovered evidence and evidence which should have been taken in original hearing.

EFFECTIVE DATE OF 1960 AMENDMENT

Section 4(d)(4) of Pub. L. 86–752 provided that: ''The amendment made by paragraph (2) of subsection (c) of this section [amending this section] shall only apply to petitions for rehearing filed on or after the date of the enactment of this Act [Sept. 13, 1960].''

§ 406. Compelling furnishing of facilities; mandamus; jurisdiction

The district courts of the United States shall have jurisdiction upon the relation of any person alleging any violation, by a carrier subject to this chapter, of any of the provisions of this chapter which prevent the relator from receiving service in interstate or foreign communication by wire or radio, or in interstate or foreign transmission of energy by radio, from said carrier at the same charges, or upon terms or conditions as favorable as those given by said carrier for like communication or transmission under similar conditions to any other person, to issue a writ or writs of mandamus against said carrier commanding such carrier to furnish facilities for such communication or transmission to the party applying for the writ: *Provided*, That if any question of fact as to the proper compensation to the carrier for the service to be enforced by the writ is raised by the pleadings, the writ of peremptory mandamus may issue, notwithstanding such question of fact is undetermined, upon such terms as to security, payment of money into the court, or otherwise, as the court may think proper pending the determination of the question of fact: *Provided further*, That the remedy given by writ of mandamus shall be cumulative and shall not be held to exclude or interfere with other remedies provided by this chapter.

(June 19, 1934, ch. 652, title IV, § 406, 48 Stat. 1095.)

§ 407. Order for payment of money; petition for enforcement; procedure; order of Commission as prima facie evidence; costs; attorneys' fees

If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the line of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suits the findings and order of the Commission shall be prima facie evidence of the facts therein stated, except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail, he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

(June 19, 1934, ch. 652, title IV, § 407, 48 Stat. 1095.)

§ 408. Order not for payment of money; when effective

Except as otherwise provided in this chapter, all orders of the Commission, other than orders for the payment of money, shall take effect thirty calendar days from the date upon which public notice of the order is given, unless the Commission designates a different effective date. All such orders shall continue in force for the period of time specified in the order or until the Commission or a court of competent jurisdiction issues a superseding order.

(June 19, 1934, ch. 652, title IV, § 408, 48 Stat. 1096; Pub. L. 97–259, title I, § 123, Sept. 13, 1982, 96 Stat. 1098.)

AMENDMENTS

1982—Pub. L. 97–259 substituted provision that all orders of the Commission but for payment of money shall take effect thirty calendar days from the date upon which public notice of the order is given, unless the Commission designates a different effective date, and that such orders shall continue in force for the period of time specified in the order or until the Commission or a court of competent jurisdiction issues a superseding order, for provision that such orders would take effect within such reasonable time, not less than thirty days after service of the order, and would continue in force until its further order, or for a specified period of time, as prescribed in the order, unless the same were suspended or modified or set aside by the Commission, or suspended or set aside by a court of competent jurisdiction.

§ 409. Hearings

(a) Filing of initial decisions; exceptions

In every case of adjudication (as defined in section 551 of title 5) which has been designated by the Commission for hearing, the person or persons conducting the hearing shall prepare and file an initial, tentative, or recommended decision, except where such person or persons become unavailable to the Commission or where the Commission finds upon the record that due and timely execution of its functions imperatively and unavoidably require that the record be certified to the Commission for initial or final decision.

(b) Exceptions to initial decisions; memoranda; determination of Commission or authority within Commission; prohibition against consideration of own decision

In every case of adjudication (as defined in section 551 of title 5) which has been designated by the Commission for hearing, any party to the proceeding shall be permitted to file exceptions and memoranda in support thereof to the initial, tentative, or recommended decision, which shall be passed upon by the Commission or by the authority within the Commission, if any, to whom the function of passing upon the exceptions is delegated under section 155(d)(1)[1] of this title: *Provided, however*, That such authority shall not be the same authority which made the decision to which the exception is taken.

[1] See References in Text note below.

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§ 1205. Funding

(a) In general

In addition to any amounts provided by appropriation Acts, funding for this chapter shall be provided from the Digital Transition and Public Safety Fund in accordance with section 3010 of the Digital Television Transition and Public Safety Act of 2005 (47 U.S.C. 309 note).

(b) Compensation

The Assistant Secretary of Commerce for Communications and Information shall compensate any such broadcast station licensee or permittee for reasonable costs incurred in complying with the requirements imposed pursuant to section 1201(c) of this title from funds made available under this section. The Assistant Secretary shall ensure that sufficient funds are made available to effectuate geographically targeted alerts.

(c) Credit

The Assistant Secretary of Commerce for Communications and Information, in consultation with the Under Secretary of Homeland Security for Science and Technology and the Under Secretary of Commerce for Oceans and Atmosphere, may borrow from the Treasury beginning on October 1, 2006, such sums as may be necessary, but not to exceed $106,000,000, to implement this chapter. The Assistant Secretary of Commerce for Communications and Information shall ensure that the Under Secretary of Homeland Security for Science and Technology and the Under Secretary of Commerce for Oceans and Atmosphere are provided adequate funds to carry out their responsibilities under sections 1203 and 1204 of this title. The Treasury shall be reimbursed, without interest, from amounts in the Digital Television Transition and Public Safety Fund as funds are deposited into the Fund.

(Pub. L. 109–347, title VI, § 606, Oct. 13, 2006, 120 Stat. 1941.)

REFERENCES IN TEXT

This chapter, referred to in subsecs. (a) and (c), was in the original ''this title'', meaning title VI of Pub. L. 109–347, Oct. 13, 2006, 120 Stat. 1936, which is classified principally to this chapter. For complete classification of title VI to the Code, see Short Title note set out under section 1201 of this title and Tables.

Section 3010 of the Digital Television Transition and Public Safety Act of 2005, referred to in subsec. (a), is section 3010 of Pub. L. 109–171, which is set out in a note under section 309 of this title.

CHAPTER 12—BROADBAND

Sec.
1301. Findings.
1302. Advanced telecommunications incentives.
1303. Improving Federal data on broadband.
1304. Encouraging State initiatives to improve broadband.
1305. Broadband Technology Opportunities Program.

§ 1301. Findings

The Congress finds the following:

(1) The deployment and adoption of broadband technology has resulted in enhanced economic development and public safety for communities across the Nation, improved health care and educational opportunities, and a better quality of life for all Americans.

(2) Continued progress in the deployment and adoption of broadband technology is vital to ensuring that our Nation remains competitive and continues to create business and job growth.

(3) Improving Federal data on the deployment and adoption of broadband service will assist in the development of broadband technology across all regions of the Nation.

(4) The Federal Government should also recognize and encourage complementary State efforts to improve the quality and usefulness of broadband data and should encourage and support the partnership of the public and private sectors in the continued growth of broadband services and information technology for the residents and businesses of the Nation.

(Pub. L. 110–385, title I, § 102, Oct. 10, 2008, 122 Stat. 4096.)

SHORT TITLE

Pub. L. 110–385, title I, § 101, Oct. 10, 2008, 122 Stat. 4096, provided that: ''This title [enacting this chapter and amending section 1302 of this title] may be cited as the 'Broadband Data Improvement Act'.''

§ 1302. Advanced telecommunications incentives

(a) In general

The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

(b) Inquiry

The Commission shall, within 30 months after February 8, 1996, and annually thereafter, initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) and shall complete the inquiry within 180 days after its initiation. In the inquiry, the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.

(c) Demographic information for unserved areas

As part of the inquiry required by subsection (b), the Commission shall compile a list of geographical areas that are not served by any provider of advanced telecommunications capability (as defined by subsection (d)(1))[1] and to the

[1] See References in Text note below.

extent that data from the Census Bureau is available, determine, for each such unserved area—

(1) the population;

(2) the population density; and

(3) the average per capita income.

(d) Definitions

For purposes of this subsection:[2]

(1) Advanced telecommunications capability

The term ''advanced telecommunications capability'' is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.

(2) Elementary and secondary schools

The term ''elementary and secondary schools'' means elementary and secondary schools, as defined in section 7801 of title 20.

(Pub. L. 104–104, title VII, § 706, Feb. 8, 1996, 110 Stat. 153; Pub. L. 107–110, title X, § 1076(gg), Jan. 8, 2002, 115 Stat. 2093; Pub. L. 110–385, title I, § 103(a), Oct. 10, 2008, 122 Stat. 4096.)

REFERENCES IN TEXT

Subsection (d)(1), referred to in subsec. (c), was in the original ''section 706(c)(1) of the Telecommunications Act of 1996'' and was translated as reading ''section 706(d)(1) of the Telecommunications Act of 1996'', which is classified to subsection (d)(1) of this section, to reflect the probable intent of Congress and the redesignation of subsec. (c) as (d) by Pub. L. 110–385, title I, § 103(a)(2), Oct. 10, 2008, 122 Stat. 4096.

CODIFICATION

Section was formerly set out as a note under section 157 of this title.

Section was enacted as part of the Telecommunications Act of 1996, and not as part of the Broadband Data Improvement Act which comprises this chapter.

AMENDMENTS

2008—Subsec. (b). Pub. L. 110–385, § 103(a)(1), substituted ''annually'' for ''regularly''.

Subsecs. (c), (d). Pub. L. 110–385, § 103(a)(2), (3), added subsec. (c) and redesignated former subsec. (c) as (d).

2002—Subsec. (c)(2). Pub. L. 107–110 substituted ''section 7801 of title 20'' for ''paragraphs (14) and (25), respectively, of section 14101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 8801)''.

EFFECTIVE DATE OF 2002 AMENDMENT

Amendment by Pub. L. 107–110 effective Jan. 8, 2002, except with respect to certain noncompetitive programs and competitive programs, see section 5 of Pub. L. 107–110, set out as an Effective Date note under section 6301 of Title 20, Education.

DEFINITIONS

For definitions of terms used in this section, see section 3(b) of Pub. L. 104–104, set out as a Common Terminology note under section 153 of this title.

§ 1303. Improving Federal data on broadband

(a) Omitted

(b) International comparison

(1) In general

As part of the assessment and report required by section 1302 of this title, the Federal Communications Commission shall include information comparing the extent of broadband service capability (including data transmission speeds and price for broadband service capability) in a total of 75 communities in at least 25 countries abroad for each of the data rate benchmarks for broadband service utilized by the Commission to reflect different speed tiers.

(2) Contents

The Commission shall choose communities for the comparison under this subsection in a manner that will offer, to the extent possible, communities of a population size, population density, topography, and demographic profile that are comparable to the population size, population density, topography, and demographic profile of various communities within the United States. The Commission shall include in the comparison under this subsection—

(A) a geographically diverse selection of countries; and

(B) communities including the capital cities of such countries.

(3) Similarities and differences

The Commission shall identify relevant similarities and differences in each community, including their market structures, the number of competitors, the number of facilities-based providers, the types of technologies deployed by such providers, the applications and services those technologies enable, the regulatory model under which broadband service capability is provided, the types of applications and services used, business and residential use of such services, and other media available to consumers.

(c) Consumer survey of broadband service capability

(1) In general

For the purpose of evaluating, on a statistically significant basis, the national characteristics of the use of broadband service capability, the Commission shall conduct and make public periodic surveys of consumers in urban, suburban, and rural areas in the large business, small business, and residential consumer markets to determine—

(A) the types of technology used to provide the broadband service capability to which consumers subscribe;

(B) the amounts consumers pay per month for such capability;

(C) the actual data transmission speeds of such capability;

(D) the types of applications and services consumers most frequently use in conjunction with such capability;

(E) for consumers who have declined to subscribe to broadband service capability, the reasons given by such consumers for declining such capability;

(F) other sources of broadband service capability which consumers regularly use or on which they rely; and

(G) any other information the Commission deems appropriate for such purpose.

[2] So in original. Probably should be ''section:''.

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or condition alleged in the complaint not to be just and reasonable. Factual allegations shall be supported by affidavit of a person or persons with actual knowledge of the facts and exhibits shall be verified by the person who prepares them. The response, reply, and other pleadings may be signed by counsel.

(b) The response shall be served on the complainant and all parties listed in complainant's certificate of service.

(c) The reply shall be served on the respondent and all parties listed in respondent's certificate of service.

(d) Failure to respond may be deemed an admission of the material factual allegations contained in the complaint.

[44 FR 31650, June 1, 1979]

§ 1.1408 Number of copies and form of pleadings.

(a) An original and three copies of the complaint, response, and reply shall be filed with the Commission.

(b) All papers filed in the complaint proceeding must be drawn in conformity with the requirements of §§ 1.49, 1.50 and 1.52.

§ 1.1409 Commission consideration of the complaint.

(a) In its consideration of the complaint, response, and reply, the Commission may take notice of any information contained in publicly available filings made by the parties and may accept, subject to rebuttal, studies that have been conducted. The Commission may also request that one or more of the parties make additional filings or provide additional information. Where one of the parties has failed to provide information required to be provided by these rules or requested by the Commission, or where costs, values or amounts are disputed, the Commission may estimate such costs, values or amounts it considers reasonable, or may decide adversely to a party who has failed to supply requested information which is readily available to it, or both.

(b) The complainant shall have the burden of establishing a *prima facie* case that the rate, term, or condition is not just and reasonable or that the denial of access violates 47 U.S.C. § 224(f). If, however, a utility argues that the proposed rate is lower than its incremental costs, the utility has the burden of establishing that such rate is below the statutory minimum just and reasonable rate. In a case involving a denial of access, the utility shall have the burden of proving that the denial was lawful, once a *prima facie* case is established by the complainant.

(c) The Commission shall determine whether the rate, term or condition complained of is just and reasonable. For the purposes of this paragraph, 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.

(d) The Commission shall deny the complaint if it determines that the complainant has not established a *prima facie* case, or that the rate, term or condition is just and reasonable, or that the denial of access was lawful.

(e) When parties fail to resolve a dispute regarding charges for pole attachments and the Commission's complaint procedures under Section 1.1404 are invoked, the Commission will apply the following formulas for determining a maximum just and reasonable rate:

(1) The following formula shall apply to attachments to poles by cable operators providing cable services. This formula shall also apply to attachments to poles by any telecommunications carrier (to the extent such carrier is not a party to a pole attachment agreement) or cable operator providing telecommunications services until February 8, 2001:

$$\text{Maximum Rate} = \text{Space Factor} \times \text{Net Cost of a Bare Pole} \times \text{Carrying Charge Rate}$$

$$\text{Where Space Factor} = \frac{\text{Space Occupied by Attachment}}{\text{Total Usable Space}}$$

(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 × Cost
Where Cost
in Urbanized Service Areas = 0.66 × (Net Cost of a Bare Pole × Carrying Charge Rate)
in Non-Urbanized Service Areas = 0.44 × (Net Cost of a Bare Pole × Carrying Charge Rate).

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

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

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

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

(3) The following formula shall apply to attachments to conduit by cable operators and telecommunications carriers:

$$\text{Maximum Rate per Linear ft./m.} = \underbrace{\left[\frac{1}{\text{Number of Ducts}} \times \frac{1 \text{ Duct}}{\text{No. of Inner Ducts}}\right]}_{\text{(Percentage of Conduit Capacity)}} \times \underbrace{\left[\frac{\text{No. of Ducts}}{} \times \frac{\text{Net Conduit Investment}}{\text{System Duct Length (ft./m.)}}\right]}_{\text{(Net Linear Cost of a Conduit)}} \times \text{Carrying Charge Rate}$$

simplified as:

$$\text{Maximum Rate Per Linear ft./m.} = \frac{1 \text{ Duct}}{\text{No. of Inner Ducts}} \times \frac{\text{Net Conduit Investment}}{\text{System Duct Length (ft./m.)}} \times \text{Carrying Charge Rate}$$

If no inner-duct is installed the fraction, ''1 Duct divided by the No. of Inner-Ducts'' is presumed to be ½.

(f) Paragraph (e)(2) of this section shall become effective February 8, 2001 (i.e., five years after the effective date of the Telecommunications Act of 1996). Any increase in the rates for pole attachments that results from the adoption of such regulations shall be phased in over a period of five years beginning on the effective date of such regulations in equal annual increments. The five-year phase-in is to apply to rate increases only. Rate reductions are to be implemented immediately. The determination of any rate increase shall be based on data currently available at the time of the calculation of the rate increase.

[43 FR 36094, Aug. 15, 1978, as amended at 52 FR 31770, Aug. 24, 1987; 61 FR 43025, Aug. 20, 1996; 61 FR 45619, Aug. 29, 1996; 63 FR 12025, Mar. 12, 1998; 65 FR 31282, May 17, 2000; 66 FR 34580, June 29, 2001; 76 FR 26639, May 9, 2011]

§ 1.1410 Remedies.

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:

(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.

(c) 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 from the date that the complaint, as acceptable, was filed, plus interest.

[44 FR 31650, June 1, 1979, as amended at 76 FR 26639, May 9, 2011]

§ 1.1411 Meetings and hearings.

The Commission may decide each complaint upon the filings and information before it, may require one or more informal meetings with the parties to clarify the issues or to consider settlement of the dispute, or may, in its discretion, order evidentiary procedures upon any issues it finds to have been raised by the filings.

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(b) The response shall be served on the complainant and all parties listed in complainant's certificate of service.

(c) The reply shall be served on the respondent and all parties listed in respondent's certificate of service.

(d) Failure to respond may be deemed an admission of the material factual allegations contained in the complaint.

[44 FR 31650, June 1, 1979]

§ 1.1408 Number of copies and form of pleadings.

(a) An original and three copies of the complaint, response, and reply shall be filed with the Commission.

(b) All papers filed in the complaint proceeding must be drawn in conformity with the requirements of §§ 1.49, 1.50 and 1.52.

§ 1.1409 Commission consideration of the complaint.

(a) In its consideration of the complaint, response, and reply, the Commission may take notice of any information contained in publicly available filings made by the parties and may accept, subject to rebuttal, studies that have been conducted. The Commission may also request that one or more of the parties make additional filings or provide additional information. Where one of the parties has failed to provide information required to be provided by these rules or requested by the Commission, or where costs, values or amounts are disputed, the Commission may estimate such costs, values or amounts it considers reasonable, or may decide adversely to a party who has failed to supply requested information which is readily available to it, or both.

(b) The complainant shall have the burden of establishing a *prima facie* case that the rate, term, or condition is not just and reasonable or that the denial of access violates 47 U.S.C. § 224(f). If, however, a utility argues that the proposed rate is lower than its incremental costs, the utility has the burden of establishing that such rate is below the statutory minimum just and reasonable rate. In a case involving a denial of access, the utility shall have the burden of proving that the denial was lawful, once a *prima facie* case is established by the complainant.

(c) The Commission shall determine whether the rate, term or condition complained of is just and reasonable. For the purposes of this paragraph, 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.

(d) The Commission shall deny the complaint if it determines that the complainant has not established a *prima facie* case, or that the rate, term or condition is just and reasonable, or that the denial of access was lawful.

(e) When parties fail to resolve a dispute regarding charges for pole attachments and the Commission's complaint procedures under Section 1.1404 are invoked, the Commission will apply the following formulas for determining a maximum just and reasonable rate:

(1) The following formula shall apply to attachments to poles by cable operators providing cable services. This formula shall also apply to attachments to poles by any telecommunications carrier (to the extent such carrier is not a party to a pole attachment agreement) or cable operator providing telecommunications services until February 8, 2001:

$$\text{Maximum Rate} = \text{Space Factor} \times \text{Net Cost of a Bare Pole} \times \text{Carrying Charge Rate}$$

$$\text{Where Space Factor} = \frac{\text{Space Occupied by Attachment}}{\text{Total Usable Space}}$$

(2) Subject to paragraph (f) of this section the following formula shall apply to attachments to poles by any telecommunications carrier (to the extent such carrier is not a party to a pole attachment agreement) or cable operator providing telecommunications services beginning February 8, 2001:

$$\text{Maximum Rate} = \text{Space Factor} \times \text{Net Cost of a Bare Pole} \times \begin{bmatrix}\text{Carrying}\\ \text{Charge}\\ \text{Rate}\end{bmatrix}$$

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

(3) The following formula shall apply to attachments to conduit by cable operators and telecommunications carriers:

$$\underset{\text{Linear ft./m.}}{\text{Maximum Rate per}} = \underbrace{\left[\frac{1}{\text{Number of Ducts}} \times \frac{1\text{ Duct}}{\text{No. of Inner Ducts}}\right]}_{\text{(Percentage of Conduit Capacity)}} \times \underbrace{\left[\underset{\text{Ducts}}{\text{No. of}} \times \frac{\text{Net Conduit Investment}}{\text{System Duct Length (ft./m.)}}\right]}_{\text{(Net Linear Cost of a Conduit)}} \times \begin{matrix}\text{Carrying}\\ \text{Charge}\\ \text{Rate}\end{matrix}$$

simplified as:

$$\underset{\text{Per Linear ft./m.}}{\text{Maximum Rate}} = \frac{1\text{ Duct}}{\text{No. of Inner Ducts}} \times \frac{\text{Net Conduit Investment}}{\text{System Duct Length (ft./m.)}} \times \begin{matrix}\text{Carrying}\\ \text{Charge}\\ \text{Rate}\end{matrix}$$

If no inner-duct is installed the fraction, ''1 Duct divided by the No. of Inner-Ducts'' is presumed to be ½.

(f) Paragraph (e)(2) of this section shall become effective February 8, 2001 (i.e., five years after the effective date of the Telecommunications Act of 1996). Any increase in the rates for pole attachments that results from the adoption of such regulations shall be phased in over a period of five years beginning on the effective date of such regulations in equal annual increments. The five-year phase-in is to apply to rate increases only. Rate reductions are to be implemented immediately. The determination of any rate

increase shall be based on data currently available at the time of the calculation of the rate increase.

[43 FR 36094, Aug. 15, 1978, as amended at 52 FR 31770, Aug. 24, 1987; 61 FR 43025, Aug. 20, 1996; 61 FR 45619, Aug. 29, 1996; 63 FR 12025, Mar. 12, 1998; 65 FR 31282, May 17, 2000; 66 FR 34580, June 29, 2001]

§ 1.1410 Remedies.

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:

(a) Terminate the unjust and unreasonable rate, term, or condition;

(b) Substitute in the pole attachment agreement the just and reasonable rate, term, or condition established by the Commission; and

(c) 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 from the date that the complaint, as acceptable, was filed, plus interest.

[44 FR 31650, June 1, 1979]

§ 1.1411 Meetings and hearings.

The Commission may decide each complaint upon the filings and information before it, may require one or more informal meetings with the parties to clarify the issues or to consider settlement of the dispute, or may, in its discretion, order evidentiary procedures upon any issues it finds to have been raised by the filings.

§ 1.1412 Enforcement.

If the respondent fails to obey any order imposed under this subpart, the Commission on its own motion or by motion of the complainant may order the respondent to show cause why it should not cease and desist from violating the Commission's order.

§ 1.1413 Forfeiture.

(a) If any person willfully fails to obey any order imposed under this subpart, or any Commission rule, or

(b) If any person shall in any written response to Commission correspondence or inquiry or in any application, pleading, report, or any other written statement submitted to the Commission pursuant to this subpart make any misrepresentation bearing on any matter within the jurisdiction of the Commission, the Commission may, in addition to any other remedies, including criminal penalties under section 1001 of Title 18 of the United States Code, impose a forfeiture pursuant to section 503(b) of the Communications Act, 47 U.S.C. 503(b).

§ 1.1414 State certification.

(a) If the Commission does not receive certification from a state that:

(1) It regulates rates, terms and conditions for pole attachments;

(2) In so regulating such rates, terms and conditions, the state has the authority to consider and does consider the interests of the subscribers of cable television services as well as the interests of the consumers of the utility services; and,

(3) It has issued and made effective rules and regulations implementing the state's regulatory authority over pole attachments (including a specific methodology for such regulation which has been made publicly available in the state), it will be rebuttably presumed that the state is not regulating pole attachments.

(b) Upon receipt of such certification, the Commission shall give public notice. In addition, the Commission shall compile and publish from time to time, a listing of states which have provided certification.

(c) Upon receipt of such certification, the Commission shall forward any pending case thereby affected to the state regulatory authority, shall so notify the parties involved and shall give public notice thereof.

(d) Certification shall be by order of the state regulatory body or by a person having lawful delegated authority under provisions of state law to submit such certification. Said person shall provide in writing a statement that he or she has such authority and shall cite the law, regulation or other instrument conferring such authority.

11-1146

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

American Electric Power Service, et al., Petitioners,

v.

Federal Communications Commission and United States of America, Respondents.

CERTIFICATE OF SERVICE

I, Nandan M. Joshi, hereby certify that on February 17, 2012, I electronically filed the foregoing Brief for Respondents with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Some of the participants in the case, denoted with asterisks below, are not CM/ECF users. I certify further that I have directed that copies of the foregoing document (without attachments) be mailed by First-Class Mail to those persons, unless another attorney at the same mailing address is receiving electronic service.

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