July 12, 2018

FCC FACT SHEET*

Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment

Third Report and Order and Declaratory Ruling - WC Docket No. 17-84; WT Docket No. 17-79

Background: This *Third Report and Order* would adopt a new framework for the vast majority of pole attachments governed by federal law by instituting a "one-touch make-ready" (OTMR) regime, in which the new attacher may opt to perform all work to prepare a pole for a new attachment. OTMR should accelerate broadband deployment and reduce costs by allowing the party with the strongest incentive to prepare the pole to efficiently perform the work itself. This *Declaratory Ruling* would conclude that section 253(a) of the Communications Act prohibits state and local moratoria on telecommunications facilities deployment.

What the Report and Order Would Do:

- Permit new attachers to elect an OTMR process for simple make-ready for wireline attachments in the "communications space" on a pole.
    - Establish safeguards in the OTMR process to promote coordination among the parties and ensure that new attachers perform work safely and reliably.
    - Retain a multi-party process for other new attachments where safety and reliability risks are greater, while making some modifications to speed deployment.
- Codify the Commission's existing precedent that permits attachers to "overlash" existing wires without first seeking the utility's approval while allowing the utility to request reasonable advance notice of overlashing.
- Eliminate outdated disparities between the pole attachment rates incumbent carriers must pay compared to other similarly-situated cable and telecommunications attachers.
- Make clear that the FCC will preempt, on an expedited case-by-case basis, state and local laws that inhibit the rebuilding or restoration of broadband infrastructure after a disaster.

What the Declaratory Ruling Would Do:

- Conclude that state and local moratoria on telecommunications services and facilities deployment are barred by section 253(a) of the Communications Act because they "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."
    - Define "moratoria" barred by section 253(a) to include both express moratoria and *de facto* moratoria that effectively halt or suspend the acceptance, processing, or approval of applications or permits.
- Determine that moratoria are generally not protected by the exceptions to the section 253(a) prohibition.
- Direct the Wireline Competition Bureau and Wireless Telecommunications Bureau to act promptly on petitions challenging specific alleged moratoria.

* This document is being released as part of a "permit-but-disclose" proceeding. Any presentations or views on the subject expressed to the Commission or its staff, including by email, must be filed in WC Docket No. 17-84, which may be accessed via the Electronic Comment Filing System (https://www.fcc.gov/ecfs/). Before filing, participants should familiarize themselves with the Commission's *ex parte* rules, including the general prohibition on presentations (written and oral) on matters listed on the Sunshine Agenda, which is typically released a week prior to the Commission's meeting. *See* 47 CFR § 1.1200 *et seq*.

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

In the Matter of	)	
	)	
Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WC Docket No. 17-84
	)	
Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WT Docket No. 17-79

THIRD REPORT AND ORDER AND DECLARATORY RULING*

Adopted: [] **Released: []**

By the Commission:

TABLE OF CONTENTS

* This document has been circulated for tentative consideration by the Commission at its August 2018 open meeting. The issues referenced in this document and the Commission's ultimate resolution of those issues remain under consideration and subject to change. This document does not constitute any official action by the Commission. However, the Chairman has determined that, in the interest of promoting the public's ability to understand the nature and scope of issues under consideration, the public interest would be served by making this document publicly available. The FCC's *ex parte* rules apply and presentations are subject to "permit-but-disclose" *ex parte* rules. *See, e.g.*, 47 C.F.R. §§ 1.1206, 1.1200(a). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules, including the general prohibition on presentations (written and oral) on matters listed on the Sunshine Agenda, which is typically released a week prior to the Commission's meeting. *See* 47 CFR §§ 1.1200(a), 1.1203.

I. INTRODUCTION

1. Today, we continue our efforts to promote broadband deployment by speeding the process and reducing the costs of attaching new facilities to utility poles.[1] Now, more than ever, access to this vital infrastructure must be swift, predictable, safe, and affordable, so that broadband providers can continue to enter new markets and deploy facilities that support high-speed broadband. Pole access also is essential to the race for 5G because mobile and fixed wireless providers are increasingly deploying innovative small cells on poles and because these wireless services depend on wireline backhaul.[2] Indeed, an estimated 100,000 to 150,000 small cells will be constructed by the end of 2018, and these numbers are projected to reach 455,000 by 2020 and 800,000 by 2026.[3]

2. In today's order, we take one large step and several smaller steps to improve and speed the process of preparing poles for new attachments, or "make ready."[4] Make-ready generally refers to the modification or replacement of a utility pole, or of the lines or equipment on the utility pole, to accommodate additional facilities on the pole. Consistent with the recommendations of the Broadband Deployment Advisory Committee (BDAC),[5] we fundamentally shift the framework for the vast majority of attachments governed by federal law by adopting a new pole attachment process that includes "one-touch make-ready" (OTMR), in which the new attacher performs all make-ready work. OTMR speeds and reduces the cost of broadband deployment by allowing the party with the strongest incentive —the new attacher—to prepare the pole quickly to perform all of the work itself, rather than spreading the work across multiple parties. By some estimates, OTMR alone could result in approximately 8.3 million incremental premises passed with fiber and about $12.6 billion in incremental fiber capital expenditures.[6]

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[1] Consistent with section 224 of the Communications Act of 1934, as amended (the Act), we use the term "pole attachment" to encompass "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," unless otherwise dictated by context. *See* 47 U.S.C. § 224(a)(4). In the specific context of pole attachment timelines, we use the term "pole attachment" to refer only to utility poles (and not to attachments to ducts, conduits, or rights of way). *See* 47 CFR § 1.1412(a).

[2] *See* Crown Castle Wireline NPRM Comments at 1-2; Mobilitie Wireline NPRM Comments at 7-8; Sprint Wireline NPRM Comments at 10, 39-40.

[3] *Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling*, WT Docket No. 16-421, Public Notice, 31 FCC Rcd 13360, 13363-64 (WTB 2016).

[4] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket Nos. 96-98, 95-185, Order on Reconsideration, 14 FCC Rcd 18049, 18056 n.50 (1999).

[5] *See* Letter from Paul D'Ari, Designated Federal Officer, Broadband Deployment Advisory Committee, FCC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84 (filed July 3, 2018), at Attach. Broadband Deployment Advisory Committee, FCC, Report of the Competitive Access to Broadband Infrastructure Working Group at 18-31 (2018), https://ecfsapi.fcc.gov/file/107030255502405/Competitive%20Access%20to%20Broadband%20Infrastructure%20Report.pdf (BDAC January 2018 Recommendations).

[6] *See* Letter from Thomas J. Navin, Counsel to Corning, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-84, at Attach. A, Ed Naef and Alex King, CMA Strategy Consulting, *Assessing the Impact of Removing Regulatory Barriers on Next Generation Wireless and Wireline Broadband Infrastructure Investment: Annex 1, Model Sensitivities* at 5-6 (filed Feb. 26, 2018) (Corning Economic Study).

We exclude from OTMR new attachments that are more complicated or above the "communications space" of a pole, where safety and reliability risks are greater, but we make significant incremental improvements for such attachments to speed the existing process, promote accurate billing, and reduce the likelihood of coordination failures that cause unwarranted delay.

3. We also adopt other improvements to our pole attachment rules. To provide certainty to all parties and reduce the costs of deciphering our old decisions, we codify and refine our existing precedent that requires utilities to allow "overlashing," which helps maximize the usable space on the pole. We clarify that new attachers are not responsible for the costs of repairing preexisting violations of safety or pole owner construction standards discovered during the pole attachment process. And we eliminate outdated disparities between the pole attachment rates incumbent local exchange carriers (LECs) must pay compared to other similarly-situated telecommunications attachers.

4. Finally, we address two forms of state and local regulatory barriers to the deployment of wireline and wireless facilities. In the Report and Order, we make clear that we will preempt, on a case-by-case basis, state and local laws that inhibit the rebuilding or restoration of broadband infrastructure after a disaster. In today's Declaratory Ruling, we conclude that state and local moratoria on telecommunications services and facilities deployment are barred by section 253(a) of the Act because they "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[7] Barring deployment deprives the public of better services and more broadband options, yet a small but growing number of localities have adopted moratoria in various forms. We put an end to such regulatory barriers.

II. BACKGROUND

5. Section 224 of the Act grants us broad authority to regulate attachments to utility-owned and -controlled poles, ducts, conduits, and rights-of-way.[8] The Act authorizes us to prescribe rules to: ensure that the rates, terms, and conditions of pole attachments are just and reasonable;[9] require utilities[10] to provide nondiscriminatory access to their poles, ducts, conduits, and rights-of-way to telecommunications carriers and cable television systems (collectively, attachers);[11] provide procedures for resolving pole attachment complaints;[12] govern pole attachment rates for attachers;[13] and allocate make-ready costs among attachers and utilities.[14] The Act exempts from our jurisdiction those pole

[7] 47 U.S.C. § 253(a).

[8] *See* 47 U.S.C. § 224(b)(1). The placement and use of utility infrastructure also are governed by local, state, and federal safety rules, as well as by industry standards such as those set forth in the National Electric Safety Code (NESC). The NESC is a set of standards published by the Institute of Electrical and Electronics Engineers (IEEE) for the safe installation, operation, and maintenance of electric power and communications systems. *2017 National Electrical Safety Code (C2-2017)*, IEEE (2017).

[9] 47 U.S.C. §§ 224(b)(1)-(2).

[10] The Act defines a utility as 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." 47 U.S.C. § 224(a)(1). However, for purposes of pole attachments, a utility does not include any railroad, any cooperatively-organized entity, or any entity owned by a federal or state government. *Id.*

[11] 47 U.S.C. § 224(f). The Act allows utilities that provide electric service to deny access to their poles, ducts, conduits, or rights-of-way because of "insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes." *Id.* at § 224(f)(2).

[12] 47 U.S.C. § 224(b)(1).

[13] 47 U.S.C. §§ 224(d)-(e).

[14] 47 U.S.C. §§ 224(b), (h)-(i).

attachments in states that have elected to regulate pole attachments themselves.[15] Pole attachments in thirty states are currently governed by our rules.

6. Our rules take into account the many purposes of utility poles and how an individual pole is divided into various "spaces" for specific uses.[16] Utility poles often accommodate equipment used to provide a variety of services, including electric power, telephone, cable, wireline broadband, and wireless.[17] Accommodating a variety of services on the same pole benefits the public by minimizing "unnecessary and costly duplication of plant for all pole users."[18] Different vertical portions of the pole serve different functions.[19] The bottom of the pole generally is unusable for most types of attachments, although providers of wireless services and facilities sometimes attach equipment associated with distributed antenna systems (DAS) and other small wireless facilities to the portion of the pole near the ground.[20] Above that, the lower usable space on a pole—the "communications space"—houses low-voltage communications equipment, including fiber, coaxial cable, and copper wiring.[21] The topmost portion of the pole, the "electric space," houses high-voltage electrical equipment.[22] Work in the electric space generally is considered more dangerous than work in the communications space.[23] Historically, communications equipment attachers used only the communications space; however, mobile wireless providers increasingly are seeking access to areas above the communications space, including the electric space, to attach pole-top small wireless facilities.[24]

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[15] *See* 47 U.S.C. § 224(c). To date, twenty states and the District of Columbia have opted out of Commission regulation of pole attachments in their jurisdictions. *States That Have Certified That They Regulate Pole Attachments*, WC Docket No. 10-101, Public Notice, 25 FCC Rcd 5541, 5541-42 (WCB 2010).

[16] 47 CFR §§ 1.1412(e), (i); 1.1413(a). The citations to the rules throughout this Order and Appendix A reflect the renumbering of Part 1, subpart J of Title 47 of the Code of Federal Regulations as adopted by the Commission in July 2018. *See Amendment of Procedural Rule Governing Formal Complaint Proceedings Delegated to the Enforcement Bureau*, EB Docket No. 17-245, Report and Order, FCC 18-XXX, Appx. A (adopted July 12, 2018).

[17] *See* Letter from H. Russell Frisby Jr, Counsel to Edison Electric Institute (EEI), to Marlene Dortch, Secretary, FCC, WC Docket No. 17-84, at Attach. Duke Energy, *What's on an electric utility pole?* (filed Oct. 3, 2017) (EEI Oct. 3, 2017 Wireline *Ex Parte* Letter).

[18] S. REP. NO. 95-580, at 13 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 109, 121.

[19] *See* Florida Public Service Commission, *What's on a Utility Pole?* http://www.psc.state.fl.us/ConsumerAssistance/UtilityPole (last visited June 27, 2018); *see also* EEI Oct. 3, 2017 Wireline *Ex Parte* Letter at Attach. *Pole Attachments: Safety and Reliability*, at 4.

[20] *See* EEI Oct. 3, 2017 Wireline *Ex Parte* Letter at Attach. *Pole Attachments: Safety and Reliability*; Crown Castle Wireline NPRM Comments at 5.

[21] *See* Florida Public Service Commission, *What's on a Utility Pole?* http://www.psc.state.fl.us/ConsumerAssistance/UtilityPole (last visited June 27, 2018); *see also* EEI Oct. 3, 2017 Wireline *Ex Parte* Letter at Attach. Duke Energy, *What's on an electric utility pole?*

[22] *See* Florida Public Service Commission, *What's on a Utility Pole?* http://www.psc.state.fl.us/ConsumerAssistance/UtilityPole (last visited June 27, 2018); *see also* EEI Oct. 3, 2017 Wireline *Ex Parte* Letter at Attach. Duke Energy, *What's on an electric utility pole?*

[23] *See* Coalition of Concerned Utilities (CCU) Wireline NPRM Comments at 28-29; Texas Office of Public Utility Counsel Wireline NPRM Comments at 4; EEI Wireline NPRM Reply at 23; Alliant Energy Corp. et al. (Midwest Electric Utilities) Wireline NPRM Reply at 25-28.

[24] *See* Crown Castle Wireline NPRM Comments at 18.

7. When a new attacher seeks access to a pole, it is necessary to evaluate whether adding the attachment will be safe and whether there is room for it.[25] In many cases, existing attachments must be moved to make room for the new attachment. In some cases, it is necessary to install a larger pole to accommodate a new attachment.[26] Our current rules, adopted in 2011, prescribe a multi-stage process for placing new attachments on utility poles:

- Application Review and Survey. The new attacher applies to the utility for pole access. Once the application is complete, the utility has 45 days in which to make a decision on the application and complete any surveys to determine whether and where attachment is feasible and what make-ready is required.[27] The utility may take an additional 15 days for large orders.[28] Our current rules allow new attachers in the communications space to perform surveys when the utility does not meet its deadline.[29]

- Estimate. The utility must provide an estimate of all make-ready charges within 14 days of receiving the results of the survey.[30]

- Attacher Acceptance. The new attacher has 14 days or until withdrawal of the estimate by the utility, whichever is later, to approve the estimate and provide payment.[31]

- Make-Ready. The existing attachers are required to prepare the pole within 60 days of receiving notice from the utility for attachments in the communications space (105 days in the case of larger orders) or 90 days for attachments above the communications space (135 days in the case of larger orders).[32] A utility may take 15 additional days after the make-ready period ends to complete make-ready itself.[33] Our current rules allow new attachers in the communications space to perform make-ready work themselves using a utility-approved contractor when the utility or existing attachers do not meet their deadlines.[34]

8. A number of commenters allege that pole attachment delays and the high costs of attaching to poles have deterred them from deploying broadband.[35] For example, Nittany Media's CTO

[25] *See* American Cable Association (ACA) Wireline NPRM Reply at 18; Ameren et al. (Electric Utilities) Wireline NPRM Reply at 17.

[26] *See* Google Fiber Wireline NPRM Comments at 7.

[27] 47 CFR § 1.1412(c).

[28] 47 CFR §§ 1.1412(c), (g).

[29] 47 CFR § 1.1412(i).

[30] 47 CFR § 1.1412(d).

[31] 47 CFR §§ 1.1412(d)(1)-(2).

[32] 47 CFR §§ 1.1412(e)(1)(ii), (e)(2)(ii). A "larger order" is "the lesser of 3000 poles or 5 percent of the utility's poles in a state." 47 CFR § 1.1412(g)(3).

[33] 47 CFR §§ 1.1412(e)(1)(iv), (e)(2)(iv).

[34] 47 CFR § 1.1412(e)(1)(v).

[35] *See, e.g.*, Crown Castle Wireline NPRM Comments at 4-10; Google Fiber Wireline NPRM Comments at 2; Lightower Wireline NPRM Comments at I, 2; Mobilitie Wireline NPRM Comments at 8-11; *see also* INCOMPAS Wireline NPRM Comments at 6 ("The existing rules, while adopted with the right objectives, are insufficient for modern infrastructure."); Fiber Broadband Association (FBA) Wireline NPRM Comments at 4 ("Yet, six years after the *2011 Pole Attachment Order*, the FBA's service provider members still find that substantial problems persist in seeking access to poles. In too many instances, pole owners simply ignore the Commission's mandated timelines.").

explains that "[o]ver the past 4 years I have seen a tremendous increase in the costs of fiber construction. Although material and labor costs have remained stable and even in some cases become more efficient, pole attachment costs have increased exponentially."[36] Commenters in particular point to the make-ready stage of our current timeline as the largest source of high costs and delays in the pole attachment process.[37] In response to these types of concerns and to promote broadband deployment, two localities and one state—Louisville, Kentucky;[38] Nashville, Tennessee;[39] and the State of West Virginia[40]—adopted their own versions of OTMR where the new attacher performs all the required make-ready work.

9. As part of its commitment to speeding broadband deployment, the Commission established the Broadband Deployment Advisory Committee (BDAC) in January 2017 to advise on how best to remove barriers to broadband deployment, such as delays in new pole attachments.[41] Earlier this year, the BDAC recommended that the Commission take a series of actions to promote competitive access to broadband infrastructure, including adopting OTMR for simple attachments in the

[36] Letter from Michael H. Hain, CTO, Nittany Media, Inc., to Marlene Dortch, Secretary, FCC, WC Docket No. 17-84, at 1 (filed June 15, 2017). *See also* FBA Wireline NPRM Comments at 3 (stating that FBA "encourages the Commission to adopt reforms that will improve efficiency by addressing practices of many pole owners and existing attachers that delay and increase the cost of pole access"); Google Fiber Wireline NPRM Comments at 2 ("[S]taging make-ready in sequential 60-day notice periods . . . results in delay and increased costs . . . These problems, in turn, hinder—and may even foreclose entirely—the deployment of new networks and expansion of broadband service."); Lightower Wireline NPRM Comments at i ("Lightower has experienced barriers [to deploying wired broadband infrastructure] due to a lack of cost transparency.").

[37] *See* Letter from Katharine R. Saunders, Managing Associate General Counsel, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84 (filed Nov. 13, 2017) (Verizon Nov. 13, 2017 Wireline *Ex Parte* Letter), at Attach. Nicholas Vantzelfde, Managing Partner, Communications Media Advisors, LLC, *Perspectives on the Current State of Make Ready and the Potential Impact of a One-Touch Make-Ready Policy*, at 4 (2017) (CMA Report) ("Expediting the make-ready process can reduce payback periods and thus spur increased investment for next-generation networks. The current process is inefficient; impeding broadband deployment and creating additional burdens for pole owners."); Letter from Karen Reidy, VP, Regulatory Aff., INCOMPAS, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2 (filed Dec. 20, 2017) (INCOMPAS Dec. 20, 2017 Wireline *Ex Parte* Letter) ("[T]he current [make-ready] approach—with its sequential make-ready performed by different parties—results in substantial delays, lack of predictability, higher costs, and reduced fiber network expansion."); CCU Wireline NPRM Comments at 11; Google Fiber Wireline NPRM Comments at 9; BDAC January 2018 Recommendations at 19-20.

[38] *See* Louisville Ordinance No. O-427-15, § 116.72(D)(2). In March 2017, the United States District Court for the Western District of Kentucky allowed several challenges to the Louisville OTMR ordinance to proceed. *See Insight Kentucky Partners II v. Louisville/Jefferson County Metro Government*, 2017 WL 1193065 (W.D. Ky. Aug. 16, 2017).

[39] *See* Nashville Ordinance No. BL2016-343, § 13.18.020 (A). In November 2017, the United States District Court for the Middle District of Tennessee found that the Nashville OTMR ordinance was preempted by federal law and permanently enjoined the City of Nashville and Davidson County, TN from applying the ordinance to private parties. *See BellSouth Telecomm., LLC. v. Metro. Gov't of Nashville and Davidson Cnty.*, Tenn., 2017 WL 5641145 (M.D. Tenn. Nov. 21, 2017).

[40] *See* W. VA. Code § 31G (2017). In June 2018, after both West Virginia and Frontier, which challenged the West Virginia OTMR statute, agreed that the Commission's pole attachment rules preempt West Virginia OTMR statute, the United States District Court for the Southern District of West Virginia granted Frontier's motion for summary judgment and permanently enjoined the West Virginia OTMR statute. *See Frontier West Virginia Inc., et al. v. Gov. Jim Justice II, et al.; West Virginia Cable Telecommunications Ass'n Inc. v. James C. Justice Jr., et al.*, Civil Action Nos. 2:17-cw-03560, 2:17-cv-03609, Memorandum Opinion and Order (S.D. W.Va. June 14, 2018).

[41] *See* FCC, Broadband Deployment Advisory Committee, Organization, Charter, https://www.fcc.gov/sites/default/files/bdac-charter.pdf (last visited June 28, 2018).

communications space and making incremental improvements to the Commission's pole attachment process for complex and non-communications space attachments.[42]

10. We are also committed to using all the tools at our disposal to speed the restoration of infrastructure after disasters. Disasters such as the 2017 hurricanes can have debilitating effects on communications networks,[43] and one of our top priorities is assisting in the rebuilding of network infrastructure in the wake of such events.[44] We have also made clear our commitment to ensuring that our own federal regulations do not impede restoration efforts.[45]

11. The Commission initiated this proceeding on April 20, 2017 by adopting a *Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment* seeking comment on a number of potential regulatory reforms to our rules and procedures to accelerate deployment of next-generation networks and services.[46] The Commission sought comment on, among other things, speeding the pole attachment timeline;[47] alternative pole attachment processes, including OTMR;[48] and creating a presumption that the incumbent LEC attachers pay the same pole attachment rate as other telecommunications attachers.[49] The Commission also sought comment on whether moratoria on the deployment of telecommunications facilities are inconsistent with section 253(a) of the Act.[50]

12. On November 16, 2017, the Commission adopted a *Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking* enacting reforms to better enable providers to invest in next generation networks.[51] Among other proposals, the *Further Notice of Proposed Rulemaking* sought comment on the treatment of overlashing by utilities[52] and what actions the Commission can take to facilitate the rebuilding and repairing of broadband infrastructure after natural disasters.[53]

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[42] *See* BDAC January 2018 Recommendations at 19, 21.

[43] *See* Letter from Sandra. E. Torres López, Chairwoman, Puerto Rico Telecommunications Regulatory Board, to Ajit Pai, Chairman, FCC, WC Docket No. 10-90, at 1 (filed Dec. 13, 2017) (estimating that Hurricanes Irma and Maria caused approximately $1.5 billion of damage to Puerto Rico's communications network).

[44] *See, e.g., Uniendo a Puerto Rico Fund and the Connect USVI Fund*, WC Docket No. 18-143, et. al., Order and Notice of Proposed Rulemaking, FCC 18-57 (May 29, 2018) (establishing the Uniendo a Puerto Rico Fund and the Connect USVI Fund to rebuild, improve and expand voice and broadband networks in Puerto Rico and the U.S. Virgin Islands.

[45] *See, e.g., Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking, 32 FCC Rcd 11128, 11157-59, paras. 71-78 (2017) (*Wireline Infrastructure Order*); *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Second Report and Order, FCC 18-74, paras. 58-59 (June 8, 2018) (*Second Wireline Infrastructure Order*) (streamlining network change procedures where *force majeure* event necessitates a network change).

[46] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, 32 FCC Rcd 3266 (2017) (*Wireline Infrastructure Notice*).

[47] *Id.* at 3268-70, paras. 7-12.

[48] *Id.* at 3270-76, paras. 13-31.

[49] *Id.* at 3279-80, paras. 44-46.

[50] *Id.* at 3297, para. 102.

[51] *See generally Wireline Infrastructure Order*.

[52] *See id.* at 11188-89, paras. 160-62.

[53] *See id.* at 11194, paras. 178-79.

III. REPORT AND ORDER

13. Based on the record in this proceeding, we amend our pole attachment rules to facilitate faster, more efficient broadband deployment and to address state and local legal barriers to rebuilding networks after disasters. But, at the outset, we emphasize that parties are welcome to reach bargained solutions that differ from our rules.[54] Our rules provide processes that apply in the absence of a negotiated agreement, but we recognize that they cannot account for every distinct situation and encourage parties to seek superior solutions for themselves through voluntary privately-negotiated solutions. In addition, we recognize that some states will seek to build on the rules that we adopt herein in order to serve the particular needs of their communities. Provided such state requirements do not conflict with the rules we adopt today, states are free to experiment with other ways to encourage broadband deployment in their local jurisdictions.

A. Speeding Access to Poles

14. Most fundamentally, we amend our rules to allow new attachers[55] with simple wireline attachments in the communications space to elect an OTMR-based pole attachment process that places them in control of the work necessary to attach their equipment, and we improve our existing attachment process for other, more complex attachments. We summarize these changes, as well as our prior rules, in the table below:[56]

[54] *See* CCU Wireline NPRM Comments at 18 (encouraging that "utilities and attachers be free to agree on their own one-touch make-ready process").

[55] We define a new attacher as a cable television system or telecommunications carrier requesting to attach new or upgraded facilities (e.g., equipment or lines) to a pole owned or controlled by a utility. *See infra* Appx. A, 47 CFR § 1.1412(a)(2). Therefore, new attachers include existing attachers that need to upgrade their facilities with new attachments.

[56] This table is a summary for informational purposes only, and it sacrifices nuance for brevity. The text of this *Report and Order* (excluding the table) and the rules in Appendix A set forth our binding determinations.

Phase	**Prior Rules**	**OTMR-Based Regime**	**Enhanced Non-OTMR Regime**
Review of Application for Completeness	Vague definition of complete application can lead to delays. No timeline for utility to determine whether application is complete. *47 CFR § 1.1412(c)*	Revised definition of complete application makes it clear what must be included in application. A utility has 10 business days to determine whether an application is complete; the utility must specify any deficiencies and has limited time to review resubmitted applications. *Appx. A §§ 1.1412(c)(1), (j)(1)(ii)*	
Review of Whether to Grant Complete Application; Survey	The utility has 45 days to decide whether to grant a complete application and to complete any surveys. The utility has an additional 15 days for large orders. *47 CFR § 1.1412(c)*	The utility has 15 days to decide whether to grant a complete application. The new attacher conducts the survey and determines its timing. *Appx. A § 1.1412(j)(2), (j)(3)*	Same as prior rules, except that the utility must take certain steps to facilitate survey participation by new and existing attachers. *Appx. A § 1.1412(c)(3)*
Estimate	The utility must provide an estimate of the make-ready charges within 14 days of receiving the survey results. *47 CFR § 1.1412(d)*	N/A – no estimate stage	Same as prior rules, except the estimate must detail basis for charges. *Appx. A § 1.1412(d)*
Attacher Acceptance	The attacher has 14 days or until withdrawal of the estimate by the utility, whichever is later, to approve the estimate and provide payment. *47 CFR § 1.1412(d)(i)-(ii)*	N/A – no acceptance stage	Same as prior rules. *Appx. A § 1.1412(d)(2)*
Make-Ready	The existing attachers must prepare the pole within 60 days of receiving notice from the utility in the communications space (105 days for larger orders) or 90 days in the above the communications space (135 days for larger orders). A utility may take 15 additional days after the make-ready period to complete make-ready itself. *47 CFR § 1.1412(e)(1)(ii), (e)(1)(iv), (e)(2)(ii), (e)(2)(iv)*	The new attacher performs all work in as little as one trip. The new attacher must provide 15 days' notice to existing attachers before commencing work, and this notice period may run concurrently with the utility's review of whether to grant the application. The new attacher must notify existing attachers within 15 days after completion of work on a pole so that existing attachers can inspect the work. *Appx. A § 1.1412(j)(4)*	The existing attachers prepare the pole within 30 days in the communications space (75 days for larger orders) or 60 days above the communications space (105 days for larger orders). A utility may take 15 additional days after the make-ready period to complete make-ready itself for work outside the communications space. *Appx. A § 1.1412(e)(1)(ii), (e)(2)(ii), (e)(2)(iv)*
Self-Help Remedy	New attachers in the communications space may perform work themselves when the deadlines are not met. *47 CFR § 1.1412(i)*	N/A	New attachers in any part of the pole may perform work themselves when the deadlines are not met. We take steps to strengthen the self-help remedy. *Appx. A § 1.1412(i)(2)*

15. No matter the attachment process, we encourage all parties to work cooperatively to meet deadlines, perform work safely, and address any problems expeditiously. Utilities, new attachers, and existing attachers agree that cooperation among the parties works best to make the pole attachment process proceed smoothly and safely.[57]

1. New OTMR-Based Pole Attachment Process

16. We adopt a new pole attachment process that new attachers can elect that places them in control of the surveys, notices, and make-ready work necessary to attach their equipment to utility poles. With OTMR as the centerpiece of this new pole attachment regime, new attachers will save considerable time in gaining access to poles (with accelerated deadlines for application review, surveys, and make-ready work) and will save substantial costs with one party (rather than multiple parties) doing the work to prepare poles for new attachments. A better aligning of incentives for quicker and less expensive attachments will serve the public interest through greater broadband deployment and competitive entry.

a. Applicability and Merits of OTMR Regime

17. We adopt the BDAC's recommendation and amend our rules to allow new attachers to elect OTMR for simple make-ready for wireline attachments in the communications space on a pole.[58] We define simple make-ready as the BDAC does, i.e., make-ready where "existing attachments in the communications space of a pole could be transferred without any reasonable expectation of a service outage or facility damage and does not require splicing of any existing communication attachment or relocation of an existing wireless attachment."[59] Commenters state that simple make-ready work does not raise the same level of safety concerns as complex make-ready or work above the communications space on a pole.[60] There is substantial support in the record, both from utilities and attachers, for allowing OTMR for simple make-ready;[61] and because this option will apply to the substantial majority of pole

[57] *See, e.g.*, CCU Wireline NPRM Comments at 3-4; Midwest Electric Utilities Wireline NPRM Comments at 18; CenterPoint Energy Houston Electric, LLC et al. (POWER Coalition) Wireline NPRM Comments at 9-10; AT&T Wireline NPRM Reply at 4 n.4.

[58] *See* BDAC January 2018 Recommendations at 21.

[59] *Id.* at 20.

[60] *See, e.g.*, ExteNet Systems, Inc. (ExteNet) Wireline & Wireless NPRM Comments at 54-55; FBA Wireline NPRM Comments at 5 n.12, 8; AT&T Wireline NPRM Reply at 8-9; Letter from Kristine Laudadio Devine, Counsel to Google Fiber, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2 (filed June 4, 2018) (Google Fiber June 4, 2018 Wireline *Ex Parte* Letter); Letter from Charles A. Zdebski and Brett H. Freedson, Counsel to CenterPoint Energy Houston Electric, LLC and Florida Power & Light Co., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2 (filed Feb. 13, 2018) (CenterPoint Energy/FPL Feb. 13, 2018 Wireline *Ex Parte* Letter); Letter from Eben M. Wyman, Principal, Power & Communication Contractors Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at [2] (filed Nov. 30, 2017) (PCCA Nov. 30, 2017 Wireline *Ex Parte* Letter).

[61] *See* CCU Wireline NPRM Comments at 17-18; Computing Technology Industry Association (COMPTIA) Wireline NPRM Comments at 2-3; EEI Wireline NPRM Comments at 32; Electric Utilities Wireline NPRM Comments at 7; FBA Wireline NPRM Comments at 5; Level 3 Wireline NPRM Comments at 2-3; POWER Coalition Wireline NPRM Comments at 10; Utilities Technology Council (UTC) Wireline NPRM Reply at 17-21; AT&T Wireline NPRM Reply at 7-8; CPS Energy Wireline NPRM Reply at 8-9; Google Fiber Wireline NPRM Reply at 1-2; Verizon Wireline NPRM Reply at 4-9; Letter from Angie Kronenberg, Chief Advocate & General Counsel, INCOMPAS, to Marlene Dortch, Secretary, FCC, WC Docket No. 17-84 et al., at Attach. 3 (filed Feb. 13, 2018) (INCOMPAS Feb. 13, 2018 Wireline *Ex Parte* Letter); Letter from Brett Heather Freedson, Counsel to CenterPoint Energy Houston Electric, LLC et al., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, Attach. 1 (filed May 25, 2018) (CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter); Letter from Debbie Goldman, Telecommunications Policy Director, Communications Workers of America, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2 (filed Feb. 6, 2018) (CWA Feb. 6, 2018 Wireline *Ex Parte*

attachment projects,[62] it will speed broadband deployment. We also follow the BDAC's recommendation and do not provide an OTMR option for more complex projects in the communications space or for any projects above the communications space at this time.[63]

18. Our new rules define "complex" make-ready, as the BDAC does, as "[t]ransfers and work within the communications space that would be reasonably likely to cause a service outage(s) or facility damage, including work such as splicing of any communication attachment or relocation of existing wireless attachments."[64] We consider "[a]ny and all wireless activities, including those involving mobile, fixed, and point-to-point wireless communications and wireless internet service providers[] . . . to be . . . complex."[65] While the BDAC recommendation did not explicitly address the treatment of pole replacements, we interpret the definition of complex make-ready to include all pole replacements as well. We agree with commenters that pole replacements are usually not simple or routine and are more likely to cause service outages or facilities damage,[66] and thus we conclude that they should fall into the complex category of work.

19. There is substantial support from commenters in the record for not using OTMR for complex make-ready work at this time.[67] We agree that we should exclude these more challenging attachments from OTMR at this time to minimize the likelihood and impact of service disruption. In particular, cutting or splicing of existing wires on a pole has the heightened potential to result in a network outage.[68] We also recognize that wireless attachments involve unique physical and safety

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Letter); Letter from Lonnie R. Stephenson, International President, IBEW, to Marlene Dortch, Secretary, FCC, WC Docket No. 17-84, at 2 (filed Jan. 30, 2018) (IBEW Jan. 30, 2018 Wireline *Ex Parte* Letter).

[62] According to AT&T, approximately 80 percent of current make-ready work is "simple." *See* Letter from Ola Oyefusi, Director, Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at Attach. *Accelerating Wireline Broadband Deployment: Presentation – Pole Attachment Process with OTMR* at 2 (filed Jan. 22, 2018) (AT&T Jan. 22, 2018 Wireline *Ex Parte* Letter). *See also* Letter from Eric B. Langley, Counsel to Electric Utilities, to Marlene Dortch, Secretary, FCC, WC Docket No. 17-84, at 2 (filed Mar. 19, 2018) (Electric Utilities Mar. 19, 2018 Wireline *Ex Parte* Letter) (stating that "more than 80[] [percent] of make-ready poles require communications space make-ready only"). We recognize that in the future, it is likely that less than 80 percent of make-ready work will be eligible for OTMR as wireless carriers ramp up non-simple 5G deployments. *See, e.g.*, AT&T Wireline NPRM Comments at 8 (stating that "[i]ndustry-wide 5G network deployment is expected to involve 10 to 100 times more antenna locations than 4G or 3G."); EEI Wireline NPRM Comments at 29 (asserting that "[i]t can be expected that an increase in the volume of wireless attachment requests due to 5G deployments will exacerbate pole attachment delays due to the complex nature of the installations and the number of poles involved.").

[63] *See* BDAC January 2018 Recommendations at 21-22, 27.

[64] *Id.* at 20.

[65] *Id.*

[66] *See* Letter from Kristine Laudadio Devine, Counsel to Google Fiber, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2 (filed Apr. 12, 2018) (Google Fiber Apr. 12, 2018 Wireline *Ex Parte* Letter); Midwest Electric Utilities Wireline NPRM Reply at 25-26; Puget Sound Energy Wireline NPRM Comments at 7-8.

[67] *See, e.g.*, Charter Communications, Inc. (Charter) Wireline & Wireless NPRM Comments at 55; FBA Wireline NPRM Comments at 5 n.12; Google Fiber Wireline NPRM Comments at 5-6; Level 3 Wireline NPRM Comments at 3; POWER Coalition Wireline NPRM Comments at 11; Texas Office of Public Utility Counsel Wireline NPRM Comments at 4; Letter from Frank S. Simone, Vice President-Federal Regulatory, AT&T, and Debbie Goldman, Telecommunications Policy Director, Communications Workers of America, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, GN Docket No. 17-83, at 1 (filed Jan. 16, 2018) (AT&T-CWA Jan. 16, 2018 Wireline *Ex Parte* Letter); CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at 1.

[68] *See* Google Fiber Apr. 12, 2018 Wireline *Ex Parte* Letter at 2.

complications that existing attachers must consider (e.g., wireless configurations cover multiple areas on a pole, considerably more equipment is involved, RF impacts must be analyzed), thus increasing the challenges of using an accelerated, single-party process at this time.[69]

20. The new OTMR process also will not be available for work above the communications space, including the electric space.[70] Many utility commenters argue that work above the communications space, which mainly involves wireless attachments, frequently impacts electrical facilities and that such work should fall to the utilities to manage and complete.[71] We recognize that work above the communications space is more dangerous for workers and the public and that impacts of electric outages are especially severe.[72] Therefore, we find at this time that the value of control by existing attachers and utilities over infrastructure above the communications space outweighs the benefits of allowing OTMR for these attachments. Based on the foregoing analysis, we decline Verizon's request to allow OTMR for complex make-ready and work above the communications space.[73] We recognize that by not providing an OTMR option above the communications space for the time being, we are not permitting OTMR as an option for small cell pole-top attachments necessary for 5G deployment. We take this approach because there is broad agreement that more complex projects and all projects above the communications space raise substantial safety and continuity of service concerns.[74] At the same time, we adopt rules aimed at mitigating the safety and reliability concerns about the OTMR process we adopt today, and we are optimistic that once parties have more experience with OTMR, either they will by contract or we will by rule expand the reach of OTMR. In the meantime, we find that the benefits of moving incrementally by providing a right to elect OTMR only in the communications space and only for simple wireline projects outweigh the costs.

21. We agree with commenters that argue that OTMR is substantially more efficient for new attachers, current attachers, utilities, and the public than the current sequential make-ready approach set forth in our rules.[75] We agree with Next Centuries Cities that "OTMR facilitates deployment and reduces

[69] *See* CCU Wireline NPRM Comments at 27-28; EEI Wireline NPRM Comments at 28-29; Midwest Electric Utilities Wireline NPRM Comments at 28-29; American Public Power Association (APPA) Wireline NPRM Reply at 28.

[70] This accords with the BDAC's recommendations. *See* BDAC January 2018 Recommendations at 21-22.

[71] *See* CCU Wireline NPRM Comments at 28; EEI Wireline NPRM Comments at 28-29; Electric Utilities Wireline NPRM Comments at 6; Midwest Electric Utilities Wireline NPRM Comments at 30; POWER Coalition Wireline NPRM Comments at 11; Puget Sound Energy Wireline NPRM Comments at 5; Texas Office of Public Utility Counsel Wireline NPRM Comments at 4; UTC Wireline NPRM Comments at 13.

[72] *See, e.g.*, CCU Wireline NPRM Comments at 28-29; Electric Utilities Wireline NPRM Comments at 8-9; Puget Sound Energy Wireline NPRM Comments at 4; Texas Office of Public Utility Counsel Wireline NPRM Comments at 4; EEI Wireline NPRM Reply at 20; Midwest Electric Utilities Wireline NPRM Reply at 24-26.

[73] *See* Letter from Katharine R. Saunders, Managing Associate General Counsel, Verizon, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, WC Docket No. 17-84, at 4 (filed Mar. 8, 2018) (Verizon Mar. 8, 2018 Wireline *Ex Parte* Letter).

[74] *See, e.g.*, CCU Wireline NPRM Comments at 28-29; EEI Wireline NPRM Comments at 28; Texas Office of Public Utility Counsel Wireline NPRM Comments at 4; Midwest Electric Utilities Wireline NPRM Reply at 25-26; APPA Wireline NPRM Reply at 28; AT&T-CWA Jan. 16, 2018 Wireline *Ex Parte* Letter at 2; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at 2.

[75] *See* Computer & Communications Industry Association (CCIA) Wireline & Wireless NPRM Comments at 17; Letter from Christopher Shipley, Attorney and Policy Advisor, INCOMPAS, to Marlene Dortch, Secretary, FCC, Docket Nos. 17-84 et al., at 2 (filed Apr. 20, 2018) (INCOMPAS April 20, 2018 Wireline *Ex Parte* Letter); Letter from Kristine Laudadio Devine, Counsel to Google Fiber Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 1-2 (filed Feb. 1, 2018) (Google Fiber Feb. 1, 2018 Wireline *Ex Parte* Letter); Electric Utilities Mar. 19, 2018 Wireline *Ex Parte* Letter at 2.

barriers to access, which leads to increased broadband deployment, decreased costs for consumers, and increased service speeds."[76] Indeed, Corning estimates that OTMR for wireline deployments could result in over eight million additional premises passed with fiber and about $12.6 billion in incremental fiber capital expenditures.[77] Although we do not at this time provide for an OTMR option for pole-top small cell deployment, OTMR will facilitate the rollout of 5G services because mobile services depend on wireline backhaul, and OTMR will expedite the buildout of wireline backhaul capacity.[78] Utilities such as Ameren and Oncor Electric agree that "[OTMR] in the communications space is the most effective vehicle for the Commission to make large strides in speeding the deployment of broadband."[79]

22. OTMR speeds broadband deployment by better aligning incentives than the current multi-party process.[80] It puts the parties most interested in efficient broadband deployment—new attachers—in a position to control the survey and make-ready processes.[81] The misaligned incentives in the current process often result in delay by current incumbents and utilities and high costs for new attachers as a result of the coordination of sequential make-ready work performed by different parties.[82] As Google Fiber points out, under the current process, if the lowest attacher on the pole (usually the

[76] Next Century Cities Wireline NPRM Comments at 7; *see also* Google Fiber Feb. 1, 2018 Wireline *Ex Parte* Letter at 1 ("OTMR will allow new attachers to pay for one trip to the pole instead of several, facilitate streamlined engagement of contractors, reduce duplication of effort, and eliminate the need to pay pass-through administrative costs of existing attachers—all factors that make deployment of new networks expensive and slow."); BDAC January 2018 Recommendations at 19, 31 ("The rules should provide pole attachers with a single-contractor, single-trip solution for simple make-ready work [in the communications space] which expedites make-ready work . . . ."); Corning Economic Study at 28-29 (asserting that under sequential make-ready, a pole with four attachers means four different parties are completing make-ready at four different times, "a wasteful process as each touch can add up to $450 in costs[]" for the new attacher); CCIA Wireline & Wireless NPRM Comments at 17 ("OTMR reduces the cost and [increases the] speed of deployment of new networks by maximizing efficiency"); CPS Energy Wireline NPRM Reply at 14 ("CPS Energy has worked with industry stakeholders to develop an innovative OTMR process that effectively and efficiently facilitates access to poles in a manner that protects the legitimate interests of CPS Energy, new entrants, and existing attaching entities."); INCOMPAS April 20, 2018 Wireline *Ex Parte* Letter at 2; Electric Utilities Mar. 19, 2018 Wireline *Ex Parte* Letter at 1 (OTMR "in the communications space is the most effective vehicle for the Commission to make large strides in speeding the deployment of broadband.").

[77] *See* Corning Economic Study at 5.

[78] *See* Google Fiber Wireline NPRM Comments at 4; Verizon Wireline NPRM Comments at 2.

[79] Electric Utilities Mar. 19, 2018 Wireline *Ex Parte* Letter at 1.

[80] *See* CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at 2 ("From the perspective of the IOUs, this common sense approach also appropriately places the burden of coordinating make-ready work on the communications entity that ultimately will benefit from use of the pole."); Letter from Katharine R. Saunders, Managing Associate General Counsel, Verizon, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, WC Docket No. 17-84, at 2-3 (filed June 21, 2018) (Verizon June 21, 2018 Wireline *Ex Parte* Letter) (describing the buildout in West Virginia of wireline backhaul for Verizon's wireless network where it "faced multiple and extensive delays at every step of the make-ready process as existing attachers repeatedly missed deadlines. This meant that there were often teams of workers ready to complete the build who were sidelined as they waited for existing attachers to finish their respective moves. This not only delayed deployment significantly but also drove up our costs as we waited for the ability to build.").

[81] *See* CMA Report at 10, 12; COMPTIA Wireline NPRM Comments at 3; Electric Utilities Wireline NPRM Comments at 5; ExteNet Wireline & Wireless NPRM Comments at 54-55; Google Fiber Wireline NPRM Comments at 11; INCOMPAS Wireline NPRM Comments at 9-10; Next Century Cities Wireline NPRM Comments at 6.

[82] *See* CMA Report at 1-2, 6-8, 12; INCOMPAS Feb. 13, 2018 Wireline *Ex Parte* Letter Attach. 2-3; Verizon June 21, 2018 Wireline *Ex Parte* Letter at 2; *see also* CCU Wireline NPRM Comments at 11-12; Google Fiber Wireline NPRM Comments at 11-12; BDAC January 2018 Recommendations at 19-20.

incumbent LEC) moves its wires and equipment to accommodate a new attachment at the end of the existing 60-day make-ready period, then the entire pole attachment process is derailed because multiple existing attachers still have to perform make-ready on their equipment, despite the fact that the make-ready deadline contemplated in our rules has lapsed.[83] Because existing attachers lack an incentive to accommodate new attachers quickly, these delays in sequential attachment are all too common.[84] OTMR eliminates this problem.

23. We also agree with commenters that OTMR will benefit municipalities and their residents by reducing closures and disruptions of streets and sidewalks.[85] Unlike sequential make-ready work, which results in a series of trips to the affected poles by each of the attachers and repeated disruptions to vehicular traffic, OTMR's single trip to each affected pole will reduce the number of such disruptions.[86]

24. We also agree with those commenters that argue that an OTMR-based regime will benefit utilities.[87] The record indicates that many utilities that own poles are not comfortable with their current responsibilities for facilitating attachments in the communications space.[88] By shifting responsibilities from the utility to the new attacher to survey the affected poles, determine the make-ready work to be done, notify affected parties of the required make-ready work, and perform the make-ready work, our new OTMR regime will alleviate utilities of the burden of overseeing the process for most new attachments and of some of the costs of pole ownership.[89]

25. While giving the new attacher control drives the substantial benefits of an OTMR regime, it also raises concerns among some utilities and existing attachers. But we are not convinced by the arguments made by some commenters that OTMR will allow make-ready work to be performed by new

[83] *See* Google Fiber Feb. 1, 2018 Wireline *Ex Parte* Letter at 3; *see also* Letter from Katharine R. Saunders, Managing Associate General Counsel, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, WT Docket No. 17-79, at 3 (filed July 2, 2018) (Verizon July 2, 2018 Wireline *Ex Parte* Letter) (stating that "if make-ready is necessary to accommodate a new attachment that will be placed at the top of the communications space, then existing attachers will move their facilities downward proceeding sequentially from the lowest attacher in the communications space to the highest attacher in the communications space.").

[84] *See* CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at 2 ("a formidable disincentive exists for an incumbent communications attacher to cooperate in a process that ultimately will bring direct competition within its service footprint"); CCU Wireline NPRM Comments at 11; CMA Report at 1-2; INCOMPAS Feb. 13, 2018 Wireline *Ex Parte* Letter at Attach. at 2-3; Verizon June 21, 2018 Wireline *Ex Parte* Letter at 2; BDAC January 2018 Recommendations at 19-20.

[85] *See* Electric Utilities Wireline NPRM Comments at 8; ExteNet Wireline & Wireless NPRM Comments at 54-55; FBA Wireline NPRM Comments at 6-8; INCOMPAS Wireline NPRM Comments at 9; Next Century Cities Wireline NPRM Comments at 6; Verizon Nov. 13, 2017 Wireline *Ex Parte* Letter at 2; PCCA Nov. 30, 2017 Wireline *Ex Parte* Letter at 2; Google Fiber Feb. 1, 2018 Wireline *Ex Parte* Letter at 1-2.

[86] *See, e.g.*, ExteNet Wireline & Wireless NPRM Comments at 54-55; INCOMPAS Wireline NPRM Comments at 9; Verizon July 2, 2018 Wireline *Ex Parte* Letter at 3.

[87] *See, e.g.*, EEI Wireline NPRM Comments at 32; FBA Wireline NPRM Comments at 7; CPS Energy Wireline NPRM Reply at 6-7; Verizon Nov. 13, 2017 Wireline *Ex Parte* Letter at 2; INCOMPAS April 20, 2018 Wireline *Ex Parte* Letter at 2.

[88] *See, e.g.*, EEI Wireline NPRM Comments at 21-22; Electric Utilities Wireline NPRM Comments at 5-6; POWER Coalition Wireline NPRM Comments at 11-12; UTC Wireline NPRM Reply at 18; Verizon July 2, 2018 Wireline *Ex Parte* Letter at 3.

[89] *See* FBA Wireline NPRM Comments at 8; CPS Energy Wireline NPRM Reply at 6-7; UTC Wireline NPRM Reply at 18; Verizon Nov. 13, 2017 Wireline *Ex Parte* Letter at 2; INCOMPAS April 20, 2018 Wireline *Ex Parte* Letter at 2.

attachers that lack adequate incentives to perform quality work, and therefore will increase the likelihood of harm to equipment integrity and public safety.[90] As other commenters explain, the new attacher and its chosen contractor have an incentive to perform quality work in order to limit risk, keep workers safe, and avoid tort liability for damages caused by substandard work.[91] We also adopt several safeguards herein that incentivize the new attacher and its contractor to perform work correctly.[92]

26. In addition, some commenters raise concerns that OTMR may not protect public safety "given the real prospects for serious injuries to [lineworkers] and the public[;]"[93] ensure "the reliability and security of the electric grid[;]"[94] and maintain the safety and reliability of existing attachers' facilities in order to prevent service outages.[95] We are not persuaded, however, by the anecdotal evidence offered in support of these commenters' concerns.[96] For example, Charter cites problems with third-party contractor work on its equipment in San Antonio and in Kansas City.[97] CPS Energy contends, however that rather than being an indictment of OTMR, Charter's anecdotes instead show that an OTMR process can work as intended to speed broadband deployment without sacrificing safety or network integrity.[98]

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[90] *See* AT&T Wireline NPRM Comments at 16; Charter Wireline & Wireless NPRM Comments at 39; Comcast Wireline & Wireless NPRM Comments at 20; EEI Wireline NPRM Comments at 31 ; Frontier Wireline NPRM Comments at 18; NCTA Wireline & Wireless NPRM Comments at 16; POWER Coalition Wireline NPRM Comments at 12; CCU Wireline NPRM Reply at 2-6; CenturyLink Wireline NPRM Reply at 15-16; Communications Workers of America (CWA) Wireline NPRM Reply at 1; AT&T-CWA Jan. 16, 2018 Wireline *Ex Parte* Letter at 2; Letter from Elizabeth Andrion, Charter Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, GN Docket No. 17-83, at 1 (filed Feb. 5, 2018) (Charter Feb. 5, 2018 Wireline *Ex Parte* Letter).

[91] *See* CMA Report at 10-13; CPS Energy Wireline NPRM Reply at 10-11, 20, 23; Google Fiber Wireline NPRM Reply at 8; PCCA Nov. 30, 2017 Wireline *Ex Parte* Letter at 2.

[92] *See infra* sections III.A.1.b., III.A.1.c.

[93] EEI Wireline NPRM Comments at 12; *see also, e.g.*, BDAC January 2018 Recommendations at 19 ("The rules also should balance every community's interest in safety and continuous service."); AT&T Wireline NPRM Comments at 15 (stating that OTMR should preserve the safety of the public and workers).

[94] EEI Wireline NPRM Comments at 12; *see also, e.g.*, POWER Coalition Wireline NPRM Comments at 11 (OTMR "must be limited to ensure that workers on the pole are not exposed to, and do not create unsafe conditions, or act in a manner that threatens the reliability of electric infrastructure."); CCU Wireline NPRM Reply at 2-3 ("Contractors in the electric space working under the direction of communications companies could injure themselves, create hazards to subsequent pole workers or the public at large, cause electrical outages or reliability concerns, or damage electric service facilities on the poles.").

[95] *See* CenturyLink Wireline NPRM Comments at 15; Charter Wireline & Wireless NPRM Comments at 39; Comcast Wireline & Wireless NPRM Comments at 20; Frontier Wireline NPRM Comments at 18; NCTA Wireline & Wireless NPRM Comments at 15-16.

[96] *See e.g.*, AT&T Wireline NPRM Comments at 16 ("unapproved contractors have caused outages to AT&T wireline facilities in Tennessee, Kentucky, Florida, Georgia, and North Carolina. In 2016, AT&T suffered four outages in the Nashville area that were caused by an attacher's unapproved contractors' underground boring operations, one of which resulted in a major 911 outage."); Comcast Wireline & Wireless NPRM Comments at 21-22 ("Comcast has experienced this dynamic firsthand in Nashville, where, at last count, roughly 40 percent of the instances of make-ready work performed by Google Fiber contractors on Comcast's equipment violated requirements set forth in the National Electrical Safety Code[.]") (emphasis removed).

[97] *See* Charter Wireline & Wireless NPRM Comments at 39-44 (noting NESC violations discovered after OTMR performed on its equipment and after make-ready).

[98] *See* CPS Energy Wireline NPRM Reply at 23; *see also* Google Fiber June 4, 2018 Wireline *Ex Parte* Letter at 1 ("The mere fact that, at some point, errors were made by someone in performing make-ready work does not implicate the safety and efficiency of a well-structured OTMR regime.").

We agree. As CPS Energy points out, its OTMR process ensured that Charter received notice of the completion of make-ready and received adequate opportunity to perform a post-make-ready inspection.[99] It was during the inspection that Charter discovered problems with the make-ready work performed by the new attacher, at which point it had the opportunity to report any make-ready problems discovered during the inspection to the new attacher for remediation.[100] As CPS Energy notes, its OTMR process "worked as designed: Charter experienced no outages."[101] The process we adopt today assures these same safeguards.[102]

27. We are committed to ensuring that our approach to pole attachments preserves the safety of workers and the public and protects the integrity of existing electric and communications infrastructure. As an initial matter, we follow the BDAC's recommendation that all complex work and work above the communications space, where reliability and safety risks are greater, will not be eligible for the new OTMR process.[103] In addition, we take several steps to promote coordination among the parties and ensure that new attachers perform work safely and reliably, thereby significantly mitigating the potential drawbacks of OTMR. First, we require new attachers to use a utility-approved contractor to perform OTMR work, except when the utility does not provide a list of approved contractors, in which case new attachers must use qualified contractors.[104] This requirement addresses existing attachers' apprehension about unfamiliar contractors working on their facilities[105] and also guards against delays that result when utilities fail to maintain approved contractor lists.[106] Second, we require new attachers to provide advance notice and allow representatives of existing attachers and the utility a reasonable opportunity to be present when surveys and OTMR work are performed in order to encourage new attachers to perform quality work and to provide the utility and existing attachers an opportunity for oversight to protect safety and prevent equipment damage.[107] Third, we require new attachers to allow existing attachers and the utility the ability to inspect and request any corrective measures soon after the new attacher performs the OTMR work to address existing attachers' and utilities' concerns that the new

[99] CPS Energy Wireline NPRM Reply at 23.

[100] *See id.*; *see also* Google Fiber Wireline NPRM Reply at 12 n.24 (noting that in Nashville, "Comcast inspected the work before it was completed, and upon receiving notice of the violations, Google Fiber made corrections as required."); PCCA Nov. 30, 2017 Wireline *Ex Parte* Letter at 2 ("[W]e believe OTMR can be, and already is[,] performed in the field safely and efficiently.").

[101] CPS Energy Wireline NPRM Reply at 23.

[102] *See infra* section III.A.1.c.

[103] *See* BDAC January 2018 Recommendations at 21-22, 27.

[104] *See infra* section III.A.1.b. (describing the required contractor qualifications).

[105] *See, e.g.*, AT&T Wireline NPRM Comments at 16; Charter Wireline & Wireless NPRM Comments at 39; Comcast Wireline & Wireless NPRM Comments at 21.

[106] *See* ACA Wireline NPRM Reply at 24-25.

[107] *See* ACA Wireline NPRM Comments at 16-17; *see, e.g.*, Charter Wireline & Wireless NPRM Comments at 39-44 ("Charter's experience has been that the work done under [a] one-touch policy is only as effective as the contractor performing the work and the quality and timeliness of the initial notice that Charter receives."); Comcast Wireline & Wireless NPRM Comments at 20-22; NCTA Wireline NPRM Comments at 15-16 ("[T]hese ordinances generally provide little or no advance notice to an existing provider that its facilities will be moved, little or no opportunity to perform the work even when notice is provided, no ability to select the contractor that performs the work on behalf of the new entrant, and limited ability to inspect and remediate (and no indemnification requirement) if the work is done poorly. The effect of these provisions is to jeopardize the safety and quality of service of existing providers."); AT&T Wireline NPRM Reply at 9 ("Under AT&T's OTMR proposal, existing attachers are provided 30 days after notice to make these determinations and to invoke their right to the existing 60-day make-ready period if complex make-ready is required.").

attacher's contractor may damage equipment or cause an outage without their knowledge and with no opportunity for prompt recourse.[108]

28. We recognize that we cannot fully align the incentives of new attachers with those of existing attachers and utilities, but we find that the significant benefits of faster, cheaper, more efficient broadband deployment from this new OTMR process outweigh any costs that remain for most pole attachments. We expect the OTMR regime we adopt today to speed broadband deployment without substantial service interruptions or danger to the public or workers. To the extent that it exceeds our expectations, we may consider expanding the availability of our OTMR process where it is safe to do so.[109] Conversely, if new attachers fail to prevent physical harm or outages, we will not hesitate to revisit whether to maintain an OTMR option.

29. We note that even where an attachment qualifies for our new OTMR process, there may be instances where a new attacher prefers to use our existing pole attachment timeline because, for instance, the new attacher prefers a process where existing attachers are responsible for moving their own equipment rather than the new attacher.[110] Therefore, we permit new attachers to elect our existing pole attachment regime (as modified herein) rather than the new OTMR process.

30. *Rejecting Non-OTMR Solutions.* We reject proposals advanced in the record to reform the pole attachment timeline—specifically, "right-touch, make-ready"[111] and NCTA's "Accelerated and Safe Access to Poles" ("ASAP") proposal—which merely modify the current framework rather than using OTMR.[112] We find that compared to our OTMR approach, these approaches have much more limited benefits because they rely on diffuse responsibility among parties that lack the new attacher's incentive to ensure that the work is done quickly, cost-effectively, and properly.[113] Moreover, they would "do nothing to solve the numerous separate climbs and construction stoppages in the public-rights-of-way" resulting from sequential make-ready.[114] We also agree with AT&T that adopting a penalties-based approach is more likely to promote conflict than speedier deployment.[115]

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[108] *See, e.g.*, Charter Wireline & Wireless NPRM Comments at 56-57; Comcast Wireline & Wireless NPRM Comments at 21-23; NCTA Wireline & Wireless NPRM Reply at 16-17.

[109] Corning estimates that applying OTMR to 5G attachments would result in an additional 5.9 million incremental premises passed and about $8.8 billion in associated capital expenditures. Corning Economic Study at 5-6.

[110] *See* Verizon Nov. 13, 2017 Wireline *Ex Parte* Letter at 2 ("Attachers who do not elect to use OTMR would be able to continue to use the existing pole attachment timeframes and processes.").

[111] *See* Comcast Wireline & Wireless NPRM Reply at 10-11 (proposing right-touch, make-ready, which allows existing attachers to perform make-ready sequentially within a designated time period and relies on fines and other penalties to encourage existing attachers to meet their deadlines).

[112] *See* Letter from Steven F. Morris, Vice President & Associate General Counsel, NCTA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84 (filed Mar. 5, 2018) (NCTA Mar. 5, 2018 Wireline *Ex Parte* Letter) (setting forth "ASAP" proposal, which shortens existing pole attachment timeline, particularly for utilities).

[113] *See* CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at 3; Letter from Kristine Laudadio Devine, Counsel to Google Fiber, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 4 (filed Mar. 14, 2018) (Google Fiber Mar. 14, 2018 Wireline *Ex Parte* Letter) ("By reducing inefficiency and waste in make-ready, adoption of OTMR will shift the core economic assumptions that inform deployment planning.").

[114] INCOMPAS Wireline NPRM Comments at 10; *see* CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at 2-3 ("[T]he ASAP Proposal would maintain the current sequence of duplicative visits to the pole[.]").

[115] *See* AT&T Wireline NPRM Comments at 28 ("Adopting a penalties-based approach would only foment conflict, in litigation or otherwise, between new and existing attachers about who is to blame for the make-ready delay."); *see also* Crown Castle Wireline NPRM Comments at 25 (stating that "the administration, tracking, and enforcement of such fines would simply complicate matters"); Frontier Wireline NPRM Comments at 19 (stating that any

31. We also agree with commenters that the ASAP proposal would put unrealistic time pressure on existing attachers and utilities.[116] For example, NCTA recommends: (1) an expedited 15-day period for utilities to both complete their review of pole attachment applications and conduct the appropriate pole surveys; and (2) a seven-day period for presenting the new attacher with an estimate of make-ready charges.[117] As the Electric Utilities explain, "NCTA's recent 'ASAP' proposal seeks to cut critical engineering review and addresses steps in the access process that are not part of the problem."[118] While a more compressed pole attachment timeline is appropriate for our OTMR regime because a single party controls the work, such timelines are not appropriate for a utility that has to coordinate work separately for both the new attacher and multiple existing attachers.[119]

32. *Legal Considerations.* We reject the contentions of certain cable commenters that OTMR "deprives an existing attacher of its statutory right to notice and an opportunity to add to or modify its own existing attachment before a pole is modified or altered and thus violates Section 224(h)."[120] Section 224(h) of the Act provides, in relevant part, that "[w]henever the owner of a pole . . . intends to modify or alter such pole . . . the owner shall provide written notification of such action to any entity that has obtained an attachment . . . so that such entity may have a reasonable opportunity to add to or modify its existing attachment."[121] We agree with Verizon that there is no statutory right under section 224(h) for an existing attacher to add to or modify its existing attachment when a new attacher is performing the make-ready. On its face section 224(h) only applies to situations where the pole owner modifies or alters the pole, and thus is not implicated under the OTMR approach we adopt today: under our approach new attachers, not pole owners, perform OTMR work.[122]

33. We also find that OTMR does not constitute a government taking of existing attachers' property that requires just compensation under the Fifth Amendment, and we reject arguments to the contrary.[123] As an initial matter, OTMR is not a "permanent physical occupation" of an existing attacher's property;[124] at most it gives contractors of the new attacher a temporary right to move and

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significant penalties for failing to act in a certain timeframe would unfairly shift significant costs and risks to existing attachers and utilities); Verizon Wireline NPRM Reply at 9.

[116] *See* Verizon Mar. 8, 2018 Wireline *Ex Parte* Letter at 3-4 (stating that "rather than enabling new attachers to help drive the application review, survey, and make-ready estimate process, the NCTA proposal would place increased burdens on pole owners and existing attachers to process applications and complete make-ready"); Google Fiber Mar. 14, 2018 Wireline *Ex Parte* Letter at 4-5; Electric Utilities Mar. 19, 2018 Wireline *Ex Parte* Letter at 2; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at 2.

[117] NCTA Mar. 5, 2018 Wireline *Ex Parte* Letter Attach. 1-2.

[118] Electric Utilities Mar. 19, 2018 Wireline *Ex Parte* Letter at 2.

[119] *See* Verizon Wireline NPRM Comments at 9 ("With the one-touch make-ready alternative available to those who want to move more quickly, the Commission should leave intact the current process and timelines for those attachers who do not wish to take on the responsibility for conducting an engineering survey, estimating the necessary make-ready work, and doing one-touch make-ready through an approved contractor.")

[120] NCTA Wireline NPRM Reply at 20; *see also* Charter Wireline NPRM Comments at 45-46; Comcast Wireline NPRM Comments at 19; NCTA Comments at 19.

[121] 47 U.S.C. §224(h).

[122] Verizon Wireline NPRM Reply at 10.

[123] *See* Charter Wireline & Wireless NPRM Comments at 49-50; Comcast Wireline & Wireless NPRM Comments at 22.

[124] *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1073 (1992). With respect to utilities' property interests, we recognize that our new OTMR regime grants access to utilities' poles, as our current regime does, via section 224(f)(1), which requires utilities to provide cable systems and telecommunications carriers with nondiscriminatory

rearrange attachments.[125] In such situations, where a regulation falls short of eliminating all economically beneficial use of the property at issue, courts apply the balancing test of *Penn Central Transportation Co.*[126] and evaluate the economic impact of the regulation on the property owner, the extent to which the regulation has interfered with "distinct investment-backed expectations," and "the character of the government action."[127] Applying that test here makes clear that OTMR effects no taking. We are limiting the application of OTMR to simple work (i.e., where outages are not expected to occur) on wireline attachments in the communications space performed by qualified contractors, and we have taken steps to ensure that the OTMR process limits adverse effects on existing attachers' networks,[128] which means any economic impact on existing attachers and any interference with investment expectations will be limited. Furthermore, OTMR represents at most an incidental movement of existing attachers' property.[129] To the extent that movement affects existing attachers' or utilities' property, such impact is incidental and not our purpose, which is to promote broadband deployment and further the public interest.[130]

b. Contractor Selection Under the OTMR Process

34. We adopt rules requiring attachers using the OTMR process to use a utility-approved contractor if the utility makes available a list of qualified contractors authorized to perform surveys and simple make-ready work in the communications space. If there is no utility-approved list of contractors, we adopt rules that require OTMR attachers to use a contractor that meets key safety and reliability criteria, as recommended by the BDAC.[131] The record suggests that inconsistent updating of approved contractor lists by utilities, as well as a lack of uniform contractor qualification and selection standards, leads to delays when new attachers seek to exercise their self-help remedy and perform make-ready work on a pole.[132] At the same time, existing attachers are understandably apprehensive about having

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access to utilities' poles, ducts, and rights-of-way, and that Congress' grant of such mandatory access likely constitutes a government taking. *See Gulf Power Co. v. United States*, 187 F.3d 1324, 1328-29 (11th Cir. 1999). However, we agree with the Eleventh Circuit that by mandating that utilities receive just and reasonable rates for such access, the Act "is not facially unconstitutional under the Fifth Amendment, because, at least in most cases, it provides a constitutionally adequate process which ensures a utility does not suffer that taking without obtaining just compensation," *Id.* at 1338. Our OTMR regime changes the manner by which new attachers may invoke their mandatory access right under section 224(f)(1), but does not change the process by which new attachers must compensate utilities for such access.

[125] *See* Google Fiber Wireline NPRM Comments at 13-14.

[126] *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978); *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001).

[127] *Penn Central Transp. Co.*, 438 U.S. at 124.

[128] *See infra* section III.A.1.c.(i), (v) (specifying that new attachers must provide advance notice and allow representatives of existing attachers and the utility a reasonable opportunity to be present when surveys and OTMR work are performed); section III.A.1.c.(vi) (mandating that new attachers allow existing attachers and the utility the ability to inspect and request any corrective measures soon after the new attacher performs the OTMR work).

[129] *Penn Central Transp. Co.*, 438 U.S. at 124 (noting that a taking "may more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.") (citation omitted).

[130] *See id.*

[131] *See* BDAC January 2018 Recommendations at 26.

[132] *See* ACA Wireline NPRM Reply at 24-25; *see also* BDAC January 2018 Recommendations at 20.

unfamiliar contractors work on and potentially damage their facilities.[133] The process we adopt addresses both of these problems by preventing delays in the engagement of contractors and by establishing clear minimum qualifications.[134]

35. *Utility-Approved Contractors.* We strongly encourage, but do not require, utilities to publicly maintain a list of approved contractors qualified to perform surveys and simple make-ready work as part of the OTMR process.[135] However we do not *require* utilities to do so. Utilities have a strong interest in protecting their equipment and many have indicated their interest in deciding which contractors can perform work on their poles.[136] At the same time, many utilities have indicated that they do not have the expertise to select contractors qualified to work in the communications space and would prefer to defer to the new attachers' choice of contractors.[137] Therefore, we give the utilities the option of maintaining a list of approved contractors for OTMR work but do not impose a mandate.

36. If the utility maintains a list, new and existing attachers may request that contractors meeting the qualifications set forth below be added to the utility's list and utilities may not unreasonably withhold consent to add a new contractor to the list. We adopt this requirement so that a utility that maintains a list does not have the ability to prevent deployment progress, which would be contrary to our goal in adopting OTMR. To be reasonable, a utility's decision to withhold consent must be prompt, set forth in writing that describes the basis for rejection, nondiscriminatory, and based on fair application of commercially reasonable requirements for contractors relating to issues of safety or reliability.[138]

37. To help ensure public and worker safety and the integrity of all parties' equipment, we conclude that any contractors that perform OTMR must meet certain minimum safety and reliability standards. We require utilities to ensure that contractors on the approved list meet the following minimum requirements, enumerated by the BDAC, for performing OTMR work: (1) follow published safety and operational guidelines of the utility, if available, but if unavailable, follow the National Electrical Safety Code (NESC) guidelines; (2) read and follow licensed-engineered pole designs for make-ready work, if required by the utility; (3) follow all local, state, and federal laws and regulations including, but not limited to, the rules regarding Qualified and Competent Persons under the requirements

[133] *See* AT&T Wireline NPRM Comments at 16; Charter Wireline NPRM Comments at 39; Comcast Wireline NPRM Comments at 21; *see also* BDAC January 2018 Recommendations at 27.

[134] *See* BDAC January 2018 Recommendations at 29-30.

[135] *See id.* at 28; CCU Wireline NPRM Comments at 17; CPS Energy Wireline NPRM Reply at 11; Verizon Wireline NPRM Reply at 7; Letter from Heather Burnett Gold, President & CEO, Fiber Broadband Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 4 (filed Apr. 10, 2018) (FBA Apr. 10, 2018 Wireline *Ex Parte* Letter).

[136] *See, e.g.*, CCU Wireline NPRM Comments at 17; AT&T Wireline NPRM Reply at 10; Google Fiber Wireline NPRM Reply at 9; Verizon Wireline NPRM Reply at 7.

[137] *See* BDAC January 2018 Recommendations at 20, 26, 28; Midwest Electric Utilities Wireline NPRM Comments at 27; POWER Coalition Wireline NPRM Comments at 13; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at 2.

[138] *Cf.* BDAC January 2018 Recommendations at 30 ("Either a pole owner or an existing attacher could reject a contractor proposed by an attacher before the twenty-five calendar day notice period expires, but only on established, declared transparent grounds uniformly applied on the basis of safety or reliability qualification failure."); CenterPoint Energy et al. May 25, 2018 Wireline Ex Parte Letter at 2 ("An IOU pole owner . . . may object to any proposed Communications Contractor . . . (i) if it is determined that such contractor does not satisfy the minimum qualification requirements proposed by the BDAC; or (ii) if it is determined that such contractor does not meet any minimum qualification requirement of the IOU pole owner related to safety or reliability, that is disclosed to the public, and that is evenhandedly applied; or (iii) if it determined, based on past record, that such contractor is not qualified to perform the work for which it seeks to be pre-approved.").

of the Occupational Safety and Health Administration (OSHA) rules; (4) meet or exceed any uniformly applied and reasonable safety and reliability thresholds set and made available by the utility, e.g., the contractor cannot have a record of significant safety violations or worksite accidents; and (5) be adequately insured or be able to establish an adequate performance bond for the make-ready work it will perform.[139] These requirements collectively will materially reduce safety and reliability risks, as well as delays in the completion of pole attachments, by allowing one qualified contractor to perform all necessary make-ready work instead of having multiple contractors make multiple trips to the pole to perform this work.[140]

38. *New Attacher Selection of Contractors.* Where there is no utility-approved list of qualified contractors or no approved contractors available within a reasonable time period, then, consistent with the BDAC recommendation, new attachers proceeding with OTMR may use qualified contractors of their choosing.[141] The new attacher must certify to the utility[142] (either in the three-business-day advance notice for surveys or in the 15-day make-ready notice)[143] that the named contractor meets the same five minimum requirements for safety and reliability discussed above.[144]

39. The utility may mandate additional commercially reasonable requirements for contractors relating to issues of safety and reliability, but such requirements must clearly communicate the safety or reliability issue, be non-discriminatory, in writing, and publicly available (e.g., on the utility's website).[145] This condition will guard against pole damage and resulting outages and safety hazards due to particular local conditions,[146] while ensuring that utilities do not use these additional requirements as a roadblock to deployment.[147] We also grant utilities the flexibility to mandate such additional commercially reasonable requirements for contractors because utilities are best positioned to ensure that any additional state or local legal requirements are complied with and any additional environmental or pole-specific factors are accounted for.[148]

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[139] *See* BDAC January 2018 Recommendations at 29; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter Attach. at 2.

[140] *See* BDAC January 2018 Recommendations at 19; Lumos Wireline NPRM Reply at 4-5.

[141] *Cf.* BDAC January 2018 Recommendations at 28 ("In addition to those contractors placed on an approved list by the pole owner, attachers may propose contractors to the pole owner for approval for any category of make-ready work."). To maximize options for new attachers, we allow a new attacher entitled to select a contractor that does not appear on a utility's list to use its own employees to perform pole attachment work, so long as that employee meets all qualifications for contractors set forth herein. Thus, we use the term "contractor" as a term of art that encompasses the new attacher's employees.

[142] The new attacher may choose to require the contractor to certify to the new attacher that the contractor meets the five BDAC-enumerated minimum safety and reliability requirements and provide a copy of this contractor certification to the utility.

[143] *See infra* section III.A.1.c.(i), (v).

[144] *See* BDAC January 2018 Recommendations at 29; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter Attach. at 2.

[145] *See* BDAC January 2018 Recommendations at 29; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter Attach. at 2. Ideally, such requirements for contractors would also be found in the pole attachment agreement between the utility and the new attacher.

[146] *See* Frontier Wireline NPRM Comments at 16; Charter Wireline NPRM Comments at 38.

[147] *See* Verizon Wireline NPRM Reply at 8 n.29.

[148] *Cf.* CCU Wireline NPRM Comments at 10, 24 (stating that the Coalition currently "complies with federal, state, and, when applicable, local code and operating requirements for safe work and construction practices[,]" and that "[i]t takes careful effort to maintain and operate critical electric infrastructure[]" to ensure attachments are not

40. Where there is no utility-approved list of contractors, we adopt rules, consistent with the BDAC's recommendation, allowing the utility to veto any contractor chosen by the new attacher.[149] Utilities must base any veto on safety and reliability concerns related to the contractor's ability to meet one or more of the minimum qualifications described earlier in this subsection or on the utility's previously posted safety standards.[150] When vetoing an attacher's chosen contractor, the utility must identify at least one qualified contractor available to do the work. The utility also must make its veto within either the three-business-day notice period for surveys or the 15-day notice period for make-ready.[151] In reaching this determination, we agree with the Coalition of Concerned Utilities that the safety and reliability of the pole is extremely important and, as a result, utilities should be able to disqualify contractors that raise concrete workmanship dangers.[152] To avoid an ongoing dispute between the utility and the new attacher that results in the substantial delay of the pole attachment, any veto by the utility that conforms with the requirements we set forth is determinative and final.[153]

41. *Existing Attachers.* We decline to grant existing attachers the right to veto or object to the inclusion of a contractor on the utility-approved list or a new attacher's contractor selection.[154] Several commenters explain that existing attachers lack the incentive to act quickly to accommodate a new attacher on a pole given that a new attacher may be a competitor to an existing attacher.[155] By contrast, the utility in most cases is not a competitor to the new attacher.[156] Further, while there will only be one utility with an objection right for any given pole, there could be several existing attachers for that same pole, thereby materially increasing the chances that an objection may be lodged for the purposes of competitive gamesmanship were we to allow existing attachers to challenge a new attacher's contractor

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installed out of compliance with applicable codes or in a manner that cannot withstand weather emergencies); Midwest Electric Utilities Wireline NPRM Comments at 38 (describing a utility response to an inclement weather emergency or power outage); POWER Coalition Wireline Comments at 6 (describing its members' experience complying with local requirements).

[149] *See* BDAC January 2018 Recommendations at 30; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter Attach. at 2.

[150] *See* BDAC January 2018 Recommendations at 30 (stating that a utility cannot be unreasonably restrictive if a contractor meets the minimum qualification requirements; a rejection of a contractor must be on "established, declared transparent grounds uniformly applied on the basis of safety or reliability qualification failure"); CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter Attach. at 2.

[151] If a contractor conducts a survey and the utility vetoes that contractor during the 15-day notice period for make-ready, then the survey is not invalidated because the utility already had the opportunity to: (1) be present for the survey; and (2) object to the contractor during the three-business-day notice period for surveys.

[152] *See* CCU Wireline NPRM Reply at 2-3; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter Attach. at 2.

[153] *See* AT&T Wireline NPRM Reply at 10.

[154] The BDAC recommended giving existing attachers the right to object to a new attacher's proposed contractor. *See* BDAC January 2018 Recommendations at 30. Several commenters support granting existing attachers a right to object to either or both of (1) contractors on the utility list and (2) the new attacher's contractor selection. *See* AT&T Wireline NPRM Comments at 16; CenturyLink Wireline NPRM Comments at 15; Charter Wireline NPRM Comments at 50, 56; NCTA Wireline NPRM Comments at 16.

[155] *See, e.g.*, CMA Report at 6; CCU Wireline NPRM Comments at 11; Verizon June 21, 2018 Wireline *Ex Parte* Letter at 2; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at 2; FBA Apr. 10, 2018 Wireline *Ex Parte* Letter at 2; Letter from Karen Reidy, VP of Regulatory Affairs, INCOMPAS, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2 (filed Apr. 4, 2018) (INCOMPAS Apr. 4, 2018 Wireline *Ex Parte* Letter); Google Fiber Feb. 1, 2018 Wireline *Ex Parte* Letter at 1-2.

[156] *See infra* section III.C (describing declining incumbent LEC pole ownership rates).

selection. Therefore, we are not convinced that an objection process for existing attachers could be designed in a manner sufficient to prevent significant delays in deployment. Imposition of a time limit for objections could force existing attachers to make objections more promptly, but would not prevent gamesmanship, and imposition of a good faith objection requirement would not prevent deployment delays as new attachers would need to resort to the Commission's complaint process to enforce such a requirement.

42. The rules we adopt should alleviate some commenters' concern that depriving existing attachers of a right to input in the contractor selection process could result in serious harm to existing facilities on the pole.[157] First, only simple make-ready work is subject to the OTMR process; existing attachers can perform their own make-ready work in more challenging and dangerous situations. Further, the authority we grant utilities to develop a mandatory list and veto a new attacher's contractor selection for OTMR work should help mitigate the risk to the safety and reliability of the attachments subject to make-ready work by the new attacher's contractor.[158] As several commenters point out, in many markets, contractors approved by the utilities may already be the same as those approved by existing attachers.[159] Additionally, regardless of whether the utility intervenes, contractors must meet the five criteria recommended by the BDAC, which help to ensure safe, reliable, and quality work. Finally, we conclude that we have put in place adequate protections elsewhere in the new OTMR process, in addition to the protections we identify here, to protect the network reliability and safety concerns of existing attachers.[160]

43. *Use of Union Workers to Perform Make-Ready Work.* We decline to adopt a requirement that OTMR must be performed by union contractors where an existing attacher has entered into a collective bargaining agreement (CBA) that requires the existing attacher to use union workers for pole attachment work.[161] The BDAC's OTMR recommendation did not create a different OTMR regime for existing attachers subject to CBAs,[162] and we find no reason to do so here. New attachers that are not parties to a CBA have no obligations under such a CBA. It is the new attacher's contractor that will be performing the make-ready work, so the CBA is not implicated.

44. Further, the record indicates that requiring a new attacher to hire a union contractor only because one of the existing attachers' CBA mandates the use of union workers to perform its pole attachment work would frustrate the efficiency and utility of OTMR. The record suggests that in some areas, it may not be possible for a new attacher to find union contractors covered by an existing attacher's CBA.[163] In addition, tailoring our OTMR rules to an existing attacher's CBA "would result in a

[157] *See* AT&T Wireline NPRM Comments at 16; Charter Wireline NPRM Comments at 52, 56; Comcast Wireline NPRM Comments at 21 n.51; NCTA Wireline NPRM Comments at 16.

[158] *See* CCU Wireline NPRM Comments at 26; Google Fiber Wireline NPRM Reply at 9.

[159] *See* Google Fiber Wireline NPRM Reply at 9 n.17; Verizon Wireline NPRM Reply at 6.

[160] *See infra* section III.A.1.c.(i), (v) (specifying that new attachers must provide advance notice and allow representatives of existing attachers and the utility a reasonable opportunity to be present when surveys and OTMR work are performed); section III.A.1.c.(vi) (mandating that new attachers allow existing attachers and the utility the ability to inspect and request any corrective measures soon after the new attacher performs the OTMR work).

[161] Several commenters advocate such a requirement. *See* Frontier Wireline NPRM Comments at 17-18; AT&T Wireline NPRM Reply at 9-10; CenturyLink Wireline NPRM Reply at 14; CWA Feb. 6, 2018 Wireline *Ex Parte* Letter at 2; IBEW Jan. 30, 2018 Wireline *Ex Parte* Letter at 2.

[162] *See* BDAC January 2018 Recommendations at 19-25.

[163] *See* Google Fiber Feb. 1, 2018 Wireline *Ex Parte* Letter at 4 (stating that, in many areas, the only union members covered by AT&T's collective bargaining agreements are AT&T employees).

patchwork of rules that might be subject to change every few years and would be administratively unmanageable for new attachers."[164]

45. The Communications Workers of America (CWA) has expressed concern that an OTMR regime that fails to honor CBAs has the potential to cause facility damage, service interruption, and danger to the public and workers.[165] Specifically, CWA argues that its CBAs ensure that make-ready work is performed by "well-trained employees who are directly accountable for their work," and as a result, "perform the job properly and safely."[166] We find that CWA's concerns are already addressed in the proposed OTMR regime through the opportunity for existing attachers to be present for surveys and make-ready work[167] and to conduct post-make-ready inspections on the work performed.[168] Both opportunities provide existing attachers with a safeguard against facility damage and harms that could result from contractor mistakes[169]—and nothing in our adoption of an OTMR regime should be construed as preventing an existing attacher from using union contractors pursuant to an applicable CBA on pole-related work not subject to OTMR that the existing attacher is entitled to perform.

46. Finally, allowing private contracts to dictate our policy choice would "subvert[] the supremacy of federal law over contracts."[170] As the Supreme Court has made clear, "[i]f the regulatory statute is otherwise within the powers of Congress . . . its application may not be defeated by private contractual provisions."[171]

c. OTMR Pole Attachment Timeline

47. One substantial benefit of the OTMR process is that it allows for a substantially shortened timeline for application review and make-ready work. We estimate that new attachers using the new OTMR process will save more than three months from application to completion as compared to the process provided for under our existing rules.[172]

(i) Conducting a Survey

48. Our OTMR regime saves significant time by placing the responsibility on the new attacher (rather than the utility) to conduct a survey of the affected poles to determine the make-ready work to be performed.[173] Under an OTMR regime, the survey will come near the beginning of the process (after the new attacher negotiates with the utility for pole access and chooses a contractor to

[164] Verizon Wireline NPRM Reply at 8.

[165] Letter from Debbie Goldman, Telecommunications Policy Director, CWA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 1-3 (filed May 23, 2018) (CWA May 23, 2018 Wireline *Ex Parte* Letter).

[166] *Id.* at 3.

[167] *See* ACA Wireline NPRM Comments at 16-17.

[168] *See* AT&T Wireline NPRM Comments at 3, 18; Charter Wireline NPRM Comments at 56; COMPTIA Wireline NPRM Comments at 2; Electric Utilities Wireline NPRM Comments at 6; Google Fiber Wireline NPRM Comments at 6; Portland General Electric Company et al. (Oregon Electric Utilities) Wireline NPRM Comments at 8; CPS Energy Wireline NPRM Reply at 11.

[169] *See* ACA Wireline NPRM Comments at 16-17; Electric Utilities Wireline NPRM Comments at 6; CPS Energy Wireline NPRM Reply at 11.

[170] Google Fiber Wireline NPRM Reply at 7.

[171] *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224 (1986).

[172] This calculation includes a 30-day reduction in the application review/survey stage, the elimination of the 28-day estimate and acceptance stages, and up to 45 days saved to complete make-ready.

[173] *See* Verizon Wireline NPRM Reply at 5; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at 4.

perform the work required for attachment) to enable the new attacher to determine whether any make-ready is required and, if so, what type of make-ready (simple or complex) is involved. The results of the survey typically will be included in the new attacher's pole attachment application.[174]

49. To help ensure that the new attacher handles third-party equipment with sufficient care and makes an accurate determination of the work to be done to prepare the poles for its new attachments, our new rules require new attachers to permit representatives of the utility and any existing attachers potentially affected by the proposed work to be present for the survey, using commercially reasonable efforts to provide at least three business days of advance notice of the date, time, and location of the survey and the name of the contractor performing the survey.[175] We find that advance notice of three business days strikes the right balance between providing sufficient time to accommodate coordination with the utility and existing attachers and the need to keep the pole attachment process moving forward in a timely manner.[176] Also, as the BDAC found in the context of utility surveys, joint surveys help address the potential safety and equipment damage risks raised by existing attachers.[177] To prevent coordination problems that may invite delay, we do not require a new attacher to set a date for the survey that is convenient for the utility and existing attachers.[178] In the case of reasonable scheduling conflicts, however, we encourage the parties to work together to find a mutually-agreeable time for the survey. We also encourage all attachers to provide a point of contact publicly (e.g., on their websites) so that new attachers know whom to contact when providing notices required under the OTMR regime.

(ii) Notifying the Utility of the Intent to Use OTMR

50. Consistent with the BDAC's recommendation, we require the new attacher to ensure that its contractor determines whether make-ready work identified in the survey is "simple or complex, subject to an electric utility's right to reasonably object to the determination."[179] For purposes of clarity and certainty, we require a new attacher—if it wants to use the OTMR process and is eligible to do so based on the survey—to elect OTMR in its pole attachment application and to identify in its application the simple make-ready work to be performed.[180] Some commenters oppose letting the new attacher's contractor make the simple versus complex determination.[181] AT&T, for example, advocates for allowing the existing attacher to make the determination.[182] However, we agree with those commenters that argue

[174] CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at 4.

[175] *See, e.g.*, BDAC January 2018 Recommendations at 37; ACA Wireline NPRM Reply Comments at 16-17; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at 4.

[176] *See, e.g.*, BDAC January 2018 Recommendations at 37, 39 ("Members of the Committee agreed that a joint survey would be a useful option for the attacher and could benefit the utility as well. They also agreed that the pole owner should be able to establish the timing of the joint survey and then give the attacher reasonable notice (of not less than three days) to participate."); ACA Wireline NPRM Comments at 16-17; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at 4.

[177] *See* BDAC January 2018 Recommendations at 37.

[178] *See id.* at 40.

[179] *See id.* at 24; *see also* CPS Energy Wireline NPRM Reply at 7; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at Attach. at 1 Verizon Mar. 8, 2018 Wireline *Ex Parte* Letter at 5; INCOMPAS Apr. 4, 2018 Wireline *Ex Parte* Letter at 2. At this time, we find it unnecessary to establish specific procedures around determining whether work will be in the communications space (and thus eligible for OTMR) because we expect that determination to be self-evident.

[180] CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter Attach. at 2.

[181] *See* AT&T Wireline NPRM Reply at 9; NCTA Wireline NPRM Reply at 17; CWA Feb. 6, 2018 Wireline *Ex Parte* Letter at 3.

[182] *See* AT&T Wireline NPRM Reply at 9; Charter Wireline & Wireless NPRM Comments at 55.

that the new attacher's contractor has the incentive to make the correct determination in order to (1) avoid liability for damages caused by an incorrect choice; (2) limit risk; and (3) in the case of third-party contractors, preserve relationships with all attachers, as well as with the utility, to obtain future work.[183] As a result, we find it is "more likely that approved contractors will be conservative in their determination of whether work is simple or complex."[184] In addition, we agree with Google Fiber that having a contractor chosen from a neutral utility-approved list, where such a list is available, "determine whether make-ready is simple or complex means neither the incumbent nor the new attacher has an opportunity to inject anti-competitive bias into the process."[185]

51. We require an electric utility that wishes to object to a simple make-ready determination to raise such an objection during the 15-day application review period (or within 30 days in the case of larger orders).[186] While the BDAC did not address the timing of an objection to the simple/complex determination in its OTMR recommendation, we find that setting a time limit for the objection will reduce confusion and foster quicker deployment. We find 15 days to be sufficient because the electric utility will have the right to accompany the new attacher's contractor on the survey when the contractor makes the simple/complex determination,[187] so the electric utility will have ample opportunity to have the information it needs to determine whether to object before the deadline.

52. If the electric utility objects to the new contractor's determination that work is simple, then the work is deemed complex—the utility's objection is final and determinative so long as it is specific and in writing, includes all relevant evidence and information supporting its decision, and provides a good faith explanation of how such evidence and information relate to a determination that the make-ready is not simple. This approach is consistent with other decisions left to an electric utility during our pole attachment process.[188] We find that making the electric utility's determination final is appropriate because it avoids protracted disputes that could slow deployment. However, we caution utilities that if they make such a decision in a manner inconsistent with the requirements we set forth, for instance without adequate support or in bad faith, then new attachers can avail themselves of our complaint process to address such behavior.

53. If the new attacher determines that the make-ready involves a mix of simple and complex work, then we allow the new attacher discretion to determine whether to bifurcate the work. If the new attacher prefers to complete the simple make-ready work under the OTMR process while it waits for the complex work to run its course through the longer existing process, then it may do so. A new attacher electing to bifurcate the work must submit separate applications for the simple and complex work. If the new attacher prefers that its entire project (both simple and complex work) follow the existing process, or

[183] *See* Google Fiber Wireline NPRM Reply at 6; Verizon Mar. 8, 2018 Wireline *Ex Parte* Letter at 5; *see also* INCOMPAS Apr. 4, 2018 Wireline *Ex Parte* Letter at 2 (explaining that letting existing attachers, which are often competitors of new attachers, select the contractor for OTMR could lead to anti-competitive behavior). In cases where the new attachers uses its own employees, we find that it will be sufficiently incentivized to make the correct choice in order to limit liability for damages and risk.

[184] Google Fiber Feb. 1, 2018 Wireline *Ex Parte* Letter at 3.

[185] *Id.*; *see also* Verizon Mar. 8, 2018 Wireline *Ex Parte* Letter at 5.

[186] We specifically reserve this objection right to an electric utility only and not to other utilities (such as incumbent LECs) defined in 47 U.S.C. § 224(a)(1). *See, e.g., Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5250, 5265, paras. 19, 49 (2011) (*2011 Pole Attachment Order*) ("Consulting electric utilities are entitled to make final determinations in case of disputes over capacity, safety, reliability, and generally applicable engineering purposes.").

[187] *See infra* section III.A.1.c.(i).

[188] *See* 47 U.S.C. § 224(f)(2); *see infra* Appx. A, 47 CFR § 1.1413(d).

if the new attacher does not view bifurcation as feasible, then it may employ the existing process for the entire project.

(iii) Review of Application for Completeness

54. In the interest of speeding application review, we adopt a rule to specify that under the OTMR regime, a pole attachment application is complete if it provides the utility with the information necessary under the utility's procedures, as specified in a master service agreement or in publicly-available requirements at the time of submission of the application, to make an informed decision on the application.[189] We also establish a timeline for the utility's review of the application for completeness. We adopt these requirements to address attachers' complaints—made in response to the Commission's request in the *Wireline Infrastructure Notice* for comments on ways to streamline and accelerate the pole attachment timeline[190]—that "pole owners are not transparent about telling applicants all information that is required to be included on applications at the time of their submission," often resulting in delays to the pole attachment process while the pole owner requests additional information over a series of weeks or months.[191]

55. While the current definition of a complete application only requires "information necessary under [the utility's] procedures,"[192] our revised definition provides more transparency about what an attacher must include in its application, because the master service agreement or publicly-available requirements must be available to new attachers as they prepare their application.[193] We reject NCTA's proposal that we define an application as complete if it provides "only the information reasonably necessary to commence the application process and does not impose unreasonable or unnecessary additional requirements"[194] because that definition fails to provide new attachers sufficient prior notice of the application requirements and invites disputes between the new attacher and utility over what information is "reasonably necessary to commence the application process" or what constitutes "unreasonable or unnecessary additional requirements."[195]

56. To prevent unnecessary delays in starting the pole attachment process, we adopt rules consistent with the BDAC-recommended timeline for a utility to determine whether a pole attachment application is complete:[196]

- A utility has 10 business days after receipt of a pole attachment application in which to determine whether the application is complete and notify the attacher of that decision.
- If the utility notifies the attacher that the attacher's application is not complete within the 10

[189] *See* Letter from Thomas Cohen, Counsel to ACA, to Marlene Dortch, Secretary, FCC, WC Docket No. 17-84, at 5 (filed Sep. 14, 2017) (ACA Sep. 14, 2017 Wireline *Ex Parte* Letter). The BDAC recommended a definition of a complete pole attachment application that we adopt for our existing pole attachment timeline. *See* BDAC January 2018 Recommendations at 32; *see also infra* section III.A.1.c.(iii). We slightly revise that definition for purposes of our OTMR timeline to account for the new attacher, rather than the utility, conducting the pole surveys.

[190] *See Wireline Infrastructure Notice*, 32 FCC Rcd at 3268-69, 3273, paras. 7-8, 21.

[191] *See* Lightower Wireline NPRM Comments at 4-5; ACA Sep. 14, 2017 Wireline *Ex Parte* Letter at 4; FBA Apr. 10, 2018 Wireline *Ex Parte* Letter at 3.

[192] 47 CFR § 1.1412(c).

[193] *See infra* Appx. A, 47 CFR § 1.1412(c)(1).

[194] NCTA Mar. 5, 2018 Wireline *Ex Parte* Letter at Attach. at 1.

[195] *Id.*

[196] BDAC January 2018 Recommendations at 32; *see also* ACA Sep. 14, 2017 Wireline *Ex Parte* Letter at 5. *See infra* Appx. A, 47 CFR § 1.1412(j)(1)(ii).

business-day review period, then the utility must specify where and how the application is deficient.

- If there is no response by the utility within 10 business days, or if the utility rejects the application as incomplete but fails to specify any deficiencies in the application, then the application is deemed complete.
- If the utility timely notifies the new attacher that the application is incomplete and specifies deficiencies, a resubmitted application need only supplement the previous application by addressing the issues identified by the utility, and the application shall be deemed complete within five business days after its resubmission, unless the utility specifies which deficiencies were not addressed and how the resubmitted application did not sufficiently address the utility's reasons.
- The new attacher may follow this resubmission procedure as many times as it chooses, so long as in each case it makes a bona fide attempt to correct the issues identified by the utility, and in each case the deadlines set forth herein apply to the utility's review.

57. We find that incorporating a specific timeline into our rules provides all parties with some predictability about the start of the OTMR process and avoids unnecessary delays that arise when utilities do not formally accept an application in a timely manner.[197] We also find that the timeline we adopt balances the interests of new attachers in the speedy processing of applications and of utilities in needing sufficient time to review the applications. We require utilities to specify the deficiencies in pole attachment applications within 10 business days of receipt so that the new attachers have the information necessary to address those deficiencies in a timely fashion. We also believe this gives incentives for utilities generally to communicate to prospective applicants concerning what is needed for an application because doing so will aid in the utility's formal review process. We adopt a "deemed grant" remedy to prevent delays, and we adopt a shorter timeline for second and further reviews because we expect utilities' review to be cabined to a more limited number of issues that it previously identified. We also encourage utilities that receive complete applications to respond promptly and affirmatively confirm that applications are complete, rather than wait for the 10 business-day review period to lapse.

(iv) Application Review

58. For OTMR attachments, we shorten the time period within which a utility must decide whether to grant a complete application from 45 days to 15 days for standard requests and from 60 days to 30 days for larger requests.[198] While the BDAC did not address this issue, we find that because the new attacher (rather than the utility) will be doing most of the pre-make-ready work under OTMR (e.g., surveys, notices), it is appropriate to adopt a shorter timeline for the utility to review the application.[199] Furthermore, because the utility has the right to specify the information it requires the new attacher to put in the application and has the ability to reject the application (multiple times if necessary) before accepting it for review, we find 15 days should be sufficient for the utility to conduct its review.[200]

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[197] *See* ACA Sep. 14, 2017 Wireline *Ex Parte* Letter at 4-5 (explaining the delays and lack of transparency in the application process).

[198] *See infra* Appx. A, 47 CFR § 1.1412(j)(2) (the deadline is extended to 60 days for larger pole attachment requests as described in 47 CFR § 1.1412(g)). Larger requests are when an order is greater than 3000 poles or 5 percent of the utility's poles in a state. *See infra* Appx. A, 47 CFR § 1.1412(g).

[199] *See* CPS Energy Wireline NPRM Reply at 7 (explaining that transferring the make-ready design and planning to the new attachers allows CPS Energy to slash its pole attachment application review time by over fifty percent).

[200] We retain in the OTMR context our preexisting requirement that if a utility denies an application, the utility's denial must be specific and include all relevant evidence and information supporting its denial and must explain how

(v) Make-Ready

59. The new attacher may proceed with OTMR by giving 15 days' prior written notice to the utility and all affected existing attachers.[201] To avoid unnecessary delays, we conclude that the new attacher may provide the required 15-day notice any time after the utility deems its pole attachment application complete. Thus, the 15-day notice period may run concurrently with the utility's evaluation of whether to grant the application. If, however, the new attacher cannot start make-ready work on the date specified in its 15-day notice (e.g., because its application has been denied or it is otherwise not ready to commence make-ready), then the new attacher must provide 15 days' advance notice of its revised make-ready date.

60. Although the BDAC recommendation provides for 25 days prior written notice for OTMR,[202] we find that 15 days strikes a reasonable balance between promoting fast access to utility poles (one of the core goals of OTMR) and providing sufficient time for existing attachers and the utility to work with the new attacher to arrange to be present when OTMR is being performed on their equipment.[203] Furthermore, the 25-day notice period recommended by the BDAC for OTMR is only five days shorter than the 30-day period recommended by the BDAC for existing attachers to complete complex make-ready work,[204] which is not much time savings for an OTMR process that we adopt for simple work that is unlikely to cause safety issues.[205]

61. To keep all affected parties informed about the new attacher's progress, and consistent with the BDAC's recommendation, we require the new attacher to provide representatives of the utility and existing attachers with the following information in the 15-day advance notice: (1) the date and time of the make-ready work; (2) a description of the make-ready work involved; (3) a reasonable opportunity to be present when the make-ready work is being performed; and (4) the name of the contractor chosen by the new attacher to perform the make-ready work.[206] Allowing existing attachers and the utility a reasonable opportunity to be present when OTMR work is being done addresses the concerns of existing attachers that third-party contractors may not take proper care when performing simple make-ready work

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such evidence and information relate to a denial of access for reasons of safety, reliability, lack of capacity, or engineering standards. *See* 47 CFR § 1.1403(b).

[201] *See* COMPTIA Wireline NPRM Comments at 2; Google Fiber Wireline NPRM Reply at 9; *cf.* BDAC January 2018 Recommendations at 23.

[202] *See* BDAC January 2018 Recommendations at 23; *see also* AT&T Wireline NPRM Comments at 17 (requesting that new attachers notify existing attachers at least 30 days prior to the OTMR make-ready); CPS Energy Wireline NPRM Reply at 9, 16-17 (requesting 21 days' advance notice to existing attachers of impending OTMR work); Charter Feb. 5, 2018 Wireline *Ex Parte* Letter at 1 (requesting 30 days' advance notice to give existing attachers a chance to move their equipment).

[203] *See* Level 3 Wireline NPRM Comments at 3; Verizon Wireline NPRM Comments at 7 (recommending only five days' notice before OTMR work begin); Google Fiber Wireline NPRM Reply at 9.

[204] *See* BDAC January 2018 Recommendations at 21, 23.

[205] *See* Google Fiber Wireline NPRM Reply at 9 (stating that "the Commission should not unreasonably enlarge the notice period given to existing attachers before make-ready commences[ ]" and noting that "a 15-day notice period should be sufficient for utility-approved contractors to ensure that these services will be adequately protected during make-ready").

[206] *See* BDAC January 2018 Recommendations at 23; *infra* Appx. A, 47 CFR § 1.1412(j)(4)(i); Charter Wireline & Wireless NPRM Comments at 56; NCTA Mar. 5, 2018 Wireline *Ex Parte* Letter at Attach. at 5. If a new attacher requests contact information for existing attachers from the utility for use in this notification process, the utility must provide any such contact information it possesses. We adopt this requirement so that a new attacher can fulfill its notification obligation when it does not have a direct relationship with existing attachers.

on their equipment.[207] We also adopt the advance notice requirements to allow the utility and existing attachers, if they so choose, to alert their customers that work on their equipment is forthcoming; as Liberty Cablevision of Puerto Rico explains, "[t]his is a reasonable way to address concerns that service-affecting problems arising from the make-ready work would be improperly attributed to an existing attacher."[208] In addition, providing the name of the new attacher's OTMR contractor allows existing attachers to notify the utility and the utility to object if the contractor is not properly qualified.[209]

62. We emphasize that the 15 days is only a notice period before the new attacher begins make-ready work; it is not an opportunity for existing attachers or the utility to complete make-ready work on their equipment and then bill the new attacher for that work.[210] Providing an existing attacher an affirmative right to move its own equipment during the notice period would undermine two of the main benefits of OTMR: eliminating multiple trips to the pole and decreasing make-ready costs for new attachers.[211]

63. We also adopt the BDAC recommendation that we require the new attacher to notify an affected entity immediately if the new attacher's contractor damages another company's equipment or causes an outage that is reasonably likely to interrupt the provision of service.[212] We extend this requirement to damage to the utility's equipment as well. Upon receiving notice of damaged equipment or a service outage, the utility or existing attacher can either complete any necessary remedial work and bill the new attacher for the reasonable costs related to fix the damage or require the new attacher to fix the damage at its expense within 14 days following notice from the utility or existing attacher.[213] Fourteen days provides sufficient time for the new attacher to fix any problems caused by its work, yet is a short enough period such that damaged equipment does not create a lingering safety or outage issue. This requirement addresses the concern of existing attachers and utilities that the new attacher's contractor may damage equipment or cause an outage that would harm consumers or threaten safety without the existing attacher's or utility's knowledge or an opportunity for prompt recourse.[214]

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[207] *See* BDAC January 2018 Recommendations at 27 ("Existing attachers worry that one-touch make-ready endangers their attachments and provision of service because they are in control of neither the contractor nor the quality of work performed."); Comcast Wireline & Wireless NPRM Comments at 21; NCTA Mar. 5, 2018 Wireline *Ex Parte* Letter at 2 (stating that cable operators have experienced problems with OTMR "where there is a complete lack of privity between the existing attacher and the contractor.").

[208] Liberty Cablevision of Puerto Rico Wireline NPRM Comments at 8 n.7.

[209] *See* BDAC January 2018 Recommendations at 27 ("Opponents of one-touch make-ready often cite unknown contractor qualifications as a principal reason why one-touch make-ready should not be adopted."); *see also* Charter Wireline & Wireless NPRM Comments at 42 (stating that OTMR is only as effective as the contractor performing the work).

[210] *Accord* Verizon July 2, 2018 Wireline Ex Parte Letter at 3 ("If a new attacher elects OTMR, existing attachers would not have the right to perform their own make-ready.").

[211] *See* Google Fiber Mar. 14, 2018 Wireline *Ex Parte* Letter at 1; Verizon Mar. 8, 2018 Wireline *Ex Parte* Letter at 3-4.

[212] BDAC January 2018 Recommendations at 22; Charter Wireline & Wireless NPRM Comments at 57; NCTA Mar. 5, 2018 Wireline *Ex Parte* Letter at Attach. at 5.

[213] *See, e.g.*, CenturyLink Wireline NPRM Comments at 12-13; Charter Wireline & Wireless NPRM Comments at 56-57; CPS Energy Wireline NPRM Reply at 11-12; Electric Utilities Wireline NPRM Comments at 6; Frontier Wireline NPRM Comments at 19; Level 3 Wireline NPRM Comments at 3; Midwest Electric Utilities Wireline NPRM Comments at 8; POWER Coalition Wireline NPRM Comments at 12; UTC Wireline NPRM Comments at 14; AT&T-CWA Jan. 16, 2018 Wireline *Ex Parte* Letter at 1.

[214] *See* BDAC January 2018 Recommendations at 27; Charter Wireline & Wireless NPRM Comments at 39-43; Comcast Wireline NPRM Comments at 21-22; NCTA Wireline NPRM Reply at 16-17.

(vi) Post Make-Ready

64. We agree with commenters that suggest that the OTMR process should include time for post-make-ready inspections and the quick repair of any defective make-ready work.[215] To give existing attachers and the utility an opportunity to correct any errors and to further encourage quality work by the new attacher, we adopt the BDAC's recommendation that the new attacher must provide notice to the utility and affected existing attachers within 15 days after the new attacher has completed OTMR work on a particular pole.[216] In its post-make ready notice, the new attacher must provide the utility and existing attachers at least a 30-day period for the inspection of make-ready work performed by the new attacher's contractors.[217] This post-make-ready inspection and remedy requirement gives the utility and existing attachers their own opportunity to ensure that work has been done correctly.

65. To allow new attachers to timely address allegations of needed repair work, we adopt rules requiring that within 14 days after any post-make ready inspection, the utility and the existing attachers notify the new attacher of any damage caused to their equipment by the new attacher's make-ready work. The utility or existing attacher can either complete any necessary remedial work and bill the new attacher for the reasonable costs related to fix the damage, or require the new attacher to fix the damage at its expense within 14 days following notice from the utility or existing attacher.[218] We provide the utility or existing attacher options regarding repair to maximize their flexibility in addressing issues for which they are not at fault. The safeguards we establish in the OTMR process collectively give the new attacher the incentive to ensure its contractor performs work correctly; we therefore expect the invocation of this remediation procedure to be infrequent.

66. We disagree with Verizon's argument that we should refrain from establishing a timeframe for the utility and existing attachers to inspect completed make-ready work because deadlines for raising claims about property damage are "typically governed by state contract or property law."[219] We find it appropriate to establish a post-inspection timeline at the federal level so that parties can identify any defective make-ready work that has the potential to cause harm or injury to persons or equipment and remedy it as soon as possible. We also find that the deadlines we establish for the post-make-ready timeline give the existing attachers and the utility time that is sufficient but not unnecessarily long to inspect the work and give the new attacher reasonable time to fix any equipment damage and to rectify any potentially unsafe conditions.

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[215] *See* AT&T Wireline NPRM Comments at 18; CenturyLink Wireline NPRM Comments at 15; Charter Wireline & Wireless NPRM Comments at 56-57; COMPTIA Wireline NPRM Comments at 2; Electric Utilities Wireline NPRM Comments at 6; Google Fiber Wireline NPRM Comments at 6; Oregon Electric Utilities Wireline NPRM Comments at 8; CPS Energy Wireline NPRM Reply at 11; UTC Wireline NPRM Reply at 19; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at 4.

[216] BDAC January 2018 Recommendations at 22; *see also* Electric Utilities Wireline NPRM Comments at 6; CPS Energy Wireline NPRM Reply at 11. To minimize paperwork burdens, the new attacher may batch in one post-make-ready notice all poles completed in a particular 15-day span. For example, if a pole attachment project took 30 days to complete, the new attacher could provide one notice to the existing attacher with the first 15 days' worth of work and a second notice on day 30 with the remainder of the work.

[217] *See, e.g.*, CPS Energy Wireline NPRM Reply at 11; Electric Utilities Wireline NPRM Comments at 6; Google Fiber Wireline NPRM Comments at 6 (recommending 60-day period for post-OTMR inspections).

[218] *See, e.g.*, Charter Wireline & Wireless NPRM Comments at 56-57; CPS Energy Wireline NPRM Reply at 11; Electric Utilities Wireline NPRM Comments at 6; Frontier Wireline NPRM Comments at 19-20; Midwest Electric Utilities Wireline NPRM Comments at 8; POWER Coalition Wireline NPRM Comments at 12; UTC Wireline NPRM Comments at 14; AT&T-CWA Jan. 16, 2018 Wireline *Ex Parte* Letter at 1; *see also* Level 3 Wireline NPRM Comments at 3 (submitting that remediation should take place within 30 days).

[219] Verizon Wireline NPRM Reply at 9.

d. Indemnification

67. We conclude that new attachers should be responsible for any damage resulting from work completed by the new attacher during OTMR. The OTMR rules we adopt provide a process for existing attachers to timely identify damage to their equipment that occurs during the OTMR process and to arrange for its repair.[220] To the extent that process proves insufficient, injured parties may seek judicial relief based on state law claims.

68. We find, consistent with the BDAC's recommendation,[221] that federally-imposed indemnification is not necessary.[222] The record indicates that the existing legal regime, including contract[223] and tort law,[224] provides sufficient protection for existing attachers without broad federal regulatory intrusion. The repair process we adopt in our OTMR rules adds an additional layer of protection. With these other remedies already available, we disagree with NCTA that a Commission-mandated indemnification requirement is the "only practical mechanism by which an existing attacher can hold a new attacher or its contractor accountable for the consequences of performing shoddy work" in situations where there is no privity of contract between the parties or a statutory requirement to hold harmless existing attachers.[225] Rather, we find that adding a federal layer of indemnification would not be efficient or assist in speeding broadband deployment. Further, we agree with Google Fiber that

[220] *See supra* section III.A.1.c.(vi). OTMR contractors will be required to carry adequate insurance or establish a performance bond, which should ensure there is compensation available should the contractor's work be faulty. *See supra* section III.A.1.b. To reduce disputes over the cause of damages, NCTA proposes that we require new attachers' contractors to "document, via photograph or video, the condition of the existing attachers' facilities both before performing any make-ready work and after make-ready work is complete." NCTA Mar. 5, 2018 Wireline *Ex Parte* Letter Attach. 6. While we agree with NCTA that such documentation could potentially help to resolve disputes surrounding the cause of damage, there is no record evidence as to how effective or burdensome such a requirement would be, and NCTA does not indicate how widespread this practice currently is. Therefore, we decline to mandate it at this time.

[221] *See* January 2018 BDAC Recommendations at 47.

[222] Several commenters propose such a requirement. *See* AT&T Wireline NPRM Comments at 18; Electric Utilities Wireline NPRM Comments at 6; Frontier Wireline NPRM Comments at 18; UTC Wireline NPRM Comments at 14; Comcast Wireline NPRM Reply at 11; NCTA Wireline NPRM Reply at 20.

[223] *See* Google Fiber Apr. 12, 2018 Wireline *Ex Parte* Letter at 3 (contending that contractual negotiations are sufficient to address new attacher liability to existing attachers beyond liability for damage the new attacher or the new attacher's contractor causes to the existing attacher's facilities); Verizon Mar. 8, 2018 Wireline *Ex Parte* Letter at 6 (arguing that "'[a]ny third party or indirect damages should be addressed in the attachment agreement(s) between the parties already in place'"). Google Fiber observes that it is common practice today for liability concerns to be addressed in pole attachment agreements, "under which attachers routinely agree to indemnify pole owners for property damage, bodily injury, and death arising from their work on, and attachments to utility poles." Letter from Kristine Laudadio Devine, Counsel to Google Fiber, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 3 n. 8 (filed Nov. 30, 2017) (Google Fiber Nov. 30, 2017 Wireline *Ex Parte* Letter).

[224] *See* Charter Wireline & Wireless NPRM Comments at 51 (contending that without contractual privity between the existing and new attachers, the only method of resolving disputes over deficient make-ready work is through tort litigation); CenturyLink Wireline NPRM Reply at 14 (stating that the likely only remedy for an attaching entity, like Century Link, with no contract with another communications company "would be litigation against the IOU for breach or the attacher or its contractor in tort"). Google and CPS Energy also argue that indemnification is not appropriate in situations where there is not privity of contract between new and existing attachers. *See* CPS Energy Wireline NPRM Reply at 19-21; Google Fiber Nov. 30, 2017 Wireline *Ex Parte* Letter at 2-3. State tort law remains available regardless of whether there is contractual privity.

[225] NCTA Apr. 4, 2018 Wireline *Ex Parte* Letter at 6.

indemnification obligations are typically not one-size-fits-all provisions,[226] such that it would be difficult to craft a regulatory solution that is workable in all situations.

69. We disagree with NCTA's assertion that section 224(i) of the Act requires federally mandated "[b]road indemnification of existing attachers," including indemnification for consequential damages.[227] Section 224(i) provides that existing attachers "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)."[228] NCTA claims that this language requires new attachers to pay for "any damages – such as damages caused by service downtime – resulting from such work."[229]

70. We find NCTA's reading of section 224(i) to be overly broad. In our view, the statute is best read to allow the existing attacher to recover only those costs directly connected to "rearranging or replacing the attachment," i.e., the direct costs of moving or replacing the attachment.[230] These costs do not include consequential damages. While NCTA relies on the modifier "any of" for its broad reading, contending that the phrase "any of" means the statute requires compensation for consequential damages,[231] the more natural reading of "any of" is that the statute prohibits holding existing attachers responsible for any *portion* of "the costs of rearranging or replacing its attachment." NCTA cites no precedent that supports its broad reading, and the Commission's bonding and insurance requirements that NCTA does cite[232] are far more narrow than the broad indemnification it argues for in this instance.[233] In fact, we have previously declined to adopt rules requiring broad indemnification for consequential damages, instead finding that indemnification obligations should be left for commercial negotiations.[234]

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[226] Google Fiber Nov. 30, 2017 Wireline *Ex Parte* Letter at 2-3.

[227] *See* Letter from Steven F. Morris, Vice President & Associate General Counsel, NCTA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 5 (filed Apr. 4, 2018) (NCTA Apr. 4, 2018 Wireline *Ex Parte* Letter).

[228] 47 U.S.C. § 224(i).

[229] NCTA Apr. 4, 2018 Wireline *Ex Parte* Letter at 5 n.19.

[230] 47 U.S.C. § 224(i).

[231] *See* NCTA Apr. 4, 2018 Wireline *Ex Parte* Letter at 5 n.19.

[232] *Id.* at 5; *2011 Pole Attachment Order*, 26 FCC Rcd. at 5266-69, para. 56 ("If a requirement is customary and prudent whenever a [utility-approved] contractor [for self-help] is hired, such as requiring a service bond . . . it is likely reasonable."); *In the Matter of Leased Commercial Access*, 23 FCC Rcd. 2909, 2922-23, para. 27-28 (2008) (finding it reasonable for a cable system operator to require a leased access programmer "to obtain reasonable liability insurance coverage[,]" but confirming that the Commission would "continue to address complaints about specific contract terms and conditions on a case-by-case basis"). The *2008 Leased Access Order*'s rules never went into effect due to a stay by the Sixth Circuit. *See* Order, United Church of Christ Office of Communications, Inc. *et al.* v. FCC, No. 08-3245 (and consolidated cases) (6th Cir., May 22, 2008). In June of this year, the Commission tentatively concluded that it should vacate the *2008 Leased Access Order*. *Leased Commercial Access Modernization of Media Regulation Initiative,* MB Docket Nos. 07-42, 17-105, Further Notice of Proposed Rulemaking, FCC 18-80, para. 2 (June 8, 2018). Consistent with the Commission's approach in the *2011 Pole Attachment Order*, our order today requires analogous bonding or insurance requirements for new attachers' third-party OTMR contractors. *See supra* section III.A.1.b.

[233] *Cf.* Verizon July 2, 2018 Wireline *Ex Parte* Letter at 5 (submitting that "[t]he fact that the Commission has stated that, as a general matter, a utility can impose reasonable service bond requirements on contractors and that a cable system operator can impose reasonable insurance requirements in leased access contracts does not answer whether broad indemnification is reasonable for OTMR.").

[234] *See 2011 Pole Attachment Order*, 26 FCC Rcd. at 5261, para. 39 (concluding in response to commenters seeking broad indemnification for self-help make-ready work that "we presume that utilities could structure attachment

2. Targeted Changes to the Commission's Existing Pole Attachment Process

71. To speed broadband deployment for new attachments that are not eligible for our OTMR process and for new attachers that prefer not to use the OTMR process, we make targeted changes to the rules governing the existing pole attachment timeline. Our targeted changes include:

- Revising the definition of a complete pole attachment application and establishing a timeline for a utility's determination whether an application is complete;
- Requiring utilities to provide at least three business days' advance notice of any surveys to the new attacher and each existing attacher;
- Shortening the existing make-ready deadline by 30 days for attachments above the communications space;
- Establishing a 30-day deadline for completion of all make-ready work in the communications space;
- Eliminating the 15-day utility make-ready period for communications space attachments;
- Streamlining the utility's notice requirements;
- Enhancing the new attacher's self-help remedy by making the remedy available for surveys and make-ready work for all attachments anywhere on the pole in the event that the utility or the existing attachers fail to meet the required deadlines;
- Revising the contractor selection process for a new attacher's self-help work; and
- Requiring utilities to provide detailed estimates and final invoices to new attachers regarding make-ready costs.

72. We agree with numerous commenters that with respect to the Commission's current pole attachment timeline, we should refrain from adopting wholesale changes at this time.[235] We agree with Verizon that "any timeline change should be very cautious and include only targeted, incremental reforms" and with AT&T that "[e]xisting timelines are already challenging for some utilities to meet, and shortening those deadlines even further could compromise safety by encouraging workforces to rush or to take shortcuts to meet deadlines."[236] As a result, while we make changes aimed at speeding broadband deployment where the record indicates such changes would be workable and beneficial, we leave unchanged the pole attachment deadlines for the existing application review/survey, estimate, and acceptance stages.

agreements to . . . address liability or other concerns they might have in cases where they elect to perform make-ready themselves.").

[235] *See* CCU Wireline NPRM Comments at 24-25; CenturyLink Wireline NPRM Comments at 3; Comcast Wireline NPRM Comments at 18; Charter Wireline NPRM Comments at 37-38; EEI Wireline NPRM Comments at 3, 22; Electric Utilities Wireline NPRM Comments at 11-13; Frontier Wireline NPRM Comments at 15; POWER Coalition Wireline NPRM Comments at 5; Puget Sound Energy Wireline NPRM Comments at 3-5; Texas Office of Public Utility Counsel Wireline NPRM Comments at 2; APPA Wireline & Wireless NPRM Reply at 30; AT&T Wireline NPRM Reply at 1, 4-5; CWA Wireline NPRM Reply at 1; Midwest Electric Utilities Wireline NPRM Reply at 4-5; Verizon Wireline NPRM Reply at 10.

[236] *See* AT&T Wireline NPRM Reply at 4-5; Verizon Wireline NPRM Reply at 10.

a. Creating a More Efficient Pole Attachment Timeline

(i) Review of application for completeness

73. For the reasons discussed above, we adopt rules reflecting the same improvements to our definition of a complete pole attachment application and the same completeness review process as we do for the OTMR timeline, subject to one change to adjust for the fact that the utility conducts the survey under the non-OTMR process.[237] We adopt the BDAC's recommendation and revise our existing pole attachment rules to define an application as complete if it provides the utility with the information necessary under its procedures, as specified in a master service agreement or in publicly-available requirements at the time of submission of the application, to begin to survey the affected poles.[238] While the current definition of a complete application only requires "information necessary under [the utility's] procedures,"[239] this revised definition requires more transparency on behalf of the utility as the master service agreement and public requirements will be available to new attachers as they prepare their applications. In addition, to prevent unnecessary delays in starting the pole attachment process, we adopt the same BDAC-recommended timeline as in our OTMR process for a utility to determine whether a pole attachment application is complete.[240] We agree with ACA that providing a specific timeline for determining completeness offers all parties predictability about the start of the OTMR process and avoids unnecessary delays.[241]

74. We decline to make further changes at this time to our rules governing the process prior to the utility's substantive review of a pole attachment application. Some new attachers ask that we curtail or eliminate what they describe as "burdensome" pre-application requirements imposed by some utilities,[242] such as "unnecessary" pole design and engineering analyses, the submission of a "pre-application" to allow utilities to determine make-ready costs, and the pre-payment of pole surveys and other fees.[243] Because it is unclear from the record whether any pre-application requirements have the systematic effect of delaying broadband deployment, we find it premature to adopt rules governing these requirements and instead will address any onerous pre-application requirements on a case-by-case basis via our complaint procedures. We recognize that utility-imposed pre-application procedures can have value[244] and can help to avoid incomplete or erroneous pole attachment applications, thus saving time in the process.[245] Certain pre-application requests for information (e.g., the submission of pole loading

[237] *See supra* section III.A.1.c.(iii). Except for the distinction we identify, nothing about the complete application definition and completeness review process we adopt is dependent on or justified by which party performs the make-ready work.

[238] BDAC January 2018 Recommendations at 32; ACA Sep. 14, 2017 Wireline *Ex Parte* Letter at 5; CenterPoint Energy et al. May 25, 2018 *Ex Parte* Letter at 3 n.19.

[239] 47 CFR § 1.1412(c).

[240] *See supra* section III.A.1.c.(iii); BDAC January 2018 Recommendations at 32; *see also* ACA Sep. 14, 2017 Wireline *Ex Parte* Letter at 5.

[241] ACA Sep. 14, 2017 Wireline *Ex Parte* Letter at 4-5.

[242] *See, e.g.,* Charter Wireline NPRM Comments at 36-37; ExteNet Wireline & Wireless NPRM Comments at 51; Lightower Wireline NPRM Comments at 4-5; NCTA Wireline NPRM Comments at 6-7; ACA Wireline NPRM Reply at 19; Comcast Wireline & Wireless NPRM Reply at 10; Crown Castle Reply, WC Docket No. 17-84, at 3-4 (July 17, 2017) (Wireline NPRM Reply).

[243] *See* Charter Wireline NPRM Comments at 36-37; Lightower Wireline NPRM Comments at 4-5; ACA Wireline NPRM Reply at 19; Crown Castle Wireline NPRM Reply at 3-5.

[244] *See* CCU Wireline NPRM Reply at 18 ("Each pole must be analyzed to ensure that it has sufficient strength and space to accommodate the new pole attachment, and that applicable safety codes and standards can be achieved.").

[245] *See* Midwest Electric Utilities Wireline NPRM Comments at 17-18; CCU Wireline NPRM Reply at 12-13.

analyses) can be important tools to address safety, reliability, and engineering concerns.[246] We caution utilities, however, that any such requirements must be reasonable, nondiscriminatory, and applied fairly and efficiently.[247]

(ii) Review of whether to grant complete application and survey

75. We decline to shorten the 45-day period in our existing rules during which the utility must review a complete pole attachment application and survey the affected poles for non-OTMR projects. In so doing, we reject proposals by some attachers that we shorten the application review and survey stage[248] because we agree with utility commenters that the existing 45-day timeframe accounts for demands on existing workforce, safety concerns, volume of pole attachment applications, and timing constraints.[249]

76. To make the survey and application review process more efficient and transparent, however, we adopt a change recommended by the BDAC and several commenters to require utilities to facilitate survey participation by new and existing attachers.[250] Specifically, in performing a field inspection as part of any pre-construction survey, we modify our rules to require a utility to permit the new attacher and any existing attachers potentially affected by the new attachment to be present for any pole surveys.[251] We require the utility to use commercially reasonable efforts to provide at least three business days' advance notice of any surveys to the new attacher and each existing attacher, such notice to include the date, time, and location of the survey, and the name of the contractor performing the survey.[252] We find that advance notice of three business days strikes the right balance between providing sufficient time to accommodate coordination with the attachers and the need to keep the pole attachment process moving forward in a timely manner.[253] We agree with ACA that by encouraging collaboration between all interested parties at an early stage in the pole attachment process, this requirement will facilitate "the expeditious development of solutions in advance of attachments, as well as reduce the

[246] CCU Wireline NPRM Reply at 12-13, 16; Electric Utilities Wireline NPRM Reply at 17-19; CenterPoint Energy et al. Reply, WC Docket No. 17-84, at 11 (July 17, 2017) (POWER Coalition Wireline NPRM Reply).

[247] *See 2011 Pole Attachment Order*, 26 FCC Rcd at 5274, para. 73; *see also* POWER Coalition Wireline NPRM Reply at 11 (explaining that pre-application requirements "are designed precisely to facilitate the pole owner's determination of whether any requested attachment would raise concerns of safety, reliability, and engineering").

[248] *See, e.g.*, NCTA Mar. 5, 2018 Wireline *Ex Parte* Letter at Attach. at 1 (proposing 15-day application review and survey period); Charter Feb. 5, 2018 Wireline *Ex Parte* Letter at Attach. at 1 (proposing 30-day application review and survey period); ExteNet Wireline & Wireless NPRM Comments at 51-52 (same proposal as Charter); Lightower Wireline NPRM Comments at 4.

[249] *See, e.g.*, AT&T Wireline NPRM Comments at 7-8; CCU Wireline NPRM Comments at 23; CenturyLink Wireline NPRM Comments at 8; Communications Workers of America Comments, WC Docket No. 17-84 (June 15, 2017), at 7-8 ; EEI Wireline NPRM Comments at 20-21; Electric Utilities Wireline NPRM Comments at 11; Frontier Wireline NPRM Comments at 16; POWER Coalition Wireline NPRM Comments at i; Puget Sound Energy Wireline NPRM Comments at 3; Verizon Wireline NPRM Comments at 9; APPA Wireline NPRM Reply at 3, 30; Midwest Electric Utilities Wireline NPRM Reply at 5-6, 16; UTC Wireline NPRM Reply at 1.

[250] *See* BDAC January 2018 Recommendations at 37; ACA Wireline NPRM Reply at 18-19; FBA Apr. 10, 2018 Wireline *Ex Parte* Letter at 4.

[251] *See, e.g.*, BDAC January 2018 Recommendations at 37 (stating that a joint survey requirement "would speed up the application process and lower the cost of attachments"); ACA Wireline NPRM Comments at 16-17.

[252] *See* BDAC January 2018 Recommendations at 37. To prevent coordination problems that may invite delay, we do not require a utility to set a date for the survey that is convenient for the affected attachers. *Id.* at 40. However, in the case of reasonable scheduling conflicts, we encourage the parties to work together to find a mutually-agreeable time for the survey.

[253] *See supra* section III.A.1.c.(i).

potential for future disputes" and that it "reduce[s] the possibility of improper attachments, a concern raised by virtually all utility commenters."[254]

77. In addition, to prevent unnecessary and wasteful duplication of surveys, we adopt a change to our rules that allows utilities to meet the survey requirement of our existing timeline by electing to use surveys previously prepared on the poles in question by new attachers. In the OTMR context, new attachers will perform the necessary surveys to determine whether make-ready work is simple or complex prior to the submission of an application.[255] To the extent such work is complex, it will be governed by our existing pole attachment timeline where the utility performs the survey and must give advance notice of the survey to affected attachers.[256] However, we will allow the utility to elect to use the new attacher's previously performed survey (performed as part of the OTMR pole attachment process) to fulfill its survey requirements, rather than require the utility to perform a potentially duplicative survey. The utility still must notify affected attachers of its intent to use the new attacher's survey and provide a copy of the new attacher's survey in its notice.

(iii) Make-ready stage

78. To speed both wireline and wireless broadband deployment, we amend our rules to reduce by 30 days the make-ready deadlines for all attachments, subject to limited exceptions to allow utilities and existing attachers more time where needed. Specifically, for new attachments in the communications space, we reduce the deadlines for both simple and complex make-ready from 60 to 30 days (and from 105 to 75 days for large requests in the communications space), while for new attachments above the communications space, we reduce the make-ready deadline from 90 to 60 days (and from 135 to 105 days for large requests above the communications space). We also adopt modified notice requirements to apportion more of the responsibility for promoting make-ready timeline compliance from utilities to new attachers, because new attachers have the greater incentive to drive adherence to the make-ready deadline.

79. *Make-ready deadlines.* Based on the current record and the BDAC's recommendation, we adopt a change to our rules that shortens the make-ready deadline for new pole attachments in the communications space to promote broadband deployment without imposing undue risk to safety or reliability.[257] We agree with Crown Castle that adoption of a shorter make-ready period in the communications space will promote the efficient completion of make-ready by encouraging utilities and existing attachers to prioritize attachment work.[258] We also agree with Google Fiber that a 30-day period for communications space make-ready (and 75 days for larger requests) "will ensure that existing attachers have the opportunity to control make-ready that is expected to affect their services, while reducing delays and increasing efficiency for new attachers."[259] The make-ready timelines we adopt for work in the communication space should be sufficient for both simple and complex work.

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[254] ACA Wireline NPRM Reply at 18-19 (footnotes omitted); *see also* ACA Wireline NPRM Comments at 39 (noting that Central Hudson Gas & Electric Corp. gives attachers five days' notice of the survey and permits attachers to be present).

[255] *See supra* section III.A.1.c.(i).

[256] *See infra* Appx. A 47 CFR § 1.1412(c)(3).

[257] *See* BDAC January 2018 Recommendations at 21, 24; ExteNet Wireline NPRM Comments at 52; Lightower Wireline NPRM Comments at 7; Crown Castle Wireline NPRM Reply at 11-12; Google Fiber Wireline NPRM Reply at 6.

[258] Crown Castle Wireline NPRM Comments at 17.

[259] Google Fiber Wireline NPRM Reply at 6.

80. While the BDAC recommended that we impose a 30-day deadline for complex make-ready work in the communications space,[260] it did not make a recommendation on the deadline for simple make-ready work that is not subject to OTMR. We find that there is value to maintaining consistency of deadlines in the communications space; thus, we adopt the 30-day deadline for all communications space make-ready work.

81. To facilitate faster and more efficient wireless deployment (particularly the small cell deployments necessary for advanced 5G networks), without sacrificing safety or electric grid reliability, we also adopt a rule that reduces by 30 days, from 90 days to 60 days (and from 135 to 105 days for large requests), the make-ready deadline for pole attachments above the communications space.[261] In establishing the existing deadlines for make-ready above the communications space, which are 30 days longer than the existing deadlines for make-ready work in the communications space, the Commission pointed to the safety risks associated with working on attachments in, near, or above the electric space and the recognized lack of real-world experience at the time with pole-top attachments.[262] While some electric utility commenters argue that the current make-ready timeline for work above the communications space should be kept the same or even lengthened because of the complexity of the installations and the safety concerns of working above the communications space,[263] we agree with AT&T and Verizon that utilities and attachers today "have much more experience with pole-top attachments than they had in 2011."[264] As Crown Castle asserts, it and other companies "have safely installed thousands of pole top wireless attachments,"[265] such that installations above the communications space "are no longer the unusual event that utilities were claiming before 2011."[266] AT&T also points out that in some instances, make-ready above the communications space can be less complex than make-ready work in the communications space.[267] Nevertheless, we continue to allow for more time to complete make-ready above the communications space, as opposed to make-ready work in the communications space, because such attachments involve work near electrical wires that require more careful work and more experienced contractors.

82. For all attachments, we retain as a safeguard our existing rule allowing utilities to deviate from the make-ready timelines for good and sufficient cause when it is infeasible for the utility to complete make-ready work within the prescribed time frame.[268] This safeguard will mitigate the effects

[260] BDAC January 2018 Recommendations at 21, 24; *see also* Google Fiber Wireline NPRM Comments at 7-8.

[261] *See* ExteNet Wireline NPRM Comments at 52; AT&T Wireline NPRM Reply at 6-7; Crown Castle Wireline NPRM Reply at 12-13; Verizon Wireline NPRM Reply at 11.

[262] *See 2011 Pole Attachment Order*, 26 FCC Rcd at 5258-59, para. 33.

[263] *See* CCU Wireline NPRM Comments at 26-28; EEI Wireline NPRM Comments at 28-29; Midwest Electric Utilities Wireline NPRM Comments at 28-29; APPA Wireline NPRM Reply at 30.

[264] Verizon Wireline NPRM Reply at 11; *see also* AT&T Wireline NPRM Reply at 6 (commenting that since 2011, "pole owners, wireless providers, and contractors have become more, not less, knowledgeable about and proficient at safely deploying antennas and other equipment on utility poles").

[265] Crown Castle Wireline NPRM Comments at 18.

[266] *Id.*

[267] AT&T Wireline NPRM Comments at 14; *see also* Crown Castle Wireline NPRM Comments at 18 (stating that even the NESC has been modified to eliminate some of the unique requirements for installing wireless antennas).

[268] *2011 Pole Attachment Order*, 26 FCC Rcd at 5272-73, para. 68. Pursuant to 47 CFR § 1.1412(h)(2), a utility that needs to deviate from the make-ready timeline must immediately notify in writing the affected new and existing attachers and must include the detailed reasons for, and the date and duration of, the deviation from the timeline. The utility can deviate from the make-ready timeline "for a period no longer than necessary," and the time for the deviation has the effect of tolling the make-ready timeline until the utility returns to routine operations and can resume make-ready performance. 47 CFR § 1.1412(h)(2). A new attacher may challenge the utility's determination

of our decrease in the make-ready time periods by carving out edge cases where timely completion is truly infeasible and the utility wishes to retain control of the make-ready process. It aids us in balancing the interests of utilities to control make-ready in non-OTMR circumstances and the needs of new attachers to obtain timely completion of OTMR or the ability to employ self-help.

83. Recognizing that our new timeline will put pressure on existing attachers, particularly with respect to poles that have multiple attachers that must conduct complex make-ready work within a shorter timeframe, we adopt a new safeguard for existing attachers. Specifically, we adopt the BDAC recommendation that an existing attacher may deviate from the 30-day deadline for complex make-ready in the communications space (or the 75-day deadline in the case of larger orders) for reasons of safety or service interruption that renders it infeasible for the existing attacher to complete complex make-ready by the deadline.[269] An existing attacher that so deviates must immediately notify, in writing, the new attacher and other affected existing attachers and include a detailed explanation of the reason for the deviation and a new completion date, which cannot extend beyond 60 days from the date of the utility make-ready notice to existing attachers (or 105 days in the case of larger orders). The existing attacher shall deviate from the complex make-ready time limits for a period no longer than necessary to complete make-ready. If the complex make-ready work is not complete within 60 days from the date that the existing attacher sends the notice to the new attacher, then the new attacher can complete the work using a utility-approved contractor.[270] We require existing attachers to act in good faith in obtaining an extension, and we caution that obtaining an extension as a routine matter or for the purpose of delaying the new attachment is inconsistent with acting in good faith. If a new attacher believes the existing attacher is not using the extension period in good faith, it may file a complaint with the Commission.

84. We reject AT&T's request for a uniform 60-day time period for complex make-ready.[271] Although AT&T's proposal might provide more predictability, we find that the BDAC recommendation better speeds deployment by setting a shorter 30-day period for complex make-ready in the communications space and allowing for additional time in that context only on a case-by-case basis.

85. We further accelerate communications space attachments by eliminating the optional 15-day extension period for the utility to complete the make-ready work.[272] Many commenters and the BDAC support elimination of the extra 15 days at the end of the make-ready stage because few, if any, utilities actually invoke the extension.[273] However, with respect to work above the communications

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for deviating from the make-ready timeline if the utility's rationale is not justified by good and sufficient cause. *2011 Pole Attachment Order*, 26 FCC Rcd at 5273, para. 68.

[269] BDAC January 2018 Recommendations at 21; *see also* Level 3 Wireline NPRM Comments at 3 ("New attachers must provide 30 days' written notice for complex make ready to allow a field meeting to be scheduled within that 30 days . . . The existing attacher will have 60 days from the date of notice to perform Complex Make Ready if the technicians mutually agree to such extension in the field meeting."); Oregon Electric Utilities Wireline NPRM Comments at 5 (when make-ready requires more than 45 days to complete, the parties must negotiate "a mutually satisfactory longer period to complete the make ready work.").

[270] BDAC January 2018 Recommendations at 21; *see also* AT&T-CWA Jan. 16, 2018 Wireline *Ex Parte* Letter at 3. If no utility-approved contractor is available, then the new attacher must follow the procedures outlined *infra* in section III.A.2.c. for choosing an appropriate contractor.

[271] Letter from Ola Oyefusi, Director, Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2 (filed Mar. 23, 2018).

[272] *See* 47 CFR § 1.1412(e)(1)(iv).

[273] *See* BDAC January 2018 Recommendations at 46 ("[B]ased on information that utilities rarely, if ever, assert their right to complete make-ready work that is uncompleted by existing attachers within 15 days, Committee members agreed to remove this obligation on utilities, which would facilitate a requesting attacher completing make-ready work as quickly as possible."); AT&T Wireline NPRM Comments at 13; Frontier Wireline NPRM Comments at 15; USTelecom Comments, WC Docket No. 17-84 (June 15, 2017), at 17 (USTelecom Wireline

space, we retain the optional 15-day extension period for utility make-ready.[274] Because we are extending a new attacher's self-help remedy to attachments above the communications space, and because we are reducing the amount of time for make-ready by 30 days, more utilities may need to use the additional 15 days to perform such make-ready work themselves.[275] Further, retaining this extra period promotes safety and reliability of the electric grid by granting the utility extra time to undertake the work itself. To the extent utilities do not intend to avail themselves of the additional 15 days before a new attacher resorts to self-help above the communications space, we strongly encourage utilities to communicate that intent as soon as possible to new attachers so that the new attacher can promptly begin make-ready work.

86. We decline to reduce the timeline for large attachments beyond the across-the-board 30-day decrease set forth above. While Crown Castle advocates for eliminating the additional time afforded to large pole attachment requests because of the resulting extra delay to the pole attachment process,[276] we agree with commenters that argue that the additional time is often needed for utilities to carefully process larger requests.[277] As AT&T explains "more attachments on more poles require more surveys, more coordination with attachers, and more make-ready work. That additional work, much of which involves site visits, requires additional time."[278]

87. We also decline the request of some commenters to adopt a shorter timeline for routine pole attachment requests involving a small number of poles.[279] We agree with the Coalition of Concerned Utilities that mandating shorter deadlines for smaller requests could cause the utilities to give undue priority to those requests merely because they are smaller in order to meet the compressed deadlines.[280] In addition, the Coalition of Concerned Utilities claims that new attachers have been shown to abuse the process in states where utilities are required to process smaller applications more quickly by submitting a series of smaller applications (as opposed to one large application) to ensure that utilities focus on their applications first.[281] We do not want to incentivize possible gamesmanship by instituting a federal requirement of shorter deadlines for smaller requests.

88. *Notice and New Attacher Role.* We adopt the BDAC recommendation that when a utility provides the required make-ready notice to existing attachers, then it must provide the new attacher with a copy of the notice, plus the contact information of existing attachers to which the notices were sent, and thereafter the new attacher (rather than the utility) must take responsibility for encouraging and

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NPRM Comments); Lumos Wireline NPRM Reply at 6-7.

[274] *See* 47 CFR § 1.1412(e)(2)(iv).

[275] *Cf.* CenturyLink Wireline NPRM Comments at 10.

[276] *See* Crown Castle Wireline NPRM Comments at 17-18.

[277] *See e.g.*, AT&T Wireline NPRM Comments at 10; CenturyLink Wireline NPRM Comments at 10; EEI Wireline NPRM Comments at 22; Midwest Electric Utilities Wireline NPRM Comments at 20; UTC Wireline NPRM Reply at 10-11.

[278] AT&T Wireline NPRM Comments at 10.

[279] *See* NTCA Wireline NPRM Comments at 6-7 (would apply to requests by smaller providers for routine attachments involving 100 or fewer poles in a six-month period); WTA Wireline NPRM Comments at 18 (would apply to pole attachment requests involving 50 or fewer poles); ACA Wireline NPRM Reply at 20-22 (would apply to routine pole attachment requests involving 20 or fewer poles); Charter Feb. 5, 2018 Wireline *Ex Parte* Letter at 3 (would apply to applications of 30 or fewer poles).

[280] *See* CCU Wireline NPRM Reply at 23.

[281] CCU Wireline NPRM Reply at 23 (noting that "[i]n order to treat attaching entities in a nondiscriminatory manner, utilities typically process applications in the order they are received, no matter the size if [*sic*] the application").

coordinating with existing attachers to ensure completion of make-ready work on a timely basis.[282] We adopt this additional notice requirement to empower the new attacher to promote the timely completion of make-ready. As explained by the POWER Coalition, "the new attacher is in the better position to manage the work of existing attachers, to impose reasonable deadlines, and to negotiate compensation for the work performed."[283]

89. *Delivery of Power.* We decline to amend our rules to require that the make-ready process include the delivery of electric power to a new attachment.[284] As pointed out by utility commenters, the provision of electric service is outside of our jurisdiction, as it is governed by the Federal Energy Regulatory Commission and state law.[285] We recognize, however, that electricity is critical to powering wireline and wireless equipment and that any delay in supplying power to a new attachment is an impediment to broadband deployment.[286] We therefore strongly encourage utilities and new attachers to work together to avoid delays in delivering power to new attachments.

b. Enhancing the Self-Help Remedy

90. In the interest of speeding broadband deployment, we modify our rules to provide a self-help remedy to new attachers for work above the communications space, including the installation of wireless 5G small cells, when the utility or existing attachers have failed to complete make-ready work within the required time frames. We recognize that despite widespread agreement that make-ready work often extends past Commission-prescribed timelines,[287] and new attachers' frustration with delays caused by missed deadlines for make-ready work,[288] the record shows that, at present, new attachers rarely invoke the existing self-help remedy in the communications space.[289] In the interest of ensuring that new attachers are able to exercise the self-help remedy, we take this opportunity to reiterate its availability and

[282] *See* BDAC January 2018 Recommendations at 46; Electric Utilities Wireline NPRM Comments at 20; POWER Coalition Wireline NPRM Comments at 11-12; Letter from Thomas Cohen and J. Bradford Currier, Counsel to ACA, to Marlene Dortch, Secretary, FCC, WC Docket No. 17-84, at 6 (filed Mar. 26, 2018) (ACA Mar. 26, 2018 Wireline *Ex Parte* Letter); FBA Apr. 10, 2018 Wireline *Ex Parte* Letter at 4; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at Attach. at 3.

[283] POWER Coalition Wireline NPRM Comments at 11-12; *see also* Electric Utilities Wireline NPRM Comments at 20 (requesting we make clear that "beyond an initial notification regarding the need for and nature of make-ready, the pole owner has no further notification or coordination obligations."); ACA Mar. 26, 2018 Wireline *Ex Parte* Letter at 6 (asking that we require "the utility to notify existing attachers about the need for and nature of make-ready work and to provide that information to the new attacher, who then will be responsible for following-up with existing attachers on that work."); Letter from Ola Oyefusi, Director, Federal Regulatory, AT&T to Marlene H. Dortch, Secretary, FCC, WC Docket 17-84, at 1-2 (filed April 19, 2018) (advocating for the new attacher to serve as "project manager" for the make-ready process).

[284] *See* Crown Castle Wireline NPRM Comments at 21-22; Lightower Wireline NPRM Comments at 7-8.

[285] *See* CCU Wireline NPRM Reply at 24-25; EEI Wireline NPRM Reply at 9; Electric Utilities Wireline NPRM Reply at 9-12; Midwest Electric Utilities Wireline NPRM Reply at 28; POWER Coalition Wireline NPRM Reply at 10.

[286] *See* Crown Castle Wireline NPRM Comments at 21-22; Lightower Wireline NPRM Comments at 7-8.

[287] *See* CCU Wireline NPRM Comments at 11-12; FBA Wireline NPRM Comments at 4; Google Fiber Wireline NPRM Comments at 11-12; CMA Report at 1-2, 6; INCOMPAS Feb. 13, 2018 Wireline *Ex Parte* Letter at Attach. at 2-3; NCTA Apr. 4, 2018 Wireline *Ex Parte* Letter at 2; *see also* BDAC January 2018 Recommendations at 19-20.

[288] *See* ACA Wireline NPRM Comments at 20; CCU Wireline NPRM Comments at 11; FBA Wireline NPRM Comments at 4; Google Fiber Wireline NPRM Comments at 11-12; CMA Report at 1-2, 6-7; INCOMPAS Feb. 13, 2018 Wireline *Ex Parte* Letter at Attach. at 2-3; NCTA Apr. 4, 2018 Wireline *Ex Parte* Letter at 2.

[289] *See* BDAC January 2018 Recommendations at 43-46; ACA Wireline NPRM Comments at 44; FBA Apr. 10, 2018 Wireline *Ex Parte* Letter at 4; Verizon July 2, 2018 Wireline *Ex Parte* Letter at 3.

modify our rules to provide a process for new attachers to communicate their intent to engage in self-help to the utility and existing attachers. These steps, together with the changes we make to the process for new attachers to hire contractors to conduct self-help work, should encourage the use of self-help where necessary and strengthen the incentive for utilities and existing attachers to complete work on time.

91. *Self-Help Above the Communications Space.* In light of the national importance of a speedy rollout of 5G services, we amend our rules to allow new attachers to invoke the self-help remedy for work above the communications space, including the installation of wireless 5G small cells, when utilities and existing attachers have not met make-ready work deadlines. Accenture estimates that wireless providers will invest $275 billion dollars over the next decade to deploy 5G, which is expected to create three million new jobs across the country and boost the U.S. gross domestic product by half a trillion dollars.[290] As CTIA explains, the network infrastructure needed to support 5G cannot wait, and it is incumbent on the Commission to quickly eliminate barriers to, and encourage investment in, 5G deployment.[291] Although we do not allow wireless attachers to perform their own work in the first instance for safety and equipment integrity reasons, we nonetheless give them the ability to use self-help to complete make-ready when utilities miss their deadline.

92. Until now, the only remedy for missed deadlines for work above the communications space has been filing a complaint with the Commission's Enforcement Bureau.[292] We agree with commenters that argue that complaints are an important but insufficient tool for encouraging compliance with our deadlines and speeding broadband deployment.[293] We expect the availability of self-help above the communications space will strongly encourage utilities and existing attachers to meet their make-ready deadlines and give new attachers the tools to deploy quickly when they do not.[294] As described by Crown Castle, the extension of the self-help remedy to attachments above the communications space closes "a significant gap in the Commission's rules that leaves Crown Castle without a meaningful remedy when the electric utility fails to perform make-ready work in a timely fashion."[295]

93. We recognize the valid concerns of utilities regarding the importance of safety and equipment integrity, particularly in the electric space,[296] and we take several steps to address these important issues. In the event that new attachers must resort to self-help above the communications space, the new attacher must use a qualified contractor to do the work.[297] In addition, we reiterate that utilities will have the opportunity to identify and address any safety and equipment concerns when they

[290] *See* CTIA Wireline NPRM Comments at 4 (quoting Accenture Strategy, Smart Cities – How 5G Can Help Municipalities Become Vibrant Smart Cities at 1 (Jan. 12, 2017), https://newsroom.accenture.com/content/1101/files/Accenture_5G-Municipalities-Become-Smart-Cities.pdf).

[291] *See* CTIA Wireline NPRM Comments at 5.

[292] *See 2011 Pole Attachment Order*, 26 FCC Rcd at 5262, paras. 42-43. We are not aware of any such complaints being filed since 2011.

[293] *See* ACA Wireline NPRM Comments at 32; *see also* Crown Castle Wireline NPRM Comments at 19.

[294] *See* ACA Wireline NPRM Comments at 46 ("The [self-help] process also would provide an incentive for utilities and existing attachers to conduct necessary make-ready works in a timely fashion to prevent other companies from moving their equipment.").

[295] Crown Castle Wireline NPRM Comments at 19.

[296] *See* CCU Wireline NPRM Comments at 28-29; Electric Utilities Wireline NPRM Comments at 8-11; POWER Coalition Wireline NPRM Comments at 11; Puget Sound Energy Wireline NPRM Comments at 5; Texas Office of Public Utility Counsel Wireline NPRM Comments at 3-4; EEI Wireline NPRM Reply at 20-21; Midwest Electric Utilities Wireline NPRM Reply at 24.

[297] *See* ACA Wireline NPRM Comments at 45; Crown Castle Wireline NPRM Comments at 19; Lightower Wireline NPRM Comments at 13-14.

receive advance self-help notice and post-completion notice from the new attacher.[298] Our rules also contain additional pre-existing protections for utilities that empower them to promote safety and reliability.[299] Finally, utilities may prevent self-help from being invoked by completing make-ready on time.

94. *Self-Help Notices*. Similar to the pre- and post-work notice requirements we adopt in the new OTMR process, and consistent with the BDAC's recommendation, we require new attachers to give affected utilities and existing attachers (1) no less than three business days advance notice for self-help surveys and five days' advance notice of when self-help make-ready work will be performed and a reasonable opportunity to be present,[300] and (2) notice no later than 15 days after make-ready is complete on a particular pole so that they have an opportunity to inspect the make-ready work.[301] Just as in the OTMR context, the advance notice must include the date and time of the work, the nature of the work, and the name of the contractor being used by the new attacher.[302] We find that these notices will promote safe, reliable work and provide the opportunity for corrections where needed, as well as allow utilities and existing attachers to alert their customers of the work.[303] In this context, we also find that the notices will help to address complaints that utilities are not receiving consistent notices from attachers regarding critical steps in the pole attachment process.[304]

[298] *See* CenturyLink Wireline NPRM Comments at 11; Liberty Cablevision of Puerto Rico Wireline NPRM Comments at 8-9; Midwest Electric Utilities Wireline NPRM Comments at 27; POWER Coalition Wireline NPRM Comments at 12; ACA Wireline NPRM Reply at 27-28; NCTA Mar. 5, 2018 Wireline *Ex Parte* Letter at Attach. at 6; BDAC January 2018 Recommendations at 42.

[299] *See infra* Appx. A, 47 CFR § 1.1413(d) (stating that when self-help surveys and make-ready work result in disputes between attachers and an electric utility, the consulting electric utilities are entitled to make final determinations "on a nondiscriminatory basis, where there is insufficient capacity and for reasons of safety, reliability, and generally applicable engineering purposes"); 47 CFR § 1.1412(e)(2)(iv) (providing the utility 15 days to complete work beyond other attachers).

[300] In our new OTMR-based pole attachment process, we require that new attachers provide no less than three business days' advance notice for surveys and 15 days advance notice for make-ready. *See supra* sections III.A.1.c.(i), (v). The notice period to commence self-help make-ready is 10 days shorter than in the OTMR process because the utility and existing attachers have at least 30 days to perform make-ready prior to the new attacher electing self-help. *See* ACA Wireline NPRM Comments at 46 (proposing 7-day self-help notice period).

[301] Just as in the OTMR context, the new attacher's post-make-ready notice must provide the affected utility and existing attachers 30 days from receipt in which to inspect the make-ready work done on a particular pole. The affected utility and existing attachers have 14 days after completion of their inspection to notify the new attacher of any damage to their equipment caused by make-ready conducted by the new attacher. If the utility or existing attachers discover damage caused by make-ready conducted by the new attacher on equipment belonging to the utility or an existing attacher, then the utility or existing attacher may either (A) complete any necessary remedial work and bill the new attacher for the reasonable costs related to fix the damage, or (B) require the new attacher to fix the damage at its expense within 14 days following notice from the utility or existing attacher. *See supra* section III.A.1.c.(vi); CenturyLink Wireline NPRM Comments at 11; Liberty Cablevision of Puerto Rico Wireline NPRM Comments at 9; Midwest Electric Utilities Wireline NPRM Comments at 27; POWER Coalition Wireline NPRM Comments at 11-12; ACA Wireline NPRM Reply at 28; Charter Feb. 5, 2018 Wireline *Ex Parte* Letter at 1; NCTA Mar. 5, 2018 Wireline *Ex Parte* Letter at Attach. at 6; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at Attach. at 4.

[302] *See supra* sections III.A.1.c.(i), (v).

[303] *See supra* sections III.A.1.c.(i), (v)-(vi).

[304] *See* Midwest Electric Utilities Wireline NPRM Comments at 27.

95. At the request of numerous commenters,[305] we also take this opportunity to reiterate that under our existing rules, the make-ready clock runs simultaneously and not sequentially for all existing attachers, and the utility must immediately notify at the same time all entities with existing attachments that are affected by the proposed make-ready work.[306] We recognize that coordinating work among existing attachers may be difficult, particularly for poles with many attachments, and existing attachers that are not the first to move may in some circumstances receive limited or even no time for work during the make-ready stage.[307] Despite these challenges, we expect utilities, new attachers, and existing attachers to work cooperatively to ensure that pole attachment deadlines are met. If others do not meet their deadlines, new attachers then may invoke the self-help remedy.[308]

c. Contractor Selection for Self-Help

96. We adopt different approaches to new attacher contractor selection for simple and non-simple self-help make-ready. Given that simple self-help and OTMR are substantially similar, we adopt the same approach to contractor selection for simple self-help in the communications space as for OTMR, and we do so for the same reasons set forth above.[309] Thus, consistent with the OTMR regime:

- A new attacher electing self-help for simple work in the communications space must select a contractor from a utility-maintained list of qualified contractors, where such a list is available. The contractor must meet the same safety and reliability criteria as contractors authorized to perform OTMR work. New and existing attachers may request that qualified contractors be added to the utility's list and the utility may not unreasonably withhold its consent for such additions.
- Where no utility-maintained list is available, or no utility-approved contractor is available within a reasonable time period, the new attacher must select a contractor that meets the same safety and reliability criteria as contractors authorized to perform OTMR work and any additional non-discriminatory, written, and publicly-available criteria relating to safety and reliability that the utility specifies. The utility may veto the new attacher's contractor selection so long as it offers another available, qualified contractor.

97. For complex work and work above the communications space, we take a different approach and require new attachers to select a contractor from the utility's list. We also require utilities to make available and keep an up-to-date a reasonably sufficient list of contractors it authorizes to perform complex and non-communications space self-help surveys and make-ready work. We thus maintain our existing contractor selection requirements as to complex self-help in the communications space and extend those requirements to self-help above the communications space.[310]

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[305] *See* Google Fiber Wireline NPRM Comments at 11-12; AT&T Wireline NPRM Reply at 11 (asserting that concerns with sequential make-ready can be resolved by clarifying that there is only one make-ready period applicable to all existing attachers); Lumos Wireline NPRM Reply at 5; CMA Report at 1-2, 6; *see also* ACA Wireline NPRM Comments at 20; CCU Wireline NPRM Comments at 11; Charter Wireline NPRM Comments at 34-35; BDAC January 2018 Recommendations at 19.

[306] *See* 47 CFR § 1.1412(e); *see also* AT&T-CWA Jan. 16, 2018 Wireline *Ex Parte* Letter at 3 ("Sequential timelines are not and have never been contemplated or required by existing Commission rules.").

[307] *See* Google Fiber Feb. 1, 2018 Wireline *Ex Parte* Letter at 3; *see also supra* section III.A.1.a. We encourage coordination to ensure that each existing attacher receives the time it needs to complete make-ready.

[308] *See* 47 CFR § 1.1412(e)(1)(v); *2011 Pole Attachment Order*, 26 FCC Rcd at 5265, para. 49.

[309] *See supra* section III.A.1.b.

[310] 47 CFR §§ 1.1413(a)-(b).

98. We treat the utility list as mandatory for complex and above the communications space work for several reasons. These types of make-ready involve greater risks than simple make-ready, and we agree with numerous commenters that utility selection of eligible contractors promotes safe and reliable work in more challenging circumstances.[311] Although the current selection process sometimes entails delays where utilities fail to provide a list of approved contractors,[312] we find that as to complex work and work above the communications space—which poses heightened safety and reliability risks—the benefits of the current approach outweigh its costs.[313] We recognize that self-help above the communications space is novel and poses particularly heightened safety and reliability risks.[314] We therefore find it especially important to give the utility control over who performs such work.[315] In reaching this conclusion, we decline to adopt the BDAC's recommendation that utilities need no longer provide, and requesting attachers need not use, utility-approved contractors to complete complex make-ready work in the communications space under the self-help remedy.[316]

99. Although we treat the utility list as mandatory for complex and above the communications space make-ready, we adopt a protective measure to prevent the utility list from being a choke-point that prevents deployment. The record indicates that some new attachers have been unable to exercise their self-help remedy because a list of utility-approved contractors was not available.[317] To alleviate this problem for complex and above the communications space work, we set forth in our rules—as we do in the context of OTMR and simple-self-help—that new and existing attachers may request that qualified contractors be added to the utility's list and that the utility may not unreasonably withhold its consent for such additions. As in the context of OTMR and simple self-help, to be reasonable, a utility's decision to withhold consent must be prompt, set forth in writing that describes the basis for rejection, nondiscriminatory, and based on fair application of commercially reasonable requirements for contractors relating to issues of safety or reliability.[318]

100. Because we adopt this safeguard for non-simple make-ready, we decline to adopt the BDAC's recommended multi-step objection and appeal process for adding and removing contractors from the utility-approved contractor list.[319] Among other things, the BDAC proposes giving existing attachers the right to request the removal of a contractor from the list,[320] and it proposes allowing appeals to the

[311] *See* CCU Wireline NPRM Comments at 28; Verizon Wireline NPRM Reply at 7; Google Fiber Feb. 1, 2018 Wireline *Ex Parte* Letter at 4.

[312] *See* ACA Wireline NPRM Comments at 44-45.

[313] AT&T Wireline NPRM Reply at 7-8; *see also 2011 Pole Attachment Order*, 26 FCC Rcd at 5267, para. 55 (concluding that the use of a utility-approved contractor by the new attacher "ensures that only qualified contractors work on utility poles").

[314] *See* CCU Wireline NPRM Comments at 28-29; Midwest Electric Wireline NPRM Utilities Comments at 28; EEI Wireline NPRM Comments at 19 n.18; UTC Wireline NPRM Reply at 16.

[315] *See* Midwest Electric Utilities Wireline NPRM Comments at 28-29; CCU Wireline Comments at 28-29; UTC Wireline NPRM Reply at 16; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter Attach. at 1.

[316] BDAC January 2018 Recommendations at 46. The BDAC's recommendation also extends to simple work in the communications space, *see id.*, and we adopt that aspect of the recommendation as set forth above.

[317] *See* ACA Wireline NPRM Reply at 24.

[318] *See supra* section III.A.1.b.

[319] *See* FCC, Broadband Deployment Advisory Committee, Approved Recommendations, Addendum to the Report of the Competitive Access to Broadband Infrastructure Working Group at 2-4 (Apr. 25, 2018) https://www.fcc.gov/sites/default/files/bdac-cabi-report-04252018.pdf (BDAC April 2018 Recommendations).

[320] *See id.* at 2-3.

Commission for an expedited letter ruling by the Commission staff.[321] We find the BDAC's process unduly complex and cumbersome, and we believe it provides counterproductive opportunities for delay to competitors to new attachers.[322] We agree with Verizon that while utilities should consider feedback on contractors from existing attachers, if existing attachers had rights to object to utility-approved contractors, "the list of approved contractors could vary from pole to pole based on the particular attachers on the poles," creating an administrative burden for new attachers and thereby slowing deployment.[323] Further, given that we do not directly regulate and generally have little information about communications pole attachment contractors operating throughout the country, we are not well-positioned at this juncture to adjudicate disputes over specific contractors' qualifications, especially on an expedited basis.

d. Detailed Make-Ready Costs

101. To facilitate the planning of more aggressive deployments, we adopt additional requirements to improve the transparency and usefulness of the make-ready cost estimates currently required under our rules.[324] We require estimates of all make-ready charges to be detailed and include documentation that is sufficient to determine the basis for all charges,[325] as well as similarly detailed post-make-ready invoices.

102. The record reflects frustration over the lack of transparency of current estimates of make-ready work charges.[326] ACA, Lumos, Crown Castle, and other commenters express support for a requirement that utilities provide detailed, itemized estimates and final invoices of all necessary make-ready costs.[327] They, along with other commenters, argue that, in many cases, utilities currently do not provide detailed estimates or detailed final invoices.[328] They claim that where utilities do not detail the basis of potential or actual charges, new attachers may reasonably fear that utilities can "potentially include costs that are unnecessary, inappropriately inflated, or that attaching entities could easily

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[321] *See id.* at 4.

[322] *See supra* section III.A.1.b (finding giving existing attachers an objection right to contractors likely to slow broadband deployment).

[323] Verizon Wireline NPRM Reply at 7.

[324] Under our current rules, a utility must present a new attacher with "an estimate of charges to perform all necessary make-ready work" within 14 days of conducting the survey of the pole or receiving from the new attacher its own conducted survey. 47 CFR § 1.1412(d); *see also 2011 Pole Attachment Order*, 26 FCC Rcd at 5255-56, paras. 26-28.

[325] *See* Lumos Wireline NPRM Reply at 13.

[326] *See* ACA Wireline & Wireless NPRM Comments at 24-26, 48; Crown Castle Wireline NPRM Comments at 15; Google Fiber Wireline NPRM Comments at 11; NCTA Wireline & Wireless NPRM Comments at 11-12; Lumos Wireline NPRM Reply at 13.

[327] *See* ACA Wireline & Wireless NPRM Comments at 24-26; Lightower Wireline NPRM Comments at 6; Crown Castle Wireline NPRM Reply at 7-8; Lumos Wireline NPRM Reply at 13.

[328] *See, e.g.*, ACA Wireline & Wireless NPRM Comments at 25, 49; Crown Castle Wireline NPRM Comments at 14; Lightower Wireline NPRM Comments at 6; Lumos Wireline NPRM Comments at 12-13; ACA Wireline & Wireless NPRM Reply at ii; Charter Feb. 5, 2018 Wireline *Ex Parte* Letter Attach. at 3; ACA Sep. 14, 2017 Wireline *Ex Parte* Letter at 7. Oregon and New York currently require detailed make-ready estimates. *See* Or. Admin. R. 860-028-0100; N.Y. Pub. Serv. Comm'n, *Proceeding on Motion of the Commission Concerning Certain Pole Attachment Issues*, Order Adopting Policy Statement on Pole Attachments, Case 03-M0432, Appendix A (Aug. 6, 2004), *available at* http://www.utilityregulation.com/content/orders/04NY0432E.pdf; *see also* ACA Wireline & Wireless NPRM Comments at 49.

avoid."[329] Numerous commenters describe experiencing "'bill shock,' where a utility's make-ready invoices far exceed[] the utility's initial estimates[,]"[330] and add that the lack of transparency of make-ready costs inhibits their ability to plan network expansions.[331] Given the frustration reflected in the record, we find that requiring detailed make-ready cost estimates and post-make-ready invoices will improve transparency in the make-ready process and better enable providers to plan broadband buildouts.[332]

103. We further clarify that our current rules require the utility to provide estimates for all make-ready work to be completed, regardless of what party completes the work.[333] Although some utilities claim they are poorly positioned to provide estimates for make-ready work other than their own,[334] we continue to find that utilities are best positioned to compile and submit these make-ready estimates and final invoices to new attachers due to their pre-existing and ongoing relationships with the existing attachers on their poles.[335]

104. We require the utility to detail all make-ready cost estimates and final invoices on a per-pole basis.[336] While we recognize that requiring utilities to provide costs on a per-pole basis may be more burdensome than providing a less granular estimate,[337] we find that a pole-by-pole estimate is necessary to enable new attachers to understand the costs of deployment and to make informed decisions about altering their deployment plans if make-ready costs on specific poles could prove to be cost-

[329] Crown Castle Wireline NPRM Comments at 15; *see also* ACA Wireline & Wireless NPRM Comments at 48 ("Utilities . . . have exploited these gaps by providing attachers with vague and un-itemized pre-job estimates and post-job bills for make-ready work and attempting to charge attachers for fixing existing safety code violations and subsidizing the utilities' own deferred maintenance.").

[330] ACA Mar. 26, 2018 Wireline *Ex Parte* Letter at 3.

[331] *See* Google Fiber Wireline NPRM Comments at 11 (noting that improved cost certainty across markets can allow attachers to plan network expansions with greater confidence); Lumos Wireline NPRM Comments at 14 (noting that requiring utilities to make their charges more transparent "would expedite the performance of necessary make-ready while maintaining cost certainty and ensuring non-discriminatory treatment of attachers"); ACA Wireline & Wireless NPRM Comments at 25-26 (stating that "post-make-ready financial surprises can damage the viability of projects" and providing examples of significant back-billing); NCTA Wireline & Wireless NPRM Comments at 11-12 (recognizing that cost transparency allows attachers to plan upgrades and extensions more effectively).

[332] *See* Lumos Wireline NPRM Reply at 13.

[333] Our current rule requires that "a utility shall present to a cable operator or telecommunications carrier an estimate of charges to perform all necessary make-ready work . . . ." 47 CFR § 1.1412(d).

[334] *See* Electric Utilities Wireline NPRM Comments at 15 (contending that utilities are ill-equipped both to estimate the make-ready costs of a third-party attacher on the utilities' poles and to enforce any requirement that these third parties provide make-ready cost estimates to new attachers); Midwest Electric Utilities Wireline NPRM Reply at 17 (arguing that a utility should be required to provide "an estimate of the costs to perform make-ready work only on the utilities own facilities" and "not . . . an estimate of the costs to perform make-ready work on other attachers' facilities"); *see also* CenterPoint Energy et al. May 25, 2018 *Ex Parte* Letter Attach. at 4 ("[M]ake-ready transactions [should] be made directly between the new attacher, and the contractor who ultimately performs the make-ready prescribed by the pole owner.").

[335] We also remind utilities of the 14-day deadline in our rules to provide the estimate of make-ready charges to the new attacher. *See* 47 CFR § 1.1412(d).

[336] *See* ACA Wireline & Wireless NPRM Comments at 24-25, 49-50; NCTA Wireline & Wireless NPRM Comments at 11-12; Crown Castle Wireline NPRM Reply at 8.

[337] *See* CCU Wireline NPRM Reply at 19 (arguing that detailing charges on a per-pole basis would be overly time consuming and cost prohibitive); Electric Utilities Wireline NPRM Reply at 26.

prohibitive.[338] Requiring per-pole estimates and invoices will also enable new attachers to better determine whether invoices are accurate, saving new attachers the unnecessary time and cost they currently devote to such a task.[339]

105. As part of the detailed estimate, the utility must disclose to the new attacher its projected material, labor, and other related costs that form the basis of its estimate, including specifications of what costs, if any, the utility is passing through to the new attacher from the utility's use of a third-party contractor. We agree with ACA that this requirement will allow new attachers to understand the basis for each individual make-ready charge and prevent disputes over "unreasonable or simply unnecessary make-ready charges in aggregate cost estimates."[340] If in compiling the estimate (or invoice) the utility determines that make-ready charges will (or did) not vary from pole-to-pole, the utility may aggregate individual charges (i.e., present one charge for labor, one charge for projected materials, etc.) rather than present a pole-by-pole estimate.

106. We decline to adopt the request of some commenters that we require utilities to provide new attachers with a publicly-available schedule of common make-ready charges. These commenters argue that easy access to make-ready rates could promote fair and predictable rates, a more efficient process, and a level playing field between attachers and utilities during attachment rate negotiations, as well as averting disputes over rates and the process used.[341] The record indicates that make-ready costs vary considerably, however, based on a wide variety of factors, including geographic area, soil, vegetation conditions, the accessibility of the pole, and the availability of contractors in the area.[342] Contractors charge varying rates for their work based on the "labor requirements, equipment used[,] and travel time to the jobsite" of the particular make-ready job.[343] Other issues, such as the complexity of the job, rights-of-way, age of the pole, what is on the pole, and size of the pole, also contribute to the determination of a make-ready rate.[344] The variety and complexity of these variables suggest that requiring utilities nationwide to produce a schedule of make-ready rates would be unreasonably burdensome unless the schedule were at such a level of generality that it would be of little use to attachers in predicting the actual costs of their planned pole attachments.[345] At the same time, we encourage utilities to voluntarily make publicly available schedules of make-ready charges in circumstances in

[338] *See* ACA Wireline & Wireless NPRM Comments at 24-25, 49-50; NCTA Wireline & Wireless NPRM Comments at 11-12; Crown Castle Wireline NPRM Reply at 8.

[339] *See* ACA Wireline & Wireless NPRM Comments at 24-25, 49-50; NCTA Wireline & Wireless NPRM Comments at 11-12; Crown Castle Wireline NPRM Reply at 8.

[340] *See* ACA Wireline & Wireless NPRM Comments at 49-50.

[341] *See, e.g.*, ACA Wireline & Wireless NPRM Comments at 47-48; AT&T Wireline NPRM Comments at 24; Comcast Wireline & Wireless NPRM Comments at 28; Lumos Wireline NPRM Comments at 14; NCTA Wireline & Wireless NPRM Comments at 12; Comcast Wireline & Wireless NPRM Reply at 11; Crown Castle Wireline NPRM Reply at 7-8.

[342] *See, e.g.*, EEI Wireline NPRM Comments at 38; Frontier Wireline NPRM Comments at 21-22; USTelecom Wireline NPRM Comments at 18-19; UTC Wireline NPRM Comments at 15.

[343] UTC Wireline NPRM Comments at 15; *see also* Electric Utilities Wireline NPRM Comments at 40 (quoting *2011 Pole Attachment Order*, 26 FCC Rcd at 5279, para. 86) ("Actual charges vary depending on numerous unique factors, including material and labor costs which fluctuate. As such, the price of make-ready does not lend itself well to fixed schedule of charges.").

[344] *See* CCU Wireline NPRM Comments at 30-31.

[345] *See* EEI Wireline NPRM Comments at 40.

which it is feasible to do so, such as where the utility operates in an area of the country with homogenous terrain.[346]

3. Treatment of Overlashing

107. We codify our longstanding policy that utilities may not require an attacher to obtain its approval for overlashing.[347] In addition, we adopt a rule that allows utilities to establish reasonable advance notice requirements. As the Commission has previously found, the ability to overlash often "marks the difference between being able to serve a customer's broadband needs within weeks versus six or more months when delivery of service is dependent on a new attachment."[348] In codifying the existing overlashing precedent while adopting a pre-notification option, we seek to promote faster, less expensive broadband deployment while addressing important safety concerns relating to overlashing.[349] We find that our codification will hasten deployment by resolving disagreements over whether utilities may impose procedural requirements on overlashing by existing attachers.[350]

108. While we make clear that pre-approval for overlashing is not permissible, we adopt a rule that utilities may, but are not required to, establish reasonable pre-notification requirements including a requirement that attachers provide 15 days (or fewer) advance notice of overlashing work.[351]

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[346] EEI asserts that utilities that currently provide a schedule of common make-ready charges typically operate in areas of the country with homogenous terrain. EEI Wireline NPRM Comments at 40.

[347] *Amendment of Commission's Rules and Policies Governing Pole Attachments*, CS Docket Nos. 97-98 and 97-151, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12141, para. 75 (2001) (2001 Pole Attachment Order) ("We affirm our policy that neither the host attaching entity nor the third-party overlasher must obtain additional approval from or consent of the utility for overlashing other than the approval obtained for the host attachment."), *aff'd Southern Co. v. FCC*, 313 F.3d 574, 582 (D.C. Cir. 2002).

[348] Crown Castle Wireline FNPRM Comments at 2; *see also* ACA Wireline and Wireless NPRM Comments at 11.

[349] *See Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, Report and Order 13 FCC Rcd 6777, 6807, para. 62 (1998); *see also* CTIA Wireline FNPRM Reply, WC Docket No. 17-84, at 3-4 (Feb. 16, 2008); FBA Wireline FNPRM Reply, WC Docket No. 17-84, at 1 (Feb. 16, 2018) (FBA Wireline FNPRM Reply).

[350] *See* ACA Wireline and Wireless NPRM Comments at 10-11; Crown Castle Wireline FNPRM Comments at 4-5; Verizon Wireline FNPRM Comments, WC Docket No. 17-84, at 19 (Jan. 17, 2018) (Verizon Wireless FNPRM Comments).

[351] *See* AT&T Wireline FNPRM Comments, WC Docket No. 17-84, at 15 (Jan. 17, 2018) (AT&T Wireline FNPRM Comments); CPS Energy Wireline FNPRM Comments, WC Docket No. 17-84, at 2 (Jan. 17, 2018) (CPS Energy Wireline FNPRM Comments); Edison Electric Institute Wireline FNPRM Comments, WC Docket No. 17-84, at 12 (Jan. 17, 2018) (EEI Wireline FNPRM Comments); Ameren et al. Wireline FNPRM Comments, WC Docket No. 17-84, at 25 (Electric Utilities Wireline FNPRM Comments); NTCA Wireline FNPRM Comments, WC Docket No. 17-84, at 5 (Jan. 17, 2018) (NTCA Wireline FNPRM Comments); CenterPoint Energy et al. Wireline FNPRM Comments, WC Docket No. 17-84, at 6 (Jan. 17, 2018) (POWER Coalition Wireline FNPRM Comments); Utility Coalition on Overlashing Wireline FNPRM Comments, WC Docket No. 17-84, at 10 (Jan. 17, 2018) (Utility Coalition on Overlashing Wireline FNPRM Comments); Utilities Technology Council Wireline FNPRM Comments, WC Docket No. 17-84, at 4 (Jan. 17, 2018) (UTC Wireline FNPRM Comments); Xcel Energy Wireline FNPRM Comments, WC Docket No. 17-84, at 1-2 (Jan. 17, 2018) (Xcel Energy Wireline FNPRM Comments); ACA Wireline FNPRM Reply, WC Docket No. 17-84, at 10 (Feb. 16, 2018) (ACA Wireline FNPRM Reply); CPS Energy Wireline FNPRM Reply, WC Docket No. 17-84, at 3 (Feb. 16, 2018) (CPS Energy Wireline FNPRM Reply); Ameren et al. Wireline FNPRM Reply, WC Docket No. 17-84, at ii-iii, 4 (Feb. 16, 2018) (Electric Utilities Wireline FNPRM Reply); National Association of State Utility Advocates Wireline FNPRM Reply, WC Docket No. 17-84, at 2-3(Feb. 16, 2018) (NASUCA Wireline FNPRM Reply); National Rural Electric Cooperative Association Wireline FNPRM Reply, WC Docket No, 17-84, at 2 (Feb. 18, 2018) (NRECA Wireline FNPRM Reply); CenterPoint Energy et al. Wireline FNPRM Reply, WC Docket No. 17-84, at 8 (Feb. 16, 2018) (POWER Coalition Wireline FNPRM Reply); Utilities Technology Council Wireline FNPRM Reply, WC Docket No. 17-84, at 1-2

Commenters express the concern that poles may not always be able to reliably support additional weight due to age and environmental factors, such as ice and wind, and as a result, overlashing even one additional cable on a pole may cause an overloading.[352] Such pole overloading could "hamper the installation or maintenance of electric facilities, or other on-going wireline or wireless facility installations."[353] We find these concerns to be valid and supported by the record.[354] Thus, we agree with commenters that allowing utilities to require advance notice will promote safety and reliability and allow the utility to protect its interests without imposing unnecessary burdens on attachers.[355] If after receiving this advance notice, a utility determines, through its own engineering analysis, that there is insufficient capacity on the pole for a noticed overlash, the noticed overlash would be inconsistent with generally applicable engineering practices, or the noticed overlash would compromise the pole's safety or reliability,[356] the utility must provide specific documentation demonstrating that the overlash creates a

(Feb. 16, 2018) (UTC Wireline FNPRM Reply). Further, a handful of states also require advance notice of overlashing; *see also* UTC Wireline FNPRM Comments at 5 (noting that Arkansas, Ohio, Louisiana, Iowa and Utah provide "for advance notice of overlashing."); Electric Utilities Wireline FNPRM Comments at 12-18 (stating that the public utility commissions of Arkansas, Ohio, Washington, Louisiana, Iowa, Utah, Connecticut have ratified or adopted an advance notice requirement to some degree); Utility Coalition on Overlashing Wireline FNPRM Comments at ii, 23-24 (noting that states such as Louisiana, California, Ohio and Michigan recognize the impact of overlashing "must be analyzed in advance of the overlashing"); ACA Wireline FNPRM Reply at 11, n. 47 ("Washington and Louisiana require 15 days' notice, while Utah requires 10 days' notice for most overlashing projects and Iowa requires 7 days' notice").

[352] *See, e.g.*, AT&T Wireline FNPRM Comments at 15; EEI Wireline FNPRM Comments at 5; Electric Utilities Wireline FNPRM Comments at 18-19; UTC Wireline FNPRM Comments at 3; CCU Wireline NPRM Reply at 30; Utility Coalition on Overlashing Wireline FNPRM Reply, WC Docket No. 17-84, at 4, 6-7 (Feb. 16, 2018); Letter from Robin F. Bromberg, Counsel, Electric Utilities, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2-3 (filed Nov. 13, 2017) (Electric Utilities Nov. 13, 2017 Wireline *Ex Parte* Letter); CenterPoint Energy/FPL Feb. 13, 2018 Wireline *Ex Parte* Letter at 2.

[353] CPS Energy Wireline FNPRM Comments at 8.

[354] For instance, the Coalition of Concerned Utilities argues that overlashing may cause the pole line "to sag to such an extent that it violates required vertical safety clearance requirements over streets and highways." CCU Wireline NPRM Reply at 30. Edison Electric suggests that overlashing may cause pole failure, interrupt electrical service and endanger the public. EEI Wireline FNPRM Comments at 5. Similarly, the Electric Utilities contend that the combination of overlashing and environmental factors, such as wind and ice, could cause pole line overload and that a utility-performed engineering analysis may prevent such an overload. Electric Utilities Wireline FNPRM Comments at 18-19.

[355] *See* AT&T Wireline FNPRM Comments at 15; CPS Energy Wireline FNPRM Comments at 2; NTCA Wireline FNPRM Comments at 5; POWER Coalition Wireline FNPRM Comments at 6; Utility Coalition on Overlashing Wireline FNPRM Comments at 10; UTC Wireline FNPRM Comments at 4; Xcel Energy Wireline FNPRM Comments at 1-2; ACA Wireline FNPRM Reply at 10-11; CPS Energy Wireline FNPRM Reply at 3-4; Electric Utilities Wireline FNPRM Reply at ii-iii, 4; NASUCA Wireline FNPRM Reply at 2-3; NRECA Wireline FNPRM Reply at 2; POWER Coalition Wireline FNPRM Reply at 8; UTC Wireline FNPRM Reply at 1-2. The record indicates that several states already require advance notice of overlashing. *See* UTC Wireline FNPRM Comments at 5; Electric Utilities Wireline FNPRM Comments at 12-18; Utility Coalition on Overlashing Wireline FNPRM Comments at ii, 23-24; ACA Wireline FNPRM Reply at 11, n. 47. This 15-day notice period is consistent with the OTMR notice period that we adopt for simple make-ready work in the communications space. *See supra* section III.A.1.c.(v).

[356] 47 U.S.C. § 224(f)(2).

capacity, safety, reliability, or engineering issue within the 15 day advance notice period and the overlasher must address any identified issues before continuing with the overlash.[357]

109. We find that an approach to overlashing that allows for pre-notification without requiring pre-approval is superior to more extreme solutions advocated by some commenters. We are unpersuaded, for example, by arguments that utility pre-approval for overlashing is necessary to ensure safety.[358] Pre-approval is not currently required, and the record does not demonstrate that significant safety or reliability issues have arisen from the application of the current policy. Rather, the record reflects that an advance notice requirement has been sufficient to address safety and reliability concerns, as it provides utilities with the opportunity to conduct any engineering studies or inspections either prior to the overlash being completed or after completion.[359] For instance, after an Edison Electric Institute member received advance notice of overlashing on 5,186 poles, its inspection found that 716 of those poles "'had preexisting violations for failure to meet NESC requirements for clearance between communications attachments and power facilities.'"[360] Similarly, in 2016, Oncor Electric Delivery in Texas received advance notice of overlashing and discovered 13.8% of the poles had existing clearance violations between existing attachments and power facilities.[361] Further requiring that attachers receive prior approval for overlashing would unnecessarily increase costs for attachers and delay deployment.[362]

110. On the other hand, we also reject commenters' arguments for notice only after overlashing (i.e., "attach-and-notify").[363] While attach-and-notify advocates assert that advance notice is time-consuming, cumbersome, and inefficient,[364] we find the burden of advance notice minimal compared to the importance of ensuring that any new overlashed facilities will not "compromise the safety or integrity of existing electric distribution and communications infrastructure."[365] Providing the utility with

[357] To the extent a utility can document that an overlash would require modifications to the pole or replacement of the pole, the overlasher will be held responsible for the costs associated with ensuring that the pole can safely accommodate the overlash. *See Southern Co. v. FCC*, 313 F.3d 574, 582 (D.C. Cir. 2002).

[358] *See, e.g.*, CCU Wireline NPRM Reply at 29-30; EEI Wireline FNPRM Comments at 13.

[359] *See, e.g.*, UTC Wireline FNPRM Comments at 4; Utility Coalition on Overlashing Wireline FNPRM Comments at 10. Conversely, the record indicates that in at least one case, a utility was not able to detect and prevent a problem because it did not receive advance notice. Specifically, Ameren Missouri identifies a situation in which a truck hit improperly low-hanging wires; it asserts that the problem was exacerbated by overlashing and claims that if it had received advance notice of the overlashing, it would have been able to perform an inspection, discover the existing violation, and prevent a company from overlashing when there was a public safety threat of a low hanging wire over a public road. *See* Electric Utilities Wireline FNPRM Comments at 21-22.

[360] EEI Wireline FNPRM Comments at 6.

[361] Electric Utilities Wireline FNPRM Comments at 21.

[362] *See, e.g.*, ACA Wireline FNPRM Comments, WC Docket No. 17-84, at 9 (Jan. 17, 2018); NCTA Wireline FNPRM Comments, WC Docket No. 17-84, at 2 (Jan. 17, 2018) (NCTA Wireline FNPRM Comments).

[363] *See* FBA Wireline FNPRM Reply at 1, 9; Verizon Wireline FNPRM Reply, WC Docket No. 17-84, at 16 (Feb. 16, 2018) (Verizon Wireline FNPRM Reply).

[364] *See, e.g.*, Comcast Wireline FNPRM Comments, WC Docket No. 17-84, at 3 (Jan. 17, 2018) (Comcast Wireline FNPRM Comments); Verizon Wireline FNPRM Comments at 19; Comcast Wireline FNPRM Reply, WC Docket No. 17-84, at 10 (Comcast Wireline FNPRM Reply); FBA Wireline FNPRM Reply at 8; NCTA Wireline FNPRM Reply at 2-3.

[365] Xcel Energy Wireline FNPRM Comments at 4; *see also* AT&T Wireline FNPRM Comments at 15 ("[A]dvance notice to the pole owner and any host attaching entity . . . promotes safety and the integrity and reliability of the wireline network by affording an opportunity to validate that the attacher has considered the impact overlashing will have on the pole and the host cables."); Electric Utilities Wireline FNPRM Comments at 1 ("[T]he Commission should clarify that pole owners may require advanced notice of overlashing in order to ensure that overlashing

advance notice of overlashing will allow it to better monitor and ensure the safety, integrity, and reliability of its poles both before and after the overlash is completed[366] without overburdening overlashers or requiring multiple trips to the pole.[367]

111. We also take this opportunity to clarify several points related to overlashing. First, if the utility elects to establish an advance notice requirement, the utility must provide advanced written notice to attachers or include the requirement in its pole attachment agreements. We find that providing this guidance will give clarity to all parties as to when the utility must receive advance notice, thereby reducing the likelihood of disputes. Utilities may require pre-notification of up to 15 days, the same notice period that we adopt for OTMR attachments.[368] We also emphasize that utilities may not use advanced notice requirements to impose quasi-application or quasi-pre-approval requirements, such as requiring engineering studies.[369] Finally, just as new attachers electing OTMR are responsible for any corrective measures needed because of their work,[370] in the event that damage to the pole or other existing attachment results from overlashing, the overlasher will be responsible for any necessary repairs arising from such overlashing.[371] Poorly performed overlashing can create safety and reliability risks,[372] and the Commission has consistently found that overlashers must ensure that they are complying with reasonable safety, reliability, and engineering practices.[373]

B. New Attachers are Not Responsible for Preexisting Violations

112. Consistent with the BDAC's recommendation, we clarify that new attachers are not responsible for the costs associated with bringing poles or third-party equipment into compliance with current safety and pole owner construction standards to the extent such poles or third-party equipment

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complies with applicable standards for safety, reliability, and engineering."); AT&T Wireline FNPRM Reply, WC Docket No. 17-84, at 1 (Feb. 16, 2018) ("Prior notice of overlashing promotes safety and the integrity and reliability of poles.").

[366] Xcel Energy Wireline FNPRM Comments at 6; *see also* Electric Utilities Wireline FNPRM Comments at ii ("Without advance notice of overlashing, electric utilities cannot evaluate the impact of the proposed overlashing (loading/clearance) or determine whether there are existing violations (loading/clearance) that must be corrected prior to overlashing."); UTC Wireline FNPRM Comments at 4 ("[U]tilities need *advance* notice of overlashing in order to conduct an engineering study and inspect the poles to assess additional loading and ensure there are no existing violations of the electric utilities' standards or applicable codes on the pole that must be remedied prior to the proposed overlashing."); Utility Coalition on Overlashing Wireline FNPRM Comments at 10 ("[A]dequate advance notice containing adequate information about the overlashing is necessary to enable utilities to analyze the capacity, safety, reliability and generally applicable engineering concerns of the utility pole owner.").

[367] *See, e.g.*, Xcel Energy Wireline FNPRM Comments at 6; CPS Energy Wireline FNPRM Comments at 6-7.

[368] *See supra* section III.A.1.c.(v).

[369] *See* ACA Wireline FNPRM Reply at 12.

[370] *See supra* section III.A.1.c.(vi).

[371] *See* Crown Castle Wireline FNPRM Reply, WC Docket No. 17-84, at 10 (Feb. 16, 2018).

[372] *See* NRECA Wireline FNPRM Reply at 1-2 (describing "poorly constructed overlashing, overlashing that results in excessive wind and ice loads, overlashing with insufficient guying to maintain pole integrity, [and] vehicles snagging overlashed wires that hang too low to the ground"); AT&T Wireline FNPRM Reply at 3-4 ("AT&T has experienced a number of incidences where sagging cables from overlashing without proper engineering caused trucks to unknowingly snag cables, felling poles on roads and sidewalks, endangering the public from pole impact and energized electric lines, and creating avoidable service outages.").

[373] *See 2001 Pole Attachment Order*, 16 FCC Rcd at 12141, para. 73. We reach this conclusion under our authority pursuant to 47 U.S.C. § 224(b)(1).

were out of compliance prior to the new attachment.[374] Although utilities have sometimes held new attachers responsible for the costs of correcting preexisting violations,[375] this practice is inconsistent with our long-standing principle that a new attacher is responsible only for actual costs incurred to accommodate its attachment.[376] The new attachment may precipitate correction of the preexisting violation, but it is the violation itself that causes the costs, not the new attacher. Holding the new attacher liable for preexisting violations unfairly penalizes the new attacher for problems it did not cause, thereby deterring deployment, and provides incentives for attachers to complete make-ready work irresponsibly and count on later attachers to fix the problem.[377]

113. We also clarify that utilities may not deny new attachers access to the pole based on safety concerns arising from a pre-existing violation, as Lightower alleges sometimes occurs.[378] Simply denying new attachers access prevents broadband deployment and does nothing to correct the safety issue. We also clarify that a utility cannot delay completion of make-ready while the utility attempts to identify or collect from the party who should pay for correction of the preexisting violation.

C. Addressing Outdated Rate Disparities

114. In the interest of promoting infrastructure deployment, the Commission adopted a policy in 2011 that similarly situated attachers should pay similar pole attachment rates for comparable access.[379] Incumbent LECs allege, however, that electric "utilities continue to charge pole attachment rates significantly higher" than the rates charged to similarly situated telecommunications attachers,[380] and that these higher rates inhibit broadband deployment.[381] To address this problem, we revise our rules to

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[374] BDAC January 2018 Recommendations at 24; *see also* Lumos Wireline NPRM Comments at 15; Electric Utilities Wireline NPRM Comments at 44; CCU Wireline NPRM Comments at 19-20; Lightower Wireline NPRM Comments at 12; ACA Wireline NPRM Reply Comments at 28-31.

[375] *See, e.g.*, ACA Wireline NPRM Comments at 22, 48-49; Lumos Wireline NPRM Comments at 15.

[376] *See, e.g.*, *Knology, Inc. v. Georgia Power Co.*, Memorandum Opinion and Order, 18 FCC Rcd 24615, 24625, para. 26 (2003); *Kansas City Cable Partners d/b/a Time Warner Cable of Kansas City v. Kansas City Power & Light Co.*, File Nos. PA 99-001, PA 99-002, Consolidated Order, 14 FCC Rcd 11599, 11606-07, para. 19 (CSB 1999).

[377] *See* ExteNet Wireline NPRM Comments at 56; Lightower Wireline NPRM Comments at 12; Lumos Wireline NPRM Comments at 15; ACA Wireline NPRM Reply at 28-31. We therefore reject CPS Energy's approach in which "the applicant is required to remedy existing technical violations of third-party attachments at its expense as part of the one-touch make-ready process." CPS Energy Wireline NPRM Reply at 10.

[378] Lightower Wireline NPRM Comments at 12.

[379] *See 2011 Pole Attachment Order*, 26 FCC Rcd at 5328, 5333-5337, paras. 203, 214-219 (establishing process by which incumbent LECs can show they are similarly situated to telecommunications attachers in order to receive comparable rates to those attachers).

[380] Verizon Wireline NPRM Comments at 11; *see also* AT&T Wireline NPRM Comments at 23 (describing the "higher attachment rates paid by AT&T's ILECs to electric utilities relative to competitors that benefit from the telecommunications rate"); Frontier Wireline NPRM Comments at 4 ("ILEC attachers currently pay disproportionately higher rates compared to other broadband attachers."); USTelecom Wireline NPRM Comments at 7 ("ILEC attachers do not currently benefit from . . . rate parity.").

[381] *See* USTelecom Wireline NPRM Comments at 7 ("The lack of regulatory parity between ILECs and their cable and CLEC counterparts in the provision of broadband services complicates investment decisions for ILECs and has undoubtedly inhibited broadband deployment in the United States."); *see also* Letter from Kevin G. Rupy, Vice President, Law & Policy, USTelecom, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2-3 (filed June 6, 2018) (USTelecom June 6, 2018 Wireline *Ex Parte* Letter) (arguing that "rationalizing antiquated monopoly-era cost structures for pole inputs is necessary for efficient investment to bring more and better broadband infrastructure to a larger share of Americans, particularly in rural areas.").

establish a presumption that, for newly-negotiated pole attachment agreements between incumbent LECs and utilities, an incumbent LEC will receive comparable pole attachment rates, terms, and conditions as a similarly-situated telecommunications carrier or a cable television system providing telecommunications services (telecommunications attachers).[382] The utility can rebut the presumption with clear and convincing evidence that the incumbent LEC receives benefits under its pole attachment agreement with the utility that materially advantage the incumbent LEC over other telecommunications attachers.

115. As the Commission has recognized, historically, incumbent LECs owned approximately the same number of poles as electric utilities and were able to ensure just and reasonable rates, terms, and conditions for their attachments by negotiating long-term joint use agreements with utilities.[383] These joint use agreements provide benefits to the incumbent LECs that are not typically found in pole attachment agreements between utilities and other telecommunications attachers, such as lower make-ready costs, the right to attach without advance utility approval, and use of the rights-of-way obtained by the utility, among other benefits.[384] By 2011, however, incumbent LECs owned fewer poles than utilities, and the Commission found that incumbent LECs "may not be in equivalent bargaining position with electric utilities in pole attachment negotiations in some cases."[385] In 2011, the Commission determined that it had the authority "to ensure that incumbent LECs' attachments to other utilities' poles are pursuant to rates, terms and conditions that are just and reasonable,"[386] and placed the burden on incumbent LECs to rebut the presumption that they are not similarly situated to an existing telecommunications attacher in order to obtain access on rates, terms, and conditions that are comparable to the existing telecommunications attacher.[387]

116. The record clearly demonstrates that incumbent LEC pole ownership continues to decline.[388] Incumbent LECs argue that a reversal of the current presumption is warranted because incumbent LECs' bargaining power vis-à-vis utilities has eroded since 2011 as their percentage of pole ownership relative to utilities has dropped, thus resulting in increased attachment rates relative to their fellow telecommunications attachers.[389] To bolster this claim, USTelecom provides the results of a recent

[382] *See* USTelecom Wireline NPRM Comments at 9; Verizon Wireline NPRM Comments at 10.

[383] *See 2011 Pole Attachment Order*, 26 FCC Rcd at 5244, para. 8. As the Commission explained at the time, "joint use agreements are structured as cost-sharing arrangements, with each party agreeing to own a certain percentage of the joint use poles. This percentage typically is 40–50% for the incumbent LEC and 50–60% for the electric utility, and generally reflects the relative ratio of pole ownership that existed at the time these agreements originally were negotiated. No money changes hands under these agreements if each party owns its specified percentage of joint use poles. . . . When pole ownership deviates from the agreement, the party that owns less than the specified percentage typically pays the other party an amount based on a per pole rate." *Id.* at 5334-35, n.651 (internal citations omitted).

[384] *See* EEI Wireline NPRM Reply at 14; UTC Wireline NPRM Reply at 27-28.

[385] *2011 Pole Attachment Order*, 26 FCC Rcd at 5329, para. 206.

[386] *2011 Pole Attachment Order*, 26 FCC Rcd at 5330, para. 208.

[387] *See* 47 CFR § 1.1414; *see also 2011 Pole Attachment Order*, 26 FCC Rcd at 5336, para. 217 (stating that, "to the extent that the incumbent LEC demonstrates that it is obtaining pole attachments on terms and conditions that leave them comparably situated to telecommunications carriers or cable operators, we believe it will be appropriate to use the rate of the comparable attacher as [a] 'just and reasonable' rate").

[388] *See* AT&T Wireline NPRM Comments at 23; Frontier Wireline NPRM Comments at 6; Letter from Kevin G. Rupy, Vice President, Law & Policy, USTelecom, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at Attach. at 7 (USTelecom Nov. 21, 2017 Wireline *Ex Parte* Letter) ("In the 46 states surveyed, USTelecom's data show that for every ILEC pole to which IOUs attach, ILECs attach to three IOU poles. Specifically, ILECs attach to approximately 13.9 million IOU poles, whereas IOUs attach to only 4.6 million ILEC poles.").

[389] *See* AT&T Wireline NPRM Comments at 23; Frontier Wireline NPRM Comments at 4-7; USTelecom Wireline NPRM Comments at 3-4; Verizon Wireline NPRM Comments at 11. According to a recent USTelecom survey, its

member survey showing that its incumbent LEC members "pay an average of $26.12 [per year] to [investor-owned utilities] today in Commission-regulated states (an *increase* from $26.00 in 2008), compared to cable and CLEC provider payments to ILECs, which average $3.00 and $3.75 [per year], respectively (a *decrease* from $3.26 and $4.45, respectively, in 2008)."[390]

117. We are convinced by the record evidence showing that, since 2008, incumbent LEC pole ownership has declined and incumbent LEC pole attachment rates have increased (while pole attachment rates for cable and telecommunications attachers have decreased).[391] We therefore conclude that incumbent LEC bargaining power vis-à-vis utilities has continued to decline. Therefore, based on these changed circumstances, we agree with both incumbent LEC and electric utility commenters' arguments that, for new pole attachment agreements between utilities and incumbent LECs,[392] we should presume that incumbent LECs are similarly situated to other telecommunications attachers and entitled to pole attachment rates, terms, and conditions that are comparable to the telecommunications attachers.[393] We conclude that, for determining a comparable pole attachment rate for new pole attachment agreements, the presumption is that the incumbent LEC should be charged no higher than the pole attachment rate for telecommunications attachers calculated in accordance with section 1.1407(e)(2) of the Commission's rules.[394] In making this determination, we agree with the Electric Utilities that presumptively applying

members in 2017 paid investor owned utilities nearly nine times what incumbent LECs charge cable provider attachers on incumbent LEC-owned poles, and almost seven times the rates incumbent LECs charge competitive LEC attachers on incumbent LEC-owned poles. *See* USTelecom Nov. 21, 2017 Wireline *Ex Parte* Letter at Attach. at 3. According to USTelecom, this disparity has risen from 2008 when its members paid eight times more than cable providers and six times more than competitive LECs. *See id*. at Attach. at 4.

[390] USTelecom Nov. 21, 2017 Wireline *Ex Parte* Letter at Attach. at i (italics in original).

[391] *See* AT&T Wireline NPRM Comments at 23; Frontier Wireline NPRM Comments at 4-7; USTelecom Wireline NPRM Comments at 3-4; Verizon Wireline NPRM Comments at 11; USTelecom Nov. 21, 2017 Wireline *Ex Parte* Letter at Attach. at 2-11.

[392] A new pole attachment agreement is one entered into after the effective date of this Order. Consistent with the Commission's conclusion in 2011, the pre-2011 pole attachment rate for telecommunications carriers will continue to serve as a reference point in complaint proceedings regarding agreements that materially advantage an incumbent LEC and which are entered into after that Order and before the effective date of the Order we release today. *See 2011 Pole Attachment Order*, 26 FCC Rcd at 5337, para. 218. This extends to circumstances where an agreement has been terminated and the parties continue to operate under an "evergreen" clause. *See* Verizon Florida LLC v. Florida Power and Light Company, Pole Attachment Complaint, Docket No. 15-73, File No. EB-15-MD-002, at 6 (filed Mar. 13, 2015) (describing how the parties had terminated a joint use agreement but continued to operate under rates established by the joint use agreement for existing attachments pursuant to the agreement's evergreen clause); *cf.* Electric Utilities Apr. 24, 2018 Wireline *Ex Parte* Letter at 5-6 ("[I]n almost all joint use agreements, investor-owned electric utilities have no right to demand removal of attachments upon termination.") (emphasis omitted).

[393] *See* USTelecom Wireline NPRM Comments at 6-8; AT&T Wireline NPRM Comments at 23; Frontier Wireline NPRM Comments at 5-7; Verizon Wireline NPRM Comments at 11-12; *see also* Electric Utilities Wireline NPRM Comments at 24 ("The Electric Utilities do not oppose a rule that creates a rebuttable presumption that ILEC attachments made pursuant to pole license agreements—thus lacking the advantages typically associated with historical joint use agreements—are subject to the telecom rate."). As the Electric Utilities comment, under new pole license agreements, "ILECs and the Electric Utilities would be permitted to attach to each other's new poles as licensees on terms similar to those the Electric Utilities offer to other wireline licensees. This would mean, by way of example, that ILECs would be required to follow the Electric Utilities' permitting processes, would not be guaranteed the lowest space on the pole, would pay annual rental on a per attachment (and not a per pole) basis, would be required to pay full make-ready costs, would be required to meet insurance, security, and indemnification requirements, and would not be afforded the historical deference afforded to ILECs as co-custodians of the joint use network." Electric Utilities Wireline NPRM Comments at 24-25.

[394] *See* 47 CFR § 1.1407(e)(2).

comparable attachment rates, terms, and conditions to incumbent LECs is a fair result "where ILECs are truly attaching on terms comparable to other wireline licensees."[395] We find that reversing our presumption in the case of new agreements will promote broadband deployment; we agree with USTelecom that greater rate parity between incumbent LECs and their telecommunications competitors "can energize and further accelerate broadband deployment."[396] However, we recognize there may be some cases in which incumbent LECs that enter into new pole attachment agreements with utilities may continue to possess greater bargaining power than other attachers, for example in geographic areas where the incumbent LEC continues to own a large number of poles. Therefore, we establish a presumption that may be rebutted, rather than a more rigid rule.

118. We decline to extend this rebuttable presumption to existing joint use agreements between utilities and incumbent LECs. We agree with electric utility commenters that reversing the current presumption would disrupt joint use relationships between them and incumbent LECs, and it is not our intent to interfere with the arm's-length benefits previously bargained for by parties to existing joint use agreements.[397] Rather than treating incumbent LECs similarly to other parties, the record indicates that existing joint use agreements give incumbent LECs benefits beyond those granted to other parties and typically were negotiated long ago at a time of more equal bargaining power between the parties.[398]

119. Where the presumption that incumbent LECs are similarly situated to other telecommunications attachers applies, utilities can rebut the presumption in a complaint proceeding by demonstrating that the incumbent LEC receives benefits that materially advantage the incumbent LEC over other telecommunications attachers.[399] As the Commission has previously found, such material benefits include: "[p]aying significantly lower make-ready costs; [n]o advance approval to make attachments; [n]o post-attachment inspection costs; [r]ights-of-way often obtained by electric company; [g]uaranteed space on the pole; [p]referential location on pole; [n]o relocation and rearrangement costs; and [n]umerous additional rights such as approving and denying pole access, collecting attachment rents and input on where new poles are placed."[400] If the utility can demonstrate that the incumbent LEC

[395] Electric Utilities Wireline NPRM Comments at 25.

[396] USTelecom Nov. 21, 2017 Wireline *Ex Parte* Letter at Attach. at 1.

[397] *See* UTC Wireline NPRM Comments at 20; Midwest Electric Utilities Wireline NPRM Reply at 32; POWER Coalition Wireline NPRM Reply at 24-25; *2011 Pole Attachment Order*, 26 FCC Rcd at 5335, para. 216 & n.654; *see also* CCU Wireline NPRM Comments at 53; Electric Utilities Wireline NPRM Reply at 2. USTelecom argues that incumbent LECs lack the ability to terminate and renegotiate existing agreements. *See* USTelecom June 6, 2018 Wireline *Ex Parte* Letter at 4. Despite this argument, we decline to apply the presumption to pre-existing, freely-negotiated joint use agreements. The presumption we adopt today will offer incumbent LECs another option going forward, when current agreements expire or in cases where an incumbent LEC does terminate an agreement. *Cf*. Letter from Eric B. Langley, Counsel, Electric Utilities, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 7 (filed Apr. 24, 2018) (Electric Utilities Apr. 24, 2018 Wireline *Ex Parte* Letter) ("[I]n the experience of the Electric Utilities, it is almost always the ILEC terminating the joint use agreement.") (emphasis omitted).

[398] *See* CCU Wireline NPRM Comments at 41-49; Electric Utilities Wireline NPRM Reply at 3-5; Midwest Electric Utilities Wireline NPRM Reply at 34; Electric Utilities Apr. 24, 2018 Wireline *Ex Parte* Letter at 7-8; *2011 Pole Attachment Order*, 26 FCC Rcd at 5334-35, para. 216 & n.654; *see also* UTC Wireline NPRM Comments at 20-21. Although USTelecom argues that the operational and financial benefits of joint use to incumbent LECs are limited, *see* USTelecom June 6, 2018 Wireline *Ex Parte* Letter at 4-7, USTelecom admits that incumbent LECs receive some benefit in the form of a distinct approach to make-ready costs. *Id*. at 5.

[399] *See 2011 Pole Attachment Order*, 26 FCC Rcd at 5336-37, para. 218; *see also* Verizon Wireline NPRM Comments at 12.

[400] *2011 Pole Attachment Order*, 26 FCC Rcd at 5335, n.654 (quoting Comcast Reply, WC Docket No. 07-245, GN Docket No. 09-51, at 25 (Oct. 4, 2010)); *see also* CCU Wireline NPRM Comments at 45-49 (stating that "ILECs

receives significant material benefits beyond basic pole attachment or other rights given to another telecommunications attacher, then we leave it to the parties to negotiate the appropriate rate or tradeoffs to account for such additional benefits.

120. If the presumption we adopt today is rebutted, the pre-*2011 Pole Attachment Order* telecommunications carrier rate is the maximum rate that the utility and incumbent LEC may negotiate. This conclusion builds on and clarifies the Commission's determination in the *2011 Pole Attachment Order* that the pre-2011 telecommunications carrier rate should serve "as a reference point in complaint proceedings" where a joint use agreement was found to materially advantage an incumbent LEC.[401] The Commission "[found] it prudent to identify a specific rate to be used as a reference point in these circumstances because it [would] enable better informed pole attachment negotiations . . . [and] reduce the number of disputes" regarding pole attachment rates.[402] We reaffirm the conclusion that reference to this rate is appropriate where incumbent LECs receive material advantages in a pole attachment agreement. And because we agree with commenters that "establishment of . . . an upper bound will provide further certainty within the pole attachment marketplace, and help to further limit pole attachment litigation,"[403] we make this rate a hard cap.[404] In so doing, we remove the potential for uncertainty caused by considering the rate merely as a "reference point."

D. Other Pole Attachment Issues

121. Below, we respond to several pole attachment related proposals raised in the record in the *Wireline Infrastructure* proceeding. We do not at this time address all outstanding issues raised in the notices or record in this proceeding, and we will take further action as warranted in this proceeding to address outstanding issues.

122. *Uniform Pole Attachment Application.* We decline to adopt rules requiring utilities to use a uniform pole application form as requested by certain commenters.[405] We agree with a previous Commission decision that it is best to "leave the details of specific application criteria and processes to individual utilities,"[406] and we do not find a compelling case in the record to change course, so long as the

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receive a host of advantages that third party attachers like cable companies and CLECs do not enjoy," before enumerating many of those specific advantages); Electric Utilities Wireline NPRM Comments at 26-30 (stating the benefits to ILECs of joint use agreements and claiming that "it is highly unlikely that ILECs made their existing attachments on 'comparable terms' to other attachers because the ILECs made them with the immense capital cost savings and operational advantages of joint use agreements"); Midwest Electric Utilities Wireline NPRM Comments at 45-46 (asserting that "ILECs generally obtain numerous benefits under their existing joint use agreements that offset any increased rates they might pay for pole access in certain circumstances").

[401] *2011 Pole Attachment Order*, 26 FCC Rcd at 5337, para. 218.

[402] *Id.* The Commission further concluded that this rate, "which historically has been used in the marketplace," accounted for "particular arrangements that provide net advantages to incumbent LECs" because it was higher than the rate available to telecommunications attachers. *Id.*

[403] USTelecom Wireline NPRM Comments at 11; *see also* Verizon Wireline NPRM Comments at 14 ("If the pre-existing telecom rate is . . . an upper bound, it will focus the parties' negotiations by cabining the range of rates at issue.").

[404] *See* USTelecom Wireline NPRM Comments at 11; POWER Coalition Wireline NPRM Reply at 25 (submitting that if the utility overcomes the presumption, then "the old telecom rate should apply" if the incumbent LEC receives joint use benefits not enjoyed by other telecommunications carriers).

[405] *See, e.g.*, Charter Feb. 5, 2018 Wireline *Ex Parte* Letter at 3 ("Utilize a pole attachment application that requires applicants to submit only the information reasonably necessary for the application process."); FBA Wireline NPRM Comments at 8-9; Mobilitie Wireline & Wireless NPRM Comments at 10; ACA Wireline NPRM Reply at 14-17.

[406] *2011 Pole Attachment Order*, 26 FCC Rcd at 5274, para. 73.

criteria and processes a utility uses are reasonable. We also agree with the Coalition of Concerned Utilities that implementation and use of a standard pole application would likely prove difficult because "[e]ach utility has its own operational, design, construction, geographical and state regulatory requirements that call for different pole attachment application information."[407]

123. *Automated Tracking of Pole Attachment Progress.* We decline to adopt ACA's proposal that we require utilities to adopt a web-based pole attachment ticket management system.[408] Attachers and utilities are in the best position to develop systems, and we are reluctant to interfere in the market absent greater evidence of need. Rather, the market appears to be working in this regard. As ACA points out, "the great majority of utilities use NJUNS, NOTIFY, or some other management system."[409] Similarly, Alliant Energy developed and implemented its own online portal for processing and tracking pole attachment applications.[410]

124. *Utility Construction Standards and Requirements.* We decline the requests of certain commenters to establish limits on the construction standards and requirements that utilities adopt for their poles.[411] We agree with those utility commenters who argue that one-size-fits-all national pole construction standards (even if they were based on the NESC or similar codes) are not a good idea, and the better policy is to defer to reasonable and targeted construction standards established by states, localities, and the utilities themselves where appropriate.[412]

125. At this time, we decline to adopt Crown Castle's request that we prohibit blanket bans by utilities on the attachment of equipment in the unusable space on a pole because we have an insufficient record on which to reach a clear determination.[413] Crown Castle argues that it "has encountered a growing number of pole owners, whose territories cover many states, who have adopted blanket bans on attaching any equipment in the [unusable] space – despite the fact that this is a well-established and long-standing practice."[414] Two utility commenters argue that where utilities prohibit such attachments, they do so based on legitimate safety and engineering considerations, such as fall hazards, climbing obstructions, and the difficulty of moving equipment in the common space when poles have to be replaced.[415] No other commenter addressed this issue. We recognize that there are likely to be circumstances in which using the lower portion of poles to install equipment associated with DAS and other small wireless facilities will be safe and efficient.[416] However, given the paucity of the record, we are not in a position to be certain whether we should mandate that utilities permit certain uses. We would be open to revisiting this issue in the future.

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[407] CCU Wireline NPRM Reply at 14; *see also* Electric Utilities Wireline NPRM Reply at 28-29 (claiming that "[d]ifferences in application forms reflect differences in electric utilities' internal construction standards, pole attachment policies, and even the specific geography and weather conditions of the utilities' service area").

[408] *See* ACA Wireline NPRM Reply at 17; Charter Wireline & Wireless NPRM Comments at 56; Crown Castle Wireline NPRM Reply at 9; NCTA Wireline & Wireless NPRM Reply at 22-23; UTC Wireline NPRM Reply at 7.

[409] ACA Wireline NPRM Reply at 17.

[410] Midwest Electric Utilities Wireline NPRM Reply at 12, 29-30.

[411] *See* Crown Castle Wireline NPRM Comments at 4-5; ExteNet Wireline & Wireless NPRM Comments at 55.

[412] *See* CenterPoint Energy/FPL Feb. 13, 2018 Wireline *Ex Parte* Letter at 4.

[413] Crown Castle Wireline NPRM Comments at 5-6.

[414] *Id.* at 5.

[415] CCU Wireline NPRM Reply at 28; Electric Utilities Wireline NPRM Reply at 24-25.

[416] *Cf. 2011 Pole Attachment Order*, 26 FCC Rcd at 5276, para. 77 (prohibiting blanket bans on wireless pole-top attachments).

E. Legal Authority

126. We conclude that we have ample authority under section 224 to take the actions above to adopt a new pole attachment process, amend our current pole attachment process, clarify responsibility for pre-existing violations, and address outdated rate disparities. Section 224 authorizes us to prescribe rules ensuring that the rates, terms, and conditions of pole attachments are just and reasonable.[417] We find that the actions we take today to speed broadband deployment further these statutory goals. In addition, while we rely solely on section 224 for legal authority, our prioritization of broadband deployment throughout today's *Report and Order* finds support in section 706(a) of the Telecommunications Act of 1996, which exhorts us to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" by "remov[ing] barriers to infrastructure investment."[418]

F. Rebuilding and Repairing Broadband Infrastructure After Disasters

127. We will not allow state and local laws to stand in the way of post-disaster restoration of essential communciations networks. In the November 2017 *Further Notice of Proposed Rulemaking* in this proceeding, we sought comment on whether there are targeted circumstances related to disasters in which the Commission should use its preemption authority.[419] We find that we have authority under sections 253 and 332(c)(7) of the Act[420] to preempt state or local laws that prohibit or have the effect of prohibiting the rebuilding or restoration of facilities used to provide telecommunications services, and we commit to exercising that authority on a case-by-case basis where needed.[421] Sections 253 and 332(c)(7) both permit us to preempt state and local laws that "prohibit or have the effect of prohibiting" the deployment of telecommunications services, and we agree with Verizon that we can use this authority to preempt state or local legal action that effectively prohibit the deployment of telecommunications services in the wake of a disaster.[422] As the Commission has previously recognized, certain federal regulations may impede restoration efforts, and we are working to address those too[423]—where it is within our

[417] 47 U.S.C. §§ 224(b)(1), (2). As we have stated previously, "the broad language of section 224(b)(1) and (b)(2) indicate a delegation of comprehensive rulemaking authority over all attachment issues, including access." *2011 Pole Attachment Order*, 26 FCC Rcd at 5282, para. 91. Our comprehensive authority covers the various rules we adopt today, including new requirements on attachers. We note that other provisions of the Act also confer broad authority to regulate providers of telecommunications service or cable television systems. *See, e.g.*, 47 U.S.C. §§ 154(i), 201, 202, 536.

[418] 47 U.S.C. § 1302(a). While section 706(a) does not provide a grant of regulatory authority, we look to it as guidance from Congress on how to implement our statutorily-assigned duties. *See Restoring Internet Freedom*, WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311, 471-480, paras. 268-83 (2018).

[419] *See Wireline Infrastructure Order*, 32 FCC Rcd at 11194, paras. 178-79.

[420] 47 U.S.C. §§ 253, 332(c)(7).

[421] Our finding that the Commission has such authority should not be construed to mean that the Commission's preemption authority under Section 253 is limited only to times of natural disasters. *See* Illinois Electric Cooperative Wireline FNRPM Comments at 4.

[422] 47 U.S.C. §§ 253(a), 332(c)(7); *see* Verizon Wireline FNPRM Comments at 20. We find that our preemption authority under section 253 and 332 is not limited to natural disasters, and also extends to *force majeure* events generally, including man-made disasters. *Cf., e.g.*, *Wireline Infrastructure Order*, 32 FCC Rcd at 11157-59, paras. 71-78 (adopting streamlined copper retirement notice procedures for *force majeure* events).

[423] *See Wireline Infrastructure Order*, 32 FCC Rcd at 11157-59, paras. 71-78 (exempting incumbent LECs from certain requirements for copper retirements that are a direct result of damage to network infrastructure caused by a *force majeure* event); *Second Wireline Infrastructure Order* at paras. 58-59 (extending streamlined notice procedures for *force majeure* events to all types of network changes); *Telephone Number Portability; Numbering Resource Optimization*, CC Docket Nos. 95-116, 99-200, Order, 32 FCC Rcd 6723 (2017) (granting a temporary waiver of the Commission's numbering rules for providers affected by Hurricane Harvey); *Telephone Number*

authority, we are committed to addressing all legal requirements that stand in the way of prompt restoration of communications infrastructure.

128. We prefer to exercise our authority to preempt state and local requirements that inhibit network restoration, to the extent necessary and warranted under section 253 and/or 332(c)(7), on an expedited adjudicatory case-by-case basis, in which we can take into account the particularized circumstances of the state or local law in question and the impact of the disaster, and other relevant factors, rather than through adoption of a rule.[424] In such cases, we direct the Wireline Competition Bureau and the Wireless Telecommunications Bureau to expedite the consideration of disaster relief petitions by placing petitions on public notice in a timely fashion and adoping expedited comment cycles. In entertaining such petitions, the Bureaus should consider whether the state or local law in question, even if it otherwise may be prudent, materially inhibits or limits the rebuilding of telecommunications infrastructure in the wake of a disaster.[425]

129. We agree with the City of New York that state and local officials are often best positioned to respond to disasters and implement disaster response protocol and will be cognizant not to exercise our preemption authority in a manner that could disrupt these efforts.[426] In the wake of Hurricanes Harvey, Irma, and Maria, the Commission worked closely with state and local partners to support restoration of communications networks in affected areas,[427] and going forward, we reiterate the need for ongoing coordination and cooperation between the Commission and state and local governments to rebuild damaged telecommunications infrastructure as quickly as possible.[428] As the Public Safety and Homeland Security Bureau is responsible for coordinating the Commission's disaster response and recovery activities[429] and is most closely in contact with state, local, and Federal public safety, disaster relief and restoration agencies in such instances, we direct the Wireline Competition Bureau and Wireless Telecommunications Bureau to consult with the Public Safety and Homeland Security Bureau in the adjudication of any petitions.

Portability; Numbering Resource Optimization, CC Docket Nos. 95-116, 99-200, Order, 32 FCC Rcd 6831 (2017) (granting a temporary waiver of the Commission's number assignment rules for providers affected by Hurricane Irma); *Telephone Number Portability; Numbering Resource Optimization*, CC Docket Nos. 95-116, 99-200, Order, 32 FCC Rcd 7005 (2017) (granting a temporary waiver of section 52.15(f)(ii) of the Commission's rules for providers affected by Hurricanes Maria and Jose).

[424] *See* Verizon Wireline FNPRM Comments at 20-22.

[425] *See California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California Pursuant to Section 253(d) of the Communications Act of 1934*, CCB Pol 96-26, Memorandum Opinion and Order, 12 FCC Rcd 14191, 14206, para. 31 (1997) (*California Payphone*).

[426] *See* City of New York Wireline FNPRM Comments at 3.

[427] *See* Statement of Chairman Ajit Pai, *FCC Response to Hurricanes Harvey, Irma, and Maria* (Sept. 26, 2017), https://www.fcc.gov/document/presentation-fcc-response-hurricanes-harvey-irma-and-maria. As of December 7, 2017, in response to all three hurricanes, the FCC issued over 30 public notices and orders, permitting the flexible use of spectrum or other non-standard actions to support incident response; granted over 200 requests for Special Temporary Authorizations; granted temporary waivers of Lifeline requirements; and waived number portability rules to facilitate restoration of telephone services. *See Public Safety and Homeland Security Bureau Seeks Comment on Response Efforts Undertaken During 2017 Hurricane Season*, PS Docket No. 17-344, Public Notice, DA 17-1180, at 2-3 (PSHSB Dec. 7, 2017); *see also Uniendo a Puerto Rico Fund and the Connect USVI Fund* at paras. 13-27 (establishing the Uniendo a Puerto Rico Fund and the Connect USVI Fund to rebuild, improve and expand voice and broadband networks in Puerto Rico and the U.S. Virgin Islands).

[428] *See* CWA Wireline FNPRM Comments at 7; Uniti Fiber Wireline FNPRM Comments at 5.

[429] *See* 47 C.F.R. § 0.191.

IV. DECLARATORY RULING

130. Section 253(a) of the Act specifies that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[430] Notwithstanding that clear admonition, some states and localities have adopted moratoria on the deployment of telecommunications services or telecommunications facilities, including explicit refusals to authorize deployment and dilatory tactics that amount to *de facto* refusals to allow deployment. To provide regulatory certainty and further deployment, we issue this Declaratory Ruling making clear that such state and local moratoria violate section 253(a) and strike at the heart of the ban on barriers to entry that Congress enacted in that provision.

A. Background

131. As the Eighth Circuit has explained, section 253(a) of the Act provides "a rule of preemption[]" that "articulates a reasonably broad limitation on state and local governments' authority to regulate telecommunications providers."[431] Section 253(b) provides an exception for state requirements that are competitively neutral, consistent with section 254 of the Act, and "necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers."[432] Section 253(c) provides another set of exceptions to the limits on state and local authority by specifying that nothing in section 253 "affects the authority of a State or local government to manage their public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for the use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government."[433] Section 253(d) requires the Commission, after notice and comment, to preempt the enforcement of specific state or local requirements that are contrary to section 253(a) or (b) "to the extent necessary to correct such violation or inconsistency."[434] Pursuant to section 253(d), the Commission has preempted both state and local actions that prohibit or have the effect of prohibiting the ability of any entity to provide telecommunications services, such as a locality's denial of franchise applications from a new competitor,[435] provisions in state

[430] 47 U.S.C. § 253(a).

[431] *Level 3 Commc'ns, LLC. v. City of St. Louis, Mo.*, 477 F.3d 528, 531–32 (8th Cir. 2007) (*Level 3*).

[432] 47 U.S.C. § 253(b); *see also Western Wireless Corp. Petition for Preemption of Statutes and Rules Regarding the Kansas State Universal Service Fund Pursuant to Section 253 of the Communications Act of 1934*, File No. CWD 98-90, Memorandum Opinion and Order, 15 FCC Rcd 16227, 16231–32, para. 9 (2000).

[433] 47 U.S.C. § 253(c).

[434] 47 U.S.C. § 253(d). In the discussion below, we discuss the relation between subsections (d) and (a) and find that the former does not preclude us from issuing this *Declaratory Ruling* under subsection (a). *See infra* section IV.B.3.

[435] *See Classic Telephone, Inc.; Petition for Preemption, Declaratory Ruling and Injunctive Relief*, CCBPol 96-10, Memorandum Opinion and Order, 11 FCC Rcd 13082, 13101, para. 36 (1996) (*Classic Telephone*).

codes that protect rural incumbents,[436] and a state grant of an exclusive license to provide telecommunications services.[437]

132. Section 253 applies to wireless and wireline telecommunications services.[438] In the *Wireline Infrastructure Notice of Inquiry*, the Commission asked whether "moratoria on market entry or the deployment of telecommunications facilities[]" are inconsistent with section 253(a).[439] The Commission also sought comment on whether to provide an exception if moratoria were imposed with "sharply restricted time limits[]" or under "exigent circumstances[.]"[440] In the *Wireless Infrastructure NPRM*, the Commission sought comment on promulgating a preemption rule to address state or local zoning authorities' unreasonable delays in acting on applications.[441] That item also initiated a Notice of Inquiry, which sought comment, among other things, on whether state or local governments have imposed restrictions on deployment comparable to moratoria.[442]

133. In response to the *Wireline Infrastructure Notice of Inquiry* and the *Wireless Infrastructure NPRM*, we received numerous comments about states and localities imposing moratoria on the deployment of telecommunications infrastructure. The record includes comments from a broad array of large and small wireline and wireless providers operating throughout the country. For example, AT&T describes an Ohio municipality that "enacted a 145-day moratorium on permits for construction in rights-of-way" and an Illinois city that "imposed a five-year moratorium on pavement cuts to roadways that have been resurfaced or reconstructed."[443] Uniti Fiber identifies 44 jurisdictions in Florida that have

[436] *See Public Utility Commission of Texas et al., Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, CCBPol 96-14 et al., Memorandum Opinion and Order, 13 FCC Rcd 3460, 3466, para. 13 (1997) (*Public Utility Comm'n of Texas*); *Silver Star Telephone Company, Inc. Petition for Preemption and Declaratory Ruling*, CCB Pol 97-1, Memorandum Opinion and Order, 12 FCC Rcd 15639, 15658, para. 42 (1997), *aff'd sub nom. RT Commc'ns, Inc. v. FCC*, 201 F.3d 1264 (10th Cir. 2000) (*RT Commc'ns*).

[437] *See Connect America Fund (Sandwich Isles Communications, Inc.) Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary and Sections 36.611 and 69.2(hh) of the Commission's Rules*, WC Docket No. 10-90, CC Docket No. 96-45, Memorandum Opinion and Order, 32 FCC Rcd 5878, 5888, para. 26 (2017).

[438] Section 253(a) on its face applies to "any interstate or intrastate telecommunications service[,]" and the Supreme Court has held that wireless telecommunications services are included in that term. 47 U.S.C. § 253(a); *Nat'l Cable & Telecomm. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 340 (2002) ("[a] provider of wireless telecommunications service is a 'provider of telecommunications service'"). The Commission has previously recognized that section 253 applies to Commercial Mobile Radio Services (CMRS). *See Federal-State Joint Board on Universal Service; Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge*, CC Docket Nos. 96-45 et al., Fourth Order on Reconsideration and Report and Order, 13 FCC Rcd 5318, 5486, para. 302 (1997) ("To demonstrate that state universal service contribution requirements for CMRS providers violate section 253, there must be a showing that the state universal service programs act as a barrier to entry for CMRS providers and are not competitively neutral."). We therefore disagree with Smart Communities that section 253 does not apply to wireless facilities. *See* Smart Communities Wireless NPRM Comments at 56-57.

[439] *Wireline Infrastructure Notice*, 32 FCC Rcd at 3297, para. 102.

[440] *Id.*

[441] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, Second Report and Order, 32 FCC Rcd 3330, 3336-37, paras. 15-16 & n.30 (*Wireless NPRM*).

[442] *Id.* at 3364-65, paras. 95-96.

[443] AT&T Wireline NPRM Comments at 74.

implemented wireless moratoria.[444] Frontier offers examples of several states that have issued moratoria, including Indiana, which "issued a complete moratorium" on broadband deployment in March 2017; Illinois, where localities "often refuse to issue work permits unless a carrier pays"; Michigan, which "has frost and freeze laws that prevent construction of facilities for extended periods of time during the winter"; and Washington, which "issued a moratorium banning Frontier from building new infrastructure" between August 2016 and January 2017.[445] The record demonstrates that moratoria are numerous, geographically diverse, and occur at both the state and local level, showing that this issue affects the deployment of telecommunications services in many cases across the nation.

B. Discussion

134. The records in both the wireline and wireless infrastructure proceedings reflect the existence of two types of moratoria, express and *de facto*. We find that both types of moratoria violate section 253(a) and generally do not fall within the section 253(b) and (c) exceptions.

1. Moratoria Violate Section 253(a)

135. *Express Moratoria.* For purposes of this Declaratory Ruling, we define express moratoria as state or local statutes, regulations, or other written legal requirements that expressly, by their very terms, prevent or suspend the acceptance, processing, or approval of applications or permits necessary for deploying telecommunications services and/or facilities.[446] Commenters identify numerous instances of express moratoria that harm the public by prohibiting or having the effect of prohibiting the provision and deployment of telecommunications services and/or facilities. For example, despite the Commission's direction in 2009 and 2014 that states and localities must complete their review of wireless siting applications for collocation deployments within 90 days and for deployments other than collocation

[444] *See* Letter from Ronald W. Del Sesto, Jr., Counsel for Uniti Fiber, to Marleen H. Dortch, Secretary, FCC, WC Docket No. 17-84, WT Docket No. 17-79, at Exh. A (filed Oct. 30, 2017) (Uniti Fiber Oct. 30, 2017 Wireless NPRM *Ex Parte* Letter); *see also* Conterra Broadband Services et al. (Conterra) Wireline NPRM Comments at 28 (describing one instance where a municipality placed a moratorium on competitive deployments, and others where state highway officials "refused to issue permits for deploying fiber on bridges, even where spare conduit is available"); T-Mobile Wireline & Wireless NPRM Comments at 37 (describing a *de facto* moratorium outside Indianapolis); Wireless Infrastructure Association (WIA) Wireline & Wireless NPRM Comments at 11-12 (describing *de facto* moratoria in jurisdictions in Massachusetts and Illinois).

[445] Frontier Wireline NPRM Comments at 32-33; *see also* Mobilitie Wireline & Wireless NPRM Comments at Attach. 2, 11-12 (describing *de facto* moratoria in jurisdictions in Arizona, California, Michigan, Minnesota, New York, Ohio, and Oregon); Sprint Wireline & Wireless NPRM Comments at 41-42 (describing instances of *de facto* moratoria in the south and with a state DOT).

[446] We specifically include facilities where such facilities are necessary for the provision of covered services within the scope of section 253. *See Public Utility Comm'n of Texas*, 13 FCC Rcd at 3496, para. 74 (finding that "section 253(a) bars state or local requirements that restrict the means or facilities through which a party is permitted to provide service"); *Petition of the State of Minnesota for a Declaratory Ruling Regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way*, CC Docket No. 98-1, Memorandum Opinion and Order, 14 FCC Rcd 21697, 21705, para. 14 (1999) (*Minnesota Preemption Order*) (concluding that Section 253(a) preempts a state's agreement with an infrastructure developer—even though the developer deployed facilities rather than provided telecommunications services—because the operative inquiry is whether the state's action has an effect on the provision of telecommunications services); *cf. Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901, 5922-23, paras. 60-62 (2007) (concluding that where the same infrastructure would provide "both telecommunications and wireless broadband Internet access service," the provisions of section 224 governing pole attachments would continue to apply to such infrastructure used to provide both types of service).

within 150 days,[447] the record in response to the *Wireless Infrastructure NPRM* shows that express moratoria on wireless deployments are all too common. Uniti Fiber, for example, identifies dozens of local jurisdictions that have implemented moratoria on wireless deployment.[448] Commenters also provide specific examples of moratoria related to the processing of siting applications involving deployment of small cells.[449] For instance, Crown Castle describes an Amherst, New York resolution prohibiting town staff from accepting or processing any applications or issuing any permits "relating to the placement or installation of telecommunication towers, facilities and antennae within the Town's public rights-of-way until the moratorium is rescinded and/or a Local Law addressing this matter is adopted.'"[450] Similarly, Uniti Fiber identifies a Jacksonville, Florida ordinance which was passed on an 'emergency' basis,[451] and which imposed a "temporary moratorium on the acceptance, processing or approval of rights-of-way permit applications for personal wireless communication systems in the City's rights-of-way."[452]

136. Likewise, in response to the *Wireline Infrastructure Notice of Inquiry*, several commenters provide examples of state and local moratoria that have prohibited or had the effect of prohibiting the deployment of telecommunications services.[453] For example, Crown Castle highlights persistent problems of moratoria imposed by local governments on the processing and acceptance of applications for new sites.[454] As another example, AT&T states that a community in Ohio enacted a 145-day moratorium on permits for construction in rights-of-ways.[455]

137. Express moratoria are facially inconsistent with section 253(a). By their terms, express moratoria prohibit the provision of telecommunications services by halting the acceptance, processing, or approval of applications or permits for such services or the facilities used to provide such services. Express moratoria also "have the effect of prohibiting" the provision of telecommunications service. The Commission has previously held that a state or local requirement has the effect of prohibiting service under section 253(a) if it "materially inhibits or limits the ability of any competitor or potential competitor

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[447] *See Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, WT Docket No. 08-165, Declaratory Ruling, 24 FCC Rcd 13994, 14016-19, paras. 56-65 (2009) (*2009 Wireless Siting Declaratory Ruling*), *aff'd sub nom. City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 569 U.S. 290 (2013); *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, WT Docket Nos. 13-238, 13-32, WC Docket No. 11-59, Report and Order, 29 FCC Rcd 12865,12971, para. 265 (2014) (*Wireless Facilities Siting Order*).

[448] *See* Uniti Fiber Oct. 30, 2017 Wireless NPRM *Ex Parte* Letter at Exh. A (providing a list of 44 jurisdictions in Florida that have implemented wireless moratoria).

[449] *See, e.g.*, Crown Castle Wireless NPRM Comments at 14-19; CTIA Wireline & Wireless NPRM Comments, Attach. 1 at 12; Verizon Wireline & Wireless NPRM Comments at 6; AT&T Wireless NPRM Comments at 14.

[450] Crown Castle Wireless NPRM Comments at 32 (quoting Town of Amherst, New York, Resolution 2017-674, adopted June 5, 2017).

[451] Uniti Fiber Oct. 30, 2017 Wireless NPRM *Ex Parte* Letter at Exh. B.

[452] *Id*.

[453] *See e.g.*, Frontier Wireline NPRM Comments at 32-33; Conterra Wireline & Wireless NPRM Comments at 28; AT&T Wireline NPRM Comments at 74; Letter from T. Scott Thompson, Counsel to Crown Castle, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 3-4 (filed Aug. 29, 2017) (Crown Castle Aug. 29, 2017 Wireline *Ex Parte* Letter); Letter from T. Scott Thompson, Counsel to Crown Castle, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, GN Docket No. 17-83, at 4 (filed Nov. 13, 2017) (Crown Castle Nov. 13, 2017 Wireline *Ex Parte* Letter).

[454] *See* Crown Castle Aug. 29, 2017 Wireline *Ex Parte* Letter at 3-4; Crown Castle Nov. 13, 2017 Wireline *Ex Parte* Letter at 4.

[455] *See* AT&T Wireline NPRM Comments at 74.

to compete in a fair and balanced legal and regulatory environment."[456] As the record demonstrates, express moratoria materially inhibit and limit the provision of service, harming competition, and they create an unfair and imbalanced regulatory environment that imposes significant costs that impede the deployment of telecommunications infrastructure and thereby exacerbates the digital divide.[457] And the impact of moratoria extend beyond the telecommunications services market. As the Wireless Internet Service Providers Association states, "a blanket moratorium that freezes all applications across the board will by definition impede the deployment of broadband services and effectively serve as a complete ban on market entry by small broadband providers that cannot afford to endure excessive delays."[458]

138. We reject the argument that all "temporary" moratoria are permissible simply because they are of a limited, defined duration.[459] As an initial matter, the record indicates that some states and localities impose so-called "temporary" moratoria without setting an end date, or continually extend temporary moratoria to create *de facto* indefinite moratoria on deployment.[460] We agree with commenters that even moratoria that are actually time limited "force providers either to delay or cancel their planned deployments."[461] Moreover, assertions that "temporary" moratoria are necessary for planning purposes or government study[462] provide insufficient justification for imposing such moratoria in light of clear congressional intent to severely limit state and local authorities' ability to take actions that prohibit or

[456] *California Payphone*, 12 FCC Rcd at 14206, para. 31. The Commission has applied this standard in subsequent cases as well. *See, e.g.*, *Public Utility Comm'n of Texas*, 13 FCC Rcd at 3463, para. 3; *TCI Cablevision of Oakland County, Inc.; Petition for Declaratory Ruling, Preemption, and Other Relief Pursuant to 47 U.S.C. §§ 541, 544(e), and 253*, CSR-4790, Memorandum Opinion and Order, 12 FCC Rcd 21396, 21439, para. 98 (1997). Several courts have also followed the Commission's *California Payphone* standard. *See, e.g.*, *Puerto Rico Tel. Co., Inc. v. Municipality of Guayanilla*, 450 F.3d 9, 18 (1st Cir. 2006); *Sprint Telephony PCS, L.P. v. Cty. of San Diego*, 543 F.3d 571, 578 (9th Cir. 2008) (*Sprint Telephony*); *T-Mobile USA Inc. v. City of Anacortes*, 572 F.3d 987, 993 (9th Cir. 2009); *Level 3*, 477 F.3d at 532.

[457] *See* Conterra Wireline NPRM Comments at 29; Frontier Wireline NPRM Comments at 32; CTIA Wireline & Wireless NPRM Comments, Attach. 1 at 25; Mobile Future Wireless NPRM Comments at 9; Mobilitie Wireline & Wireless NPRM Comments at 7; R Street Institute Wireline NPRM Comments at 13-14; Samsung Wireless NPRM Comments at 7-8; *see also* Conterra Wireline & Wireless NPRM Comments at 29 (describing situations where deployment on bridges and highways was prohibited, creating situations where the only alternative was to "bore under a significant body of water" at a cost-prohibitive price of $500,000). *Cf.* Conterra Wireline & Wireless NPRM Comments at 28 ("In one municipality, applicants were informed there was a moratorium on competitive deployments, allowing incumbent phone companies and cable operators to operate without fear of competitive deployment on the horizon.").

[458] Wireless Internet Service Providers Ass'n (WISPA) Wireline NPRM Comments at 5.

[459] *See* City of Norfolk Wireline NPRM Comments at 16; Minnesota Cities Coalition (MCC) Wireline NPRM Comments at 18-19; Washington State City Coalition (WSCC) Wireline NPRM Comments at 17-18; Illinois Municipal League (IML) Wireless NPRM Comments at 2; League of Minnesota Cities (LMC) Wireline NPRM Comments at 10-11; City of New York Wireline NPRM Comments at 4; League of Arizona Cities and Towns et al. (LACT) Wireless NPRM Comments at 12.

[460] *See, e.g.*, AT&T Wireless NPRM Comments at 14 ("A Florida city imposed a 'six-month' moratorium on [right-of-way] wireless siting that was extended multiple times over two years."); Sprint Wireless NPRM Comments at 41–42 ("One Southern city . . . imposed a moratorium on new builds in the downtown area until it revises its standards for fees, designs, and deployment in underserved areas. This moratorium has continued for 18 months.").

[461] *See* AT&T Wireline NPRM Comments at 74; *see also* AT&T Wireless NPRM Comments at 13-14 (explaining how AT&T had to cancel deployment plans after being faced with a supposedly temporary six-month moratorium that was repeatedly extended by a Florida city).

[462] *See* City of Norfolk Wireline NPRM Comments at 16; MCC Wireline NPRM Comments at 18–19; WSCC Wireline NPRM Comments at 17; IML Wireless NPRM Comments at 2.

have the effect of prohibiting the ability of any entity to provide telecommunications services.[463] We recognize, and discuss further below, that there may be limited instances where temporary moratorium could fall within the exception of 253(b)[464] and that 253(c) provides an exception for certain conduct that involves legitimate "rights-of-way" management.[465] But Congress did not countenance generalized government study and planning that stands in the way of additional competition and service upgrades, and we decline to create additional exceptions beyond those expressed by Congress.

139. *De Facto Moratoria.* We find that section 253(a) also prohibits *de facto* moratoria, which we define for the purpose of this Declaratory Ruling as state or local actions that are not express moratoria, but that effectively halt or suspend the acceptance, processing, or approval of applications or permits for telecommunications services or facilities in a manner akin to an express moratorium.[466] *De facto* moratoria are not formally codified by state or local governments as outright prohibitions but have the same effect as express moratoria since they, by their operation, prohibit deployment of telecommunications services and/or telecommunications facilities. Examples of *de facto* moratoria in the record include, but are not limited to, blanket refusals to process applications,[467] refusals to issue permits for a category of structures,[468] frequent and lengthy delays of months or even years in issuing permits and processing applications,[469] and claims that applications cannot be granted until pending local, state, or federal legislation is adopted.[470]

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[463] We observe that if describing a law or regulation as "temporary" was sufficient to insulate that law against section 253(a), every express moratorium would be adopted as "temporary" in order to evade the statute.

[464] *See infra* at Section IV.B.2.

[465] 47 U.S.C. § 253(c). We find below that express and *de facto* moratoria do not fall within the section 253(c) exception. *See infra* at Section IV.B.2.

[466] For purposes of this Declaratory Ruling we exclude fees—even highly excessive fees—from the definition of *de facto* moratoria. In doing so, we do not suggest that excessive fees are consistent with section 253(a). Rather, we choose to proceed incrementally and limit our discussion to moratoria as defined herein.

[467] *See* WIA Wireless NPRM Comments at 11 (noting multiple jurisdictions in Massachusetts and Illinois that "have not specifically passed ordinances putting moratoria in place, but have informally suspended applications or indicated that all applications will be denied while small wireless facility-targeted policies, procedures, and proposed ordinances are considered"); Mobilitie Wireless NPRM Comments at Attach. 2, 11–12 (citing local practices, including refusals to process site permit applications or negotiate master rights-of-way agreements, which, while not explicit moratoria, still have the same practical effect).

[468] *See* Conterra Wireline & Wireless NPRM Comment at 28 (citing instances where "state highway officials have refused to issue permits for deploying fiber on bridges, even where spare conduit is available"); Sprint Wireless NPRM Comments at 41 (stating that "[s]ome municipalities have dragged their feet for such a long time in establishing a process [to act on permitting applications for small cell deployment] that their actions have imposed a de facto moratorium on the use of the rights of way"); WIA Wireless NPRM Comments at 11 (stating that while some jurisdictions "have not specifically passed ordinances putting moratoria in place," they have refused to process requests to deploy small cell facilities or issue permits for small cells); CTIA Wireline & Wireless NPRM Comments, Attach. 1 at 12 (describing several localities that have imposed *de facto* moratoria by declining to process applications to locate new wireless facilities or modify existing facilities).

[469] *See* Conterra Wireline & Wireless NPRM Comments at 28 (claiming that "municipally-owned utilities frequently delay issuance of pole attachment applications"); Lightower Wireline NPRM Comments at 18 (claiming that it has been "involved in a number of scenarios in which, in spite of no pronunciation by local government that a moratorium has been imposed, the governmental entity is simply not moving forward in such a way as to process applications" related to deployment, a scenario which "may be characterized as an effective prohibition"); T-Mobile Wireline & Wireless NPRM Comments at 37 (complaining of *de facto* moratoria where localities simply fail to act on applications, and citing the example of one jurisdiction outside Indianapolis where small cell rights-of-way applications have been pending for nearly three years without being either approved or denied). *Cf. Sprint*

140. We distinguish *de facto* moratoria, which inherently violate section 253(a), from state and local actions that simply entail some delay in deployment.[471] Situations cross the line into *de facto* moratoria where the delay continues for an unreasonably long or indefinite amount of time such that providers are discouraged from filing applications, or the action or inaction has the effect of preventing carriers from deploying certain types of facilities or technologies. For example, T-Mobile describes one jurisdiction outside Indianapolis, in which small cell right-of-way applications "have been pending for nearly three years, but the jurisdiction will neither approve nor deny the applications."[472] WIA states that its members have encountered refusals to process small cell applications in Myrtle Beach, South Carolina and DeKalb County, Georgia.[473] CTIA describes situations where localities refuse to process applications to locate or modify wireless facilities until and unless the locality adopts regulations governing small cell deployment.[474] Other localities allegedly place onerous conditions on accepting or reviewing applications that would constitute *de facto* moratoria. For instance, Lightower describes situations where jurisdictions use *de facto* moratoria as punitive measures, stating that where Lightower "has contested the conditions or costs[] [of deploying telecommunications infrastructure], jurisdictions have often refused to continue processing or grant pending deployment applications."[475] These types of conduct are prohibited by section 253(a). Although we do not reach specific determinations on the numerous examples discussed by parties in our record, we find that these types of conduct are prohibited by section 253(a).

141. Like express moratoria, *de facto* moratoria prohibit or have the effect of prohibiting the provision of service, and are thus prohibited by section 253(a). Indeed, we view the formulation that Congress used in section 253(a)—"prohibit or have the effect of prohibiting"—as anticipating the distinction we draw today between express and *de facto* moratoria, and recognizing that not all barriers to the provision of service will come expressly labeled as such. As the examples above show, the presence of a formal, express moratorium is not necessary for a state or locality to take action that prohibits or has the effect of prohibiting the provision of telecommunications service through *de facto* moratoria. A *de facto* moratorium can prohibit an entity from providing telecommunications service if the provider cannot obtain approval or authorization to deploy from the state or local government due to inaction or refusal, even if there is no statute, regulation, or other express legal requirement restricting the acceptance,

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Telephony, 543 F.3d at 580 (municipal ordinance that "impose[s] an excessively long waiting period [could] amount to an effective prohibition").

[470] *See* Conterra Wireline & Wireless NPRM Comments at 29 (citing some instances where local governments cite to pending state or federal legislation as grounds to halt or delay the filing or processing of right-of-way permits or franchise applications); CTIA Wireline & Wireless NPRM Comments at 24 (citing the example of localities that "refuse to process applications, or that tell applicants to wait until the locality develops siting policies, without making any commitment" as to whether or when they will do so).

[471] This Declaratory Ruling is limited to express and *de facto* moratoria. We do not reach the limits of what actions violate section 253(a) or other provisions of the Act.

[472] T-Mobile Wireline & Wireless NPRM Comments at 37; *see also* Verizon Wireline & Wireless NPRM Comments at 6 (describing "jurisdictions, like a Midwestern suburb, where Verizon has been trying unsuccessfully to get approval for small cells since 2014, [that] have no established procedures for small cell approvals and are extremely slow to respond"); Mobilitie Wireline & Wireless NPRM Comments, Attach. 2 at 11-12 (describing jurisdictions in Arizona, Minnesota, and New York which are not processing or accepting applications).

[473] *See* WIA Wireline & Wireless NPRM Comments at 11.

[474] CTIA Wireline & Wireless NPRM Comments, Attach. 1 at 12; *see also* WIA Wireless NPRM Comments at 11 (stating that jurisdictions in Massachusetts and Illinois "have not specifically passed ordinances putting moratoria in place, but have informally suspended applications or indicated that all applications will be denied while small wireless facility-targeted policies, procedures, and proposed ordinances are considered").

[475] Lightower Wireline NPRM Comments at 21.

processing, or grant of applications or authorizations.[476] This is true even though some *de facto* moratoria may leave the hypothetical possibility of a locality taking action on an application; if applicants cannot reasonably foresee when approval will be granted because of indefinite or unreasonable delay, then an impermissible *de facto* moratorium is in place.[477]

142. There may be situations in which states or localities impose limitations on deployment, but allow for alternative means of deployment in a manner that is reasonably comparable in cost and ease. Providers sometimes inaccurately characterize these limitations as moratoria, but we find that characterization to be inapt where the limitations do not foreclose deployments and do not materially limit carriers' ability to build the facilities they need to provide service. For example, some "street-cut" requirements, which providers sometimes refer to as moratoria, are not designed to thwart construction, but to promote "dig once" policies "in order to preserve the roadway and incentivize interested providers to deploy telecommunications conduit," and would not qualify as unlawful moratoria if the state or locality imposing such street-cut requirements does not bar alternative means of deployment such as aerial lines or sublicensing existing underground conduits.[478] Consistent with the Commission's ruling in the *Minnesota Preemption Order*, such requirements do not violate section 253(a) if they provide for deployment alternatives that are viable, reasonable, and competitively neutral—if they, in short, do not have the effect of prohibiting the deployment of telecommunications networks.[479]

2. Moratoria Are Generally Not Protected Under the Section 253(b) and (c) Exceptions

143. With rare exception, neither express nor *de facto* moratoria are protected by the exceptions found in either section 253(b) or section 253(c).[480]

144. Section 253(b) allows certain "State" requirements, even if such requirements otherwise violate section 253(a), that are (i) "competitively neutral"; (ii) "consistent with section 254" of the Act; and (iii) "necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers."[481] As an initial matter, we find that no local or municipal moratoria can fall within the section 253(b) exception absent a specific delegation of regulatory authority by a state to the locality or municipality in question.[482] Given that section 253(c) discusses the authority of "a State or local government," but section 253(b) only discusses the authority of "a State," we find Congress's omission of the phrase "local government" from the latter to be persuasive evidence that the section 253(b) exception does not

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[476] *See, e.g.*, T-Mobile Wireline & Wireless NPRM Comments at 37; CTIA Wireline & Wireless NPRM Comments at 24, Attach. 1 at 12; Mobilitie Wireline & Wireless NPRM Comments, Attach. 2 at 11; Verizon Wireline & Wireless NPRM Comments at 6; WIA Wireline & Wireless NPRM Comments at 11.

[477] Section 253(a) does not require that a bar to entry be "insurmountable before the FCC must preempt it." *RT Commc'ns*, 201 F.3d at 1268.

[478] *See* LACT Wireline NPRM Comments at 13-14; *but see* Tekify Fiber Wireline NPRM Comments at 2 (arguing against moratoria that require a utility to grind and re-pave entire street lengths in a manner that effectively prohibits deployment projects within those areas). To promote deployment, we encourage state and local governments that enact a street-cut requirement that allows for alternative means of deployment to still provide advance notice to enable providers to deploy in the right-of-way in the least disruptive manner possible. *See* Liberty Cablevision of Puerto Rico Wireline NPRM Comments at 17 (arguing for six months' notice in advance of a right-of-way related moratorium for repaving or other work).

[479] *See Minnesota Preemption Order*, 14 FCC Rcd at 21709-14, paras. 23-31.

[480] *See* 47 U.S.C. § 253(b), (c).

[481] 47 U.S.C. § 253(b).

[482] *See Classic Telephone*, 11 FCC Rcd at 13100-101, para. 34.

generally apply to the conduct of local governments.[483] Indeed, some courts have held that the plain text of section 253(b) requires a finding that the provision protects only certain state activities "and does not speak to local regulation."[484] However, consistent with past Commission precedent, we need not go so far and make clear that section 253(b) does not apply to local or municipal legal requirements absent a specific delegation of authority from the state.[485]

145. Further, we find that most moratoria are not competitively neutral—they almost certainly will favor incumbents over new entrants and existing modalities over new technologies. We also find they are unlikely to fall within the ambit of any of the four public interest exceptions contained in section 253(b).[486] Neither the Commission nor a court has upheld a state requirement that violated section 253(a) on the grounds that it was necessary to "preserve and advance universal service."[487] Moreover, as a practical matter, moratoria run counter to the goal of preserving and advancing universal service as

[483] *See* 47 U.S.C. § 253(b), (c).

[484] *TCG N.Y., Inc. v. City of White Plains, N.Y.*, 125 F. Supp. 2d 81, 87 (S.D.N.Y. 2000), *aff'd in part, rev'd in part on other grounds TCG N.Y.*, 305 F.3d 67; *see also Southwestern Bell Wireless Inc. v. Johnson Cty. Bd. of Cty. Comm'rs*, 199 F.3d 1185, 1192 (10th Cir. 1999) ("[S]ection 253(b) applies only to state, not local, regulation, since, in the remainder of section 253, Congress clearly says "State or local" when it so intends."); *City of Dallas v. Metropolitan Fiber Systems of Dallas, Inc.*, 98 civ. 2128, 2000 WL 198104, at *4 (N.D.Tex. Feb.17, 2000) (holding that section 253(b) was not applicable to municipalities).

[485] *See Classic Telephone*, 11 FCC Rcd at 13100-101, para. 34; *see also N.J. Payphone Ass'n, Inc. v. Town of W. N.Y.*, 130 F. Supp. 2d 631, 639 (D.N.J. 2001), *aff'd N.J. Payphone Ass'n*, 299 F.3d 235 (3rd Cir. 2001); *Bd. of Cty. Comm'rs of Grant Cty., N.M.*, 169 F. Supp. 2d 1243, 1247 (D.N.M. 2001) ("Local governments may only manage the rights of way, unless specifically delegated authority to impose requirements under § 253(b)."); *AT&T Comm. of the Southwest, Inc. v. City of Dallas*, 8 F. Supp.2d 582, 591 (N.D.Tex.1998), *dismissed as moot on other grounds*, 243 F.3d 928 (5th Cir. 2001) ("The language of § 253 is straightforward. Absent explicit delegation by the state legislature, cities do not have the more general authority to regulate to protect public safety and welfare, advance universal service and ensure quality—this is a function reserved to states by § 253(b), not to local governments."); *Cox Comm. PCS, LP v. City of San Marcos*, 204 F. Supp. 2d 1260, 1264 (S.D. Cal. 2002) (section 253(b) only applies to states, and not municipalities, unless a state specifically delegates authority to its local governments); *BellSouth Telecomm., Inc. v. City of Coral Springs*, 42 F. Supp.2d 1304, 1307 (S.D. Fla.1999), *aff'd in part, rev'd in part on other grounds*, 252 F.3d 1169 (11th Cir. 2001) ("While states may regulate universal service, protect consumers, ensure quality and protect the public safety and welfare, local governments can only manage the public rights-of-way, unless of course a state specifically delegated the state authority to its local governments."); *BellSouth Telecomm., Inc. v. Town of Palm Beach*, 127 F. Supp. 2d 1348, 1356 (S.D. Fla. 1999) (quoting *BellSouth Telecomm. Inc v. City of Coral Springs*, 42 F. Supp. 2d 1304 (S.D. Fla. 1999)), *aff'd in part, rev'd in part on other grounds*, 252 F.3d 1169 (11th Cir. 2001). To the extent that previous Commission decisions discussed section 253(b) as applying to either state or local requirements, we find that such decisions should be understood to be referring to only those local legal requirements that were enacted pursuant to specific delegated authority from a state. *See, e.g.*, *Public Utility Commission of Texas*, 13 FCC Rcd at 3480, 3501, paras. 41, 83; *Silver Star Telephone*, 12 FCC Rcd at 15647, 15658, paras. 17, 42 (1997), aff'd sub nom. *RT Communications, Inc.*, 201 F.3d 1264; *Sandwich Isles Communications, Inc.*, 32 FCC Rcd at 5885, para. 19 (2017).

[486] *See* 47 U.S.C. § 253(b).

[487] 47 U.S.C. § 253(b). While the Commission has never upheld a state requirement on such a basis, it has preempted state requirements on the grounds that they are not necessary to preserve and advance universal service. *See, e.g.*, *Federal-State Joint Board on Universal Service Western Wireless Corporation Petition for Preemption of an Order of The South Dakota Public Utilities Commission*, CC Docket No. 96-45, Declaratory Ruling, 15 FCC Rcd 15168, 15168-69, paras. 1-2 (2000) (*Western Wireless Preemption Declaratory Ruling*) (finding that the regulation at issue—which required common carriers to provide supported services throughout a service area prior to being designated as eligible telecommunications carriers who may receive federal universal service support—was not competitively neutral, consistent with section 254, or necessary to preserve and advance universal service, and thus did "not fall within the authority reserved to the states in section 253(b)").

moratoria prevent or materially limit deployments that could assist in achieving universal service. Neither the Commission nor a court has ever evaluated whether a state requirement that violated section 253(a) was permissible on the grounds that it was nevertheless necessary to "ensure the continued quality of telecommunications services,"[488] and it is difficult to envision how a ban on deployment could conceivably improve the quality of such services. If anything, a moratorium is likely to decrease the quality of telecommunications services by barring competitive entry into the market, reducing the quality and quantity of services available to consumers, and inhibiting providers' ability to deploy the facilities needed to broaden the geographic areas they can serve, fill coverage gaps, expand capacity, and/or upgrade the technology used in their networks.[489]

146. With limited exception, moratoria are also unlikely to be necessary to "protect the public safety and welfare" or "safeguard the rights of consumers."[490] Both the Eighth and Ninth Circuits have noted that these exceptions can be applicable to legal requirements intended to protect the public from deceptive business practices.[491] On its own, the public safety and welfare exception has been understood to apply, at a minimum, to legal requirements that ensure emergency services such as 911 are made readily available.[492] Rather than preserving these vital interests, moratoria on deployment that violate section 253(a) decrease competition—thereby dampening the ability of a free and open market to act as a check against unfair or deceptive practices—and prevent the deployment of facilities that may be used in the provision of emergency services.

147. We recognize that there may be limited situations in the case of a natural disaster or other comparable emergency where an express or *de facto* moratoria that violates section 253(a) may nonetheless be "necessary" to "protect the public safety and welfare" or to "ensure the continued quality of telecommunications services."[493] For example, in the event of a widespread power or telecommunications outage, a state might need to limit access to poles in a specific, affected area until existing power and telecommunications facilities can be restored. We interpret section 253(b) to allow for these state-imposed "emergency" express moratoria only if they are (1) "competitively neutral," as expressly required by section 253(b),[494] (2) necessary to address the emergency or disaster or related

[488] 47 U.S.C. § 253(b).

[489] *See, e.g.*, R Street Wireline NPRM Comments at 13-14; Mobile Future Wireless NPRM June 15, 2017 Comments at 9.

[490] 47 U.S.C. § 253(b).

[491] *See Cedar Rapids Cellular Tel., L.P. v. Miller*, 280 F.3d 874, 880 (8th Cir. 2002) ("[T]he Supreme Court has recognized that states have an important interest in protecting the public from deceptive business practices. . . .Federal telecommunications law implicitly acknowledges the importance of this interest by leaving states some latitude to 'protect the public safety and welfare' and 'safeguard the rights of consumers.'"); *Comm'cns Telesystems Int'l v. Cal. Pub. Util. Comm'n*, 196 F.3d 1011, 1017 (9th Cir. 1999) (noting that the California Public Utility Commission has the power under section 253(b) to "implement regulations that are 'necessary' to 'protect the public' against slamming," or the unauthorized switching of consumers' long-distance carriers); *see also Classic Telephone*, 11 FCC Rcd at 13101, para. 35 ("Section 253(b) . . . ensures that States continue to have authority to require telecommunications service providers to make emergency services available to the public and comply with local consumer protection laws.").

[492] *See Freeman v. Burlington Broadcasters, Inc.*, 204 F.3d 311, 324 (2d Cir. 2000) ("[T]he legislative history indicates that '[b]y "public safety and welfare,'" the Committee means, among other things, making certain that emergency services, such as 911, are available to the public."); *see also Classic Telephone*, 11 FCC Rcd at 13101, para. 35 ("Section 253(b) . . . ensures that States continue to have authority to require telecommunications service providers to make emergency services available to the public and comply with local consumer protection laws.").

[493] 47 U.S.C. § 253(b).

[494] As the Commission has previously held, to be considered "competitively neutral" for purposes of section 253(b), a legal requirement must have a like effect on all types of providers and technologies, and must not unfairly

public safety needs, and (3) targeted only to those geographic areas that are affected by the disaster or emergency. Given that the emergency giving rise to such an express moratorium will be finite in time, a moratorium that extends beyond the duration of the emergency and associated repair efforts would not be permissible under section 253(b) because it would not be "necessary" to protect the safety and welfare of the public as section 253(b) requires.[495] Similarly, an express, statewide deployment moratorium that is not targeted to the geographic areas affected by the natural disaster or emergency would not be permissible as it would not be "necessary" in the unaffected areas and would thus be impermissibly overbroad.[496] We caution that mere assertions that express or *de facto* moratoria are necessary to achieve these goals do not suffice to invoke section 253(b).[497] Emergency moratoria must be identified as such and clearly communicated to applicants; states and localities may not use a natural disaster or similar emergency as a guise for implementing *de facto* moratoria. While narrowly tailored emergency moratoria may be legally permissible under section 253, we encourage states to work collaboratively with providers before resorting to express moratoria in the wake of natural disasters or emergencies. The burden is on states to justify the imposition of a moratorium by specifically demonstrating that a moratorium serves, and is narrowly-tailored in a manner that makes it necessary to achieve, one of the goals articulated in section 253(b).

148. We also take this opportunity to remind states that section 253(b) only permits them to impose requirements that are "necessary" to preserve or advance the interests identified in section 253(b).[498] Moratoria are "blunt instruments."[499] There may well be instances where a more limited legal requirement could reasonably be said to be "necessary" to advance universal service, protect the public safety, ensure the continued quality of telecommunications services, or safeguard the rights of consumers, but most moratoria are, by their very nature, too broad and far-ranging to satisfy such a strict standard. Such bans cannot be considered "necessary" to further a specific interest if that interest could be advanced by the imposition of some other, more targeted measure.[500]

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advantage or hamper one type of provider or technology over another. *See Western Wireless Preemption Declaratory Ruling*, 15 FCC Rcd at 15176-177, paras. 21-22 (citing *Federal-State Joint Board on Universal Service*, 12 FCC Rcd at 8801, para. 47); *see also Nixon v. Mo. Mun. League*, 541 U.S. 125, 137 (2004) (citing the Commission's holding in *Western Wireless Preemption Declaratory Ruling* and reaffirming that the Commission has "understood § 253(b) neutrality to require a statute or regulation affecting all types of utilities in like fashion").

[495] 47 U.S.C. § 253(b); *see also New England Public Communications Council Petition for Preemption Pursuant to Section 253*, CCBPol 96-11, Memorandum Opinion and Order, 11 FCC Rcd 19713,19722, para. 21 (1996) (*New England Payphone Order*) (stating that "[a]n interpretation of section 253(b) that a state's action merely be reasonable ignores the specific language of the statute requiring such state action to be 'necessary'").

[496] 47 U.S.C. § 253(b).

[497] *See, e.g.*, City of Norfolk Wireline NPRM Comments at 16-17 (claiming generally that "[m]oratoria also allow local officials to consider the legitimate concerns of members of the public, such as health, public safety and environmental issues, and how best to responsibly address them"); MCC Wireline NPRM Comments at 18; WSCC Wireline NPRM Comments at 17.

[498] 47 U.S.C. § 253(b).

[499] AT&T Wireline NPRM Comments at 74.

[500] *See New England Payphone Order*, 11 FCC Rcd at 19722, para. 22 (rejecting a measure prohibiting incumbent LECs from providing in-state payphone services as "the most restrictive means available" and concluding that the record "does not support a finding that such an extreme approach is 'necessary'" under section 253(b)); *id.*, 11 FCC Rcd at 19722, para. 21 ("An interpretation of section 253(b) that a state's action merely be reasonable ignores the specific language of the statute requiring such state action to be 'necessary.'"); *Classic Telephone*, 11 FCC Rcd at 13102, para. 38 ("Congress envisioned that in the ordinary case, States and localities would enforce the public interest goals delineated in section 253(b) through means other than absolute prohibitions on entry.") (citing S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 1, at 126 (1996)). We recognize that outside the context of section 253(b), the

149. It is even less likely that the section 253(c) exceptions could shield moratoria that violate section 253(a) from preemption. Section 253(c) specifies that "[n]othing in this section affects the authority of the State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and non-discriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government."[501] For purposes of this Declaratory Ruling, we exclude the imposition of fees from the definition of *de facto* moratoria.[502] Thus, the applicability of 253(c) depends on whether moratoria may constitute management of the public rights-of-way.[503]

150. While the Act does not define "manage[ment of] rights-of-way," the Commission has recognized in the context of section 253(c) that "[l]ocal governments must be allowed to perform the range of vital tasks necessary to preserve the physical integrity of streets and highways, to control the orderly flow of vehicles and pedestrians, [and] to manage gas, water, cable . . . and telephone facilities that crisscross the streets and public rights-of-way."[504] The Commission has described the "types of activities that fall within the sphere of appropriate rights-of-way management" as including "coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement of building codes, and keeping track of the various systems using the rights-of-way to prevent interference between them."[505] Thus, section 253(c) protects certain activities that involve the actual use of the right-of-way. In contrast, to the extent they implicate rights-of-way

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Commission has sometimes interpreted the term "necessary" as simply meaning "used" or "useful." *See New England Payphone Order*, 11 FCC Rcd at 19723-25, paras. 24-25 (distinguishing the use of the term "necessary" as used in section 253(b) from the duty imposed on ILECs by section 251(c)(6) to provide collocation of equipment that is "necessary" for interconnection or access to unbundled network elements at the ILEC's premises, and noting that the term "necessary" is interpreted to mean "used" or "useful" in the context of 251(c)(6)). Several courts have also recognized that the word "necessary" may not automatically mean absolutely essential or required. *See U.S. v. Comstock*, 560 U.S. 126, 134 (2010) (interpreting the term as used in the necessary and proper clause of the Constitution) (citing *McCulloch v. Maryland*, 17 U.S. 316, 413-15 (1819)); *Fish v. Kobach*, 840 F.3d 710, 734 (10th Cir. 2016) (interpreting the term as used in the National Voter Registration Act); *Nat. Res. Def. Council v. Thomas*, 838 F.2d 1224, 1236 (D.C. Cir. 1988) (interpreting the term as used in the Clean Air Act); *FTC v. Rockefeller*, 591 F.2d 182, 188 (2d Cir. 1979) (interpreting the term as used in the Federal Trade Commission Act). However, the Commission in the *New England Payphone Order* and *Classic Telephone*, relying in part on congressional guidance, established that it construes "necessary" in section 253(b) as meaning essential.

[501] 47 U.S.C. § 253(c).

[502] We do not take up in this Declaratory Ruling the question of the circumstances in which the imposition of fees may violate section 253(a).

[503] LMC Wireline NPRM Comments at 8–9; WSCC Wireline NPRM Comments at 20; City of NorfolkWireline NPRM Comments at 2; LACT Wireline & Wireless NPRM Reply at 51. *Cf.* IML Wireless NPRM Comments at 3-4 (arguing that municipalities have a public duty to regulate the right-of-way).

[504] *TCI Cablevision of Oakland County, Inc.; Petition for Declaratory Ruling, Preemption and Other Relief Pursuant to 47 U.S.C.* §§ 541, 544(e), and 253, Memorandum Opinion and Order, 12 FCC Rcd 21396, 21441, para. 103 (1997) (*TCI Cablevision of Oakland County*).

[505] *TCI Cablevision of Oakland County*, 12 FCC Rcd at 21441, para. 103. The Ninth Circuit determined that the following activities were beyond the management of rights-of-way under section 253(c): regulations requiring applicants to submit proof of financial, technical, and legal qualifications; ordinances imposing requirements or other controls over matters not directly related to management of rights-of-way; franchise agreements that contain conditions unrelated to the management of rights-of-way; ordinance requirements that companies provide free and excess capacity for the use of the locality; and ordinances that grant the locality unfettered discretion to insist on unspecified franchise terms and to grant, deny, or revoke a franchise based on unnamed factors. *See City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1178-79 (9th Cir. 2001), *vacated on other grounds Sprint Telephony*, 543 F.3d at 571.

issues at all, moratoria bar providers from obtaining approval to access the right-of-way.[506] Hence, we fail to see how section 253(c) could save a moratorium from preemption.

3. Authority to Act

151. We issue this authoritative interpretation of section 253 pursuant to our broad authority to interpret key provisions of the Communications Act.[507] We also have authority under the Administrative Procedure Act (APA) and our rules to issue a declaratory ruling to terminate a controversy or remove uncertainty on our own motion.[508] In this instance, we find issuing a declaratory ruling on our own motion is necessary to remove what the wireline and wireless infrastructure records reveal are substantial uncertainty and significant legal controversies caused by the state and local imposition of moratoria.[509]

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[506] *See Minnesota Preemption Order*, 14 FCC Rcd at 12728-29 (while section 253(c) protects state and local governments' authority to issue construction permits regulating how and when road construction may be conducted does not mean that it protects a state or local government's refusal to issue construction permits to most entities); *see also* AT&T Wireline NPRM Comments at 74 (arguing that moratoria "fall outside the § 253(c) savings clause that allows local governments 'to manage the public rights of way': that authority must be limited to *reasonable* regulations to avoid permitting evasion of the basic purpose of the provision").

[507] *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984) (holding that courts must grant considerable weight to an agency's reasonable interpretation of a statute it is charged with administering where the statute is ambiguous); *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 296 (2013) (stating that statutory ambiguities will be resolved, within the bounds of reasonable interpretation, by the agency that administers the statute); *id.* at 307 (holding that "Congress has unambiguously vested the FCC with general authority to administer the Communications Act through rulemaking and adjudication"); *see also Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980-84 (2005) (*NCTA v. Brand X*) (holding that the agency's interpretation of the terms "telecommunications service" and "offer" is entitled to *Chevron* deference and is a reasonable construction of the Act); *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 396 (1999) (holding that the Commission's interpretation of the interconnection requirement in 47 U.S.C. § 252(i) was reasonable).

[508] 5 U.S.C. § 554(e); 47 CFR § 1.2; *see also City of Arlington, Tex. v. FCC*, 668 F.3d 229, 243 (5th Cir. 2012) (stating that an "agency need not be presented with a specific dispute between two parties in order to use section 554(e)'s declaratory ruling mechanism" and that section 554 "empowers agencies to use declaratory rulings to 'remove uncertainty'" by issuing statutory interpretations in cases involving "concrete and narrow questions of law the resolutions of which would have an immediate and determinable impact on specific factual scenarios"), *aff'd on other grounds*, 569 U.S. 290 (2013); *Chisholm v. FCC*, 538 F.2d 349, 365 (D.C. Cir. 1976) (reiterating that "the choice whether to proceed by rulemaking or adjudication is primarily one for the agency regardless of whether the decision may affect agency policy and have general prospective application") (citing *N.L.R.B. v. Bell Aerospace Co.*, 416 U.S. 267, 291-95 (1974)); *N.C. Utilities Comm'n v. FCC*, 537 F.2d 787, 790 n.2 (4th Cir. 1976), *cert. denied*, 429 U.S. 1027 ("[F]ederal administrative agencies are not restricted to adjudication of matters that are 'cases and controversies' within the meaning of Article III of the Constitution."); *N.Y. State Comm'n on Cable Television v. FCC*, 749 F.2d 804, 815 (D.C. Cir. 1984) (holding that the Commission, in preempting state and local entry regulation of satellite master antenna television, did not abuse its discretion in labeling its action a declaratory ruling and a consolidation of precedent, rather than engaging in a rule-making procedure).

[509] *See* Verizon Wireline NPRM Comments at 33; Conterra Wireline Comments at 30; Frontier Wireline NPRM Comments at 3; Competitive Carriers Association (CCA) Wireline & Wireless NPRM Comments, WC Docket Nos. 17-84 & 17-79, at executive summary (2017); ITTA Wireline NPRM Comments, WC Docket No. 17-84, at 35 (2017); CTIA Wireline & Wireless NPRM Comments at 3; WIA Wireline & Wireless NPRM Reply Comments at executive summary, 17; WISPA Wireline NPRM Comments at 5; Crown Castle Wireline NPRM Reply Comments at iii-iv; Letter from Joshua S. Turner, Counsel to Crown Castle, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 4 (filed Nov. 10, 2017); Quintillion Networks Wireline & Wireless NPRM Reply, WC Docket Nos. 17-84 & 17-79, at 7; P.R. Telephone Company, Inc. Wireline NPRM Reply, WC Docket No. 17-84, at 16; Lightower Wireline NPRM Comments at 18; Letter from Scott K. Bergmann, VP, Regulatory Aff., CTIA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 12 (filed Sept. 8, 2017); *see also* AT&T Wireless NPRM Comments, WC Docket No. 17-79, at 13-14 (2017); Conterra Wireless NPRM Comments at 28; CTIA Wireline & Wireless NPRM Comments at 23-24; Crown Castle Wireless NPRM Comments at 32; Mobile Future

152. We exercise that authority in this *Declaratory Ruling* to make clear that express and *de facto* moratoria violate section 253(a) as legal requirements that "prohibit or have the effect of prohibiting" the provision of telecommunications service.[510] We further find the exceptions set forth in sections 253(b) and (c) to be generally inapplicable to express and *de facto* moratoria.

153. We disagree with those commenters that argue that section 253(d) precludes the Commission from interpreting the applicability of section 253(a) to certain kinds of state and local laws or policies.[511] Nothing in section 253 purports to limit the exercise of our general interpretive authority. There is no dispute that section 253(d) provides an express mechanism for the Commission to preempt specific state or local legal requirements.[512] However, Congress' inclusion of this express mechanism to consider whether specific state and local requirements are preempted, does not limit our ability, pursuant to sections 303, 201(b), and other sections of the Act,[513] to define and provide an authoritative interpretation as to what constitutes a violation of section 253(a) and what qualifies for the section 253(b) or (c) exceptions.

154. Because we interpret section 253(a) and do not specifically preempt any state or local law, the Supreme Court's holding in *City of Rancho Palos Verdes v. Abrams* that "the express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others,"[514] is not applicable here. In issuing this Declaratory Ruling we are not exercising our authority to enforce a substantive rule; rather, we are interpreting the scope of the substantive prohibition set forth in section 253(a).

155. Moreover, most courts that have considered the matter have *not* read section 253(d) as the exclusive enforcement mechanism for pursuing a claim that a state or local legal requirement violates section 253(a).[515] Some Circuit courts have held that section 253 includes an implied private cause of

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Wireless NPRM Comments at 9; Mobilitie Wireless NPRM Comments at 12; NCTA Wireless NPRM Comments, WC Docket No. 17-79, at 29 (2017); R Street Wireless NPRM Comments, WC Docket No. 17-79, at 5 (2017); Samsung Wireless NPRM Comments at 7; T-Mobile Wireless NPRM Comments, WC Docket No. 17-79, at 36-37 (2017); Verizon Wireless NPRM Comments, WC Docket No. 17-79, at 33 (2017); WIA Wireless NPRM Comments at 55.

[510] 47 U.S.C. § 253(a).

[511] *See, e.g.*, Public Knowledge Wireline NPRM Comments at 17-18; City of N.Y. Wireline NPRM Comments, WC Docket No. 17-84, at 1-2 (2017); Smart Communities Wireline NPRM Comments, WC Docket No. 17-84, at 10-11 (2017) (Smart Communities Wireline NPRM Comments); City of Alexandria et al. (Virginia Joint Commenters) Wireline NPRM Comments, WC Docket No. 17-84, at 42-43 (2017). *But see* Conterra Wireline & Wireless NPRM Comments at 15-16 ("Section 253(d) is drafted broadly and provides the Commission ample latitude to elect the best procedure for utilizing its preemption power. . . . At a minimum, reviewing courts must afford the Commission broad deference in construing the ambiguous provisions in Section 253.").

[512] *See* 47 U.S.C. § 253(d). Section 253(d) expressly grants the Commission preemption authority. As such, we disagree with EEI's view that the Commission lacks the authority to preempt state and local laws such as moratoria because Congress left such decisions to the states. EEI Wireline NPRM Comments at 4.

[513] *See Wireless Infrastructure NPRM*, 32 FCC Rcd at 3336, para. 15 & nn. 28-30.

[514] *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 121 (2005) (quoting *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001)).

[515] *See, e.g.*, *P.R. Tel. Co*., 450 F.3d at 16; *N.J. Payphone Ass'n*, 299 F.3d at 241-42; *Qwest Corp. v. City of Santa Fe, N.M.*, 380 F.3d 1258, 1266 (10th Cir. 2004) (*Qwest Corp. v. City of Santa Fe*); *BellSouth Telecomm., Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1191 (11th Cir. 2001); *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 624 (6th Cir. 2000).

action to seek relief.[516] Other Circuit courts have entertained preemption claims under the Supremacy Clause of the United States Constitution, which is a legal avenue for preemption regardless of whether a statute authorizes a private cause of action.[517] As the First Circuit has explained, "under the Supremacy Clause, any state or local law that is inconsistent with the requirements of §253(a) will be null and void, unless it falls under one of the safe harbor provisions in §253."[518] Accordingly, courts have concluded that parties may bring section 253(a) preemption challenges directly in federal court, regardless of the availability of the Commission as a forum to resolve preemption disputes pursuant to section 253(d).[519] But whatever enforcement mechanisms may be available to preempt specific state and local requirements, nothing in section 253 prevents us from declaring that a category of state or local laws is inconsistent with section 253(a) because it prohibits or has the effect of prohibiting service.

156. Indeed, in issuing our interpretation of section 253(a) and the scope of the section 253(b) and (c) exceptions, we further the notice objectives that underlie section 253(d), which requires that the Commission provide "notice and an opportunity for public comment" prior to taking any preemptive action.[520] Adopting a general interpretation enhances certainty around frequently arising, factually similar issues. By issuing this Declaratory Ruling, we place states and localities on notice that express and *de facto* moratoria are inconsistent with section 253(a).[521] In so doing, we provide states and localities the opportunity to ensure that their requirements comply with federal law. Therefore, construing section 253(d) as not limiting the Commission's authority to interpret the remainder of section 253 furthers important policy goals as well. Otherwise, the Commission would only have authority to act retrospectively to target individual laws, which would be inefficient, increase uncertainty, and impose additional costs on states and localities both from the sunk costs of enacting subsequently preempted legal requirements and the costs of litigating more section 253(d) preemption proceedings and judicial actions.[522]

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[516] *See BellSouth Telecomm., Inc.*, 252 F.3d at 1191; *TCG Detroit v. City of Dearborn*, 206 F.3d at 624. *But see Spectra Comm. Group., LLC v. City of Cameron*, 806 F.3d 1113, 1119-20 (8th Cir. 2015); *NextG Networks of N.Y., Inc. v. City of N.Y.*, 513 F.3d 49, 53 (2d Cir. 2008); *Sprint Telephony*, 543 F.3d at 580-81; *Sw. Bell Tel., L.P. v. City of Houston*, 529 F.3d 257, 261 (5th Cir. 2008); *Qwest Corp. v. City of Santa Fe*, 380 F.3d at 1266-67.

[517] *See P.R. Tel. Co*., 450 F.3d at 16; *N.J. Payphone Ass'n*, 299 F.3d at 242-43; *Qwest Corp. v. City of Santa Fe*, 380 F.3d at 1266. The Supremacy Clause invalidates state or local laws that "interfere with or are contrary to" federal law. U.S. Const. art. VI, Cl. 2.

[518] *P.R. Tel. Co*., 450 F.3d at 16 (citing U.S. Const. art. VI, Cl. 2. and *Qwest Corp. v. City of Santa Fe*, 380 F.3d at 1269).

[519] *See P.R. Tel. Co.*, 450 F.3d at 16; *N.J. Payphone Ass'n*, 299 F.3d at 242-43; *Qwest Corp. v. City of Santa Fe*, 380 F.3d at 1266.

[520] *See* 47 U.S.C. § 253(d).

[521] The League of Minnesota Cities claims that "[c]ourts continue to uphold moratoria used in limited circumstance as 'interim controls on the use of land that seek to maintain the status quo with respect to land development in an area by either "freezing" existing land uses or by allowing the issuance of . . . permits for only certain land uses that would not be inconsistent with a contemplated zoning plan or zoning change.'" LMC Wireline NPRM Comments at 10 (citing *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Plan. Agency*, 535 U.S. 302 (2002)). While the *Tahoe* case stands for the proposition that moratoria may be permitted under the Fifth Amendment to the U.S. Constitution, the fact that moratoria may be permissible under the Fifth Amendment does not limit our authority to interpret section 253 as prohibiting moratoria that prohibit or have the effect of prohibiting the ability of an entity to provide telecommunication services.

[522] Our decision today is consistent with the Commission's earlier decisions that state and local moratoria do not toll the "shot clocks" for state or municipal review of wireless siting applications pursuant to section 332(c)(7)(B)(ii) of the Act; that these "shot clocks continue to run" regardless of whether state or local governments purport to impose moratoria that suspend the acceptance or processing of siting applications for some period of time; and that

157. We also disagree with assertions that the change in regulatory classification of broadband Internet access service in the *Restoring Internet Freedom Order* affects the validity of this Declaratory Ruling.[523] Consistent with prior Commission decisions, we have authority over infrastructure that can be used for the provision of both telecommunications and other services on a commingled basis.[524] Infrastructure for wireline and wireless telecommunication services frequently is the same infrastructure used for the provision of broadband Internet access service,[525] and our ruling today will promote broadband deployment, in concert with our actions in the *Restoring Internet Freedom Order*.

158. We expect that this Declaratory Ruling, which provides our authoritative interpretation of the scope of section 253(a) as it pertains to state and local moratoria, will have several consequences that will benefit the public. First, we expect states and localities to comply with federal law by repealing existing moratoria, refusing to enforce moratoria that remain on the books, and declining to adopt new moratoria. Second, the interpretation of section 253 in this Declaratory Ruling will apply when conducting subsequent proceedings under section 253(d) to preempt specific legal rules permitted or imposed by specific states or localities. To further effectuate the benefits of issuing this Declaratory Ruling, we direct the Wireline Competition Bureau and/or the Wireless Telecommunications Bureau to act expeditiously on section 253(d) petitions challenging alleged state or local moratoria.[526] Finally, this Declaratory Ruling sets forth the Commission's reasoned interpretation of section 253(a), which will inform judicial resolution of preemption claims brought by providers, states, or localities under the Supremacy Clause of the United States Constitution.

"applicants can challenge moratoria in court when the shot clock expires without State or local government action." *See Wireless Facilities Siting Order*, 29 FCC Rcd at 12971, paras. 265-67; *see also 2009 Wireless Siting Declaratory Ruling*, 24 FCC Rcd at 14016-19, paras. 56-65 (stating that a state or local agency's failure to render a decision within "shot clock" deadlines – *i.e.*, 90 days for an application to deploy collocated antennas or within 150 days for an application to deploy facilities other than collocations – would presumptively constitute a "failure to act" that may be challenged under section 332(c)(7)(B)(v) of the Act).

[523] *See, e.g.*, Public Knowledge Wireline NPRM Comments at 13; Smart Communities Wireline NPRM Comments at 5-6; Smart Communities Wireline & Wireless NPRM Reply Comments at 37-39; Cities of San Antonio, Tex. et al. Wireline & Wireless NPRM Reply Comments at 17.

[524] *See Restoring Internet Freedom*, 33 FCC Rcd at 424-425, para. 188-190 (reaffirming that the Commission retains statutory authority to regulate facilities that provide commingled services where the Commission has statutory authority over one of the services); *Wireless Facilities Siting Order*, 29 FCC Rcd at 12973, para. 270-272 ("[T]o the extent [distributed antenna system] or small-cell facilities, including third-party facilities such as neutral host [distributed antenna system] deployments, are or will be used for the provision of personal wireless services, their siting applications are subject to [section 332(c)(7)]."); *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901, 5924, para. 65 (2007) (applying section 224 to facilities that provide both telecommunications and wireless broadband Internet access service, and applying section 332(c)(7)(B) to facilities providing personal wireless service and wireless broadband Internet access service).

[525] *Restoring Internet Freedom*, 33 FCC Rcd at 423, para. 185 (citing Cisco Systems, Inc. Comments, WC Docket No. 17-108, at 2-3 (July 17, 2017)); Mobilitie, LLC Comments, WC Docket No. 17-108, at 4 (July 17, 2017).

[526] Petitioners must follow the Commission's previously adopted procedural guidelines for section 253(d) petitions. *See* 47 CFR §§ 1.1204(b) Note 4; 1.1206(a) Note 1; and 1.1206(a)(13) Note 2; *Suggested Guidelines for Petitions for Ruling Under Section 253 of the Communications Act*, Public Notice, 13 FCC Rcd 22970 (1998); *Amendment of 47 C.F.R. § 1.1200 et seq. Concerning Ex Parte Presentations in Commission Proceedings*, GC Docket No. 95-21, Memorandum Opinion and Order, 14 FCC Rcd 18831 (1999). The Commission has adopted similar requirements for certain types of petitions pursuant to section 332(c)(7)(B). *See Procedures for Reviewing Requests for Relief From State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934*, WT Docket No. 97-192, Report and Order, 15 FCC Rcd 22821 (2000).

V. PROCEDURAL MATTERS

159. *Congressional Review Act.* The Commission will send a copy of this Third Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking, including a copy of the Final Regulatory Flexibility Certification, in a report to Congress and the Government Accountability Office pursuant to the Congressional Review Act.[527] In addition, the *Report and Order* and this final certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration (SBA) and will be published in the Federal Register.[528]

160. *Final Regulatory Flexibility Analysis.* As required by the Regulatory Flexibility Act of 1980 (RFA),[529] the Commission has prepared a Final Regulatory Flexibility Analysis (FRFA) relating to this *Report and Order*. The FRFA is contained in Appendix B.

161. *Paperwork Reduction Act of 1995 Analysis.* The *Report and Order* contains modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. OMB, the general public, and other federal agencies are invited to comment on the new or modified information collection requirements contained in this proceeding. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4), we seek specific comment on how the Commission might further reduce the information collection burden for small business concerns with fewer than 25 employees.[530]

162. In this document, we have assessed the effects of reforming our pole attachment regulations and find that doing so will serve the public interest and is unlikely to directly affect businesses with fewer than 25 employees.

VI. ORDERING CLAUSES

163. Accordingly, IT IS ORDERED that, pursuant to sections 1-4, 201, 224, 253, 303(r), and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 201, 224, 253, 303(r), and 332, and section 5(e) of the Administrative Procedure Act, 5 U.S.C. § 554(e), this Third Report and Order and Declaratory Ruling IS ADOPTED.

164. IT IS FURTHER ORDERED that part 1 of the Commission's rules IS AMENDED as set forth in Appendix A, and that any such rule amendments that contain new or modified information collection requirements that require approval by the Office of Management and Budget under the Paperwork Reduction Act SHALL BE EFFECTIVE after announcement in the Federal Register of Office of Management and Budget approval of the rules, and on the effective date announced therein.

165. IT IS FURTHER ORDERED that this *Report and Order* SHALL BE effective 30 days after publication in the Federal Register, except for 47 CFR §§ 1.1412(c)(1), 1.1412(c)(3), 1.1412(d), 1.1412(d)(3), 1.1412(e)(3), 1.1412(h)(2)-(3), 1.1412(i)(1)-(2), 1.1412(j)(1)-(5), 1.1413(a)-(b), 1.1414(b), 1.1416(b), which contain information collection requirements that have not been approved by OMB. The Federal Communications Commission will publish a document in the Federal Register announcing the effective date of these provisions.

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[527] *See* 5 U.S.C. § 801(a)(1)(A).

[528] *See* 5 U.S.C. § 605(b).

[529] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996). The SBREFA was enacted as Title II of the Contract with America Advancement Act of 1996 (CWAAA).

[530] *See Wireline Infrastructure Notice*, 32 FCC Rcd at 3306, para. 127.

166. IT IS FURTHER ORDERED that the *Declaratory Ruling* and the obligations set forth therein ARE EFFECTIVE upon release of this Order.

167. IT IS FURTHER ORDERED, pursuant to section 253(d) of the Communications Act of 1934, as amended, that the Wireline Competition Bureau and the Wireless Telecommunications Bureaus ARE DIRECTED to review specific petitions and, as necessary, preempt state or local statutes, regulations, or other legal requirements that materially limit or inhibit the rebuilding of telecommunications infrastructure in the wake of a disaster or constitute express moratoria or *de facto* moratoria.

168. IT IS FURTHER ORDERED that the Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Report and Order* to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

169. IT IS FURTHER ORDERED that the Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis and this *Declaratory Ruling*, to the Chief Counsel for Advocacy of the SBA.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Final Rules

For the reasons set forth above, Part 1 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 1 – PRACTICE AND PROCEDURE

1. The authority for part 1 is amended to read as follows:

AUTHORITY: 47 U.S.C. 151, 154(i) and (j), 155, 157, 160, 201, 224, 225, 227, 303, 309, 310, 332, 1403, 1404, 1451, 1452, and 1455.

SUBPART J – POLE ATTACHMENT COMPLAINT PROCEDURES

Amend section 1.1402 by adding paragraphs (o), (p), (q), and (r) to read as follows:

§ 1.1402 Definitions.

* * *

(o) The term *make-ready* means the modification or replacement of a utility pole, or of the lines or equipment on the utility pole, to accommodate additional facilities on the utility pole.

(p) The term *complex make-ready* means transfers and work within the communications space that would be reasonably likely to cause a service outage(s) or facility damage, including work such as splicing of any communication attachment or relocation of existing wireless attachments. Any and all wireless activities, including those involving mobile, fixed, and point-to-point wireless communications and wireless internet service providers, are to be considered complex.

(q) The term *simple make-ready* means make-ready where existing attachments in the communications space of a pole could be transferred without any reasonable expectation of a service outage or facility damage and does not require splicing of any existing communication attachment or relocation of an existing wireless attachment.

(r) The term *communications space* means the lower usable space on a utility pole, which typically is reserved for low-voltage communications equipment.

3. Amend section 1.1403 by revising paragraph (c) to read as follows:

§ 1.1403 Duty to provide access; modifications; notice of removal, increase or modification; petition for temporary stay; and cable operator notice.

* * *

(c) A utility shall provide a cable television system or telecommunications carrier no less than 60 days written notice prior to:

* * *

(3) Any modification of facilities by the utility other than make-ready, routine maintenance, or modification in response to emergencies.

* * * * *

3. Amend section 1.1412 by revising paragraphs (a), (c), (d), (e), (f), (g), (h), and (i) and adding paragraph (j) to read as follows:

§ 1.1412 Timeline for access to utility poles.

(a) *Definitions*.

(1) The term "attachment" means any attachment by a cable television system or provider of telecommunications service to a pole owned or controlled by a utility.

(2) The term "new attacher" means a cable television system or telecommunications carrier requesting to attach new or upgraded facilities to a pole owned or controlled by a utility.

(3) The term "existing attacher" means any entity with equipment on a utility pole.

* * *

(c) *Application Review and Survey*.

(1) *Application Completeness*. A utility shall review a new attacher's attachment application for completeness before reviewing the application on its merits. A new attacher's attachment application is considered complete if it provides the utility with the information necessary under its procedures, as specified in a master service agreement or in requirements that are available in writing publicly at the time of submission of the application, to begin to survey the affected poles.

(i) A utility has 10 business days after receipt of a new attacher's attachment application in which to determine whether the application is complete and notify the attacher of that decision. If the utility does not respond within 10 business days after receipt of the application, or if the utility rejects the application as incomplete but fails to specify any reasons in the application, then the application is deemed complete. If the utility timely notifies the new attacher that its attachment application is not complete, then it must specify all reasons for finding it incomplete.

(ii) Any resubmitted application need only address the utility's reasons for finding the application incomplete and shall be deemed complete within 5 business days after its resubmission, unless the utility specifies to the new attacher which reasons were not addressed and how the resubmitted application did not sufficiently address the reasons. The new attacher may follow the resubmission procedure in this paragraph as many times as it chooses so long as in each case it makes a bona fide attempt to correct the reasons identified by the utility, and in each case the deadline set forth in this paragraph shall apply to the utility's review.

(2) *Application Review on the Merits*. A utility shall respond as described in §1.1403(b) to a new attacher within 45 days of receipt of a complete application to attach facilities to its utility poles (or within 60 days in the case of larger orders as described in paragraph (g) of this section).

(3) *Survey*.

(i) A utility shall complete a survey of poles for which access has been requested within 45 days of receipt of a complete application to attach facilities to its utility poles (or within 60 days in the case of larger orders as described in paragraph (g) of this section).

(ii) A utility shall permit the new attacher and any existing attachers on the affected poles to be present for any field inspection conducted as part of the utility's survey. A utility shall use commercially reasonable efforts to provide the affected attachers with advance notice of not less than 3 business days of any field inspection as part of the survey and shall provide the date, time, and location of the surveys, and name of the contractor performing the surveys.

(iii) A utility can elect to satisfy its survey obligations in this paragraph by notifying affected attachers of its intent to use a survey conducted by a new attacher pursuant to § 1.1412(j)(3) and by providing a copy of the survey to the affected attachers within the time period set forth in paragraph (c)(3)(i) of this section.

(d) *Estimate*. Where a new attacher's request for access is not denied, a utility shall present to a new attacher a detailed, itemized pole-by-pole estimate of charges to perform all necessary make-ready within 14 days of providing the response required by §1.1412(c), or in the case where a new attacher has performed a survey, within 14 days of receipt by the utility of such survey. Where the utility determines that make-ready charges will not vary from pole-to-pole, the utility may aggregate individual charges rather than present a pole-by-pole estimate for those charges. The utility shall provide documentation that is sufficient to determine the basis of all estimated charges, including any projected material, labor, and other related costs that form the basis of its estimate.

* * *

(2) A new attacher may accept a valid estimate and make payment any time after receipt of an estimate, except it may not accept after the estimate is withdrawn.

(3) *Final invoice.* After the utility completes make-ready, it shall provide the new attacher with a detailed final invoice of the actual make-ready charges incurred on a pole-by-pole basis to accommodate the new attacher's attachment. Where the utility determines that make-ready charges did not vary from pole-to-pole, the utility may aggregate individual charges rather than present a pole-by-pole invoice for those charges.

(e) * * *

(1) For attachments in the communications space, the notice shall:

(i) Specify where and what make-ready will be performed.

(ii) Set a date for completion of make-ready in the communications space that is no later than 30 days after notification is sent (or up to 75 days in the case of larger orders as described in paragraph (g) of this section).

(iii) State that any entity with an existing attachment may modify the attachment consistent with the specified make-ready before the date set for completion.

(iv) State that if make-ready is not completed by the completion date set by the utility in paragraph (e)(1)(ii) in this section, the new attacher may complete the specified make-ready.

(v) State the name, telephone number, and e-mail address of a person to contact for more information about the make-ready procedure.

(2) For attachments above the communications space, the notice shall:

(i) Specify where and what make-ready will be performed.

(ii) Set a date for completion of make-ready that is no later than 60 days after notification is sent (or 105 days in the case of larger orders, as described in paragraph (g) of this section).

(iii) State that any entity with an existing attachment may modify the attachment consistent with the specified make-ready before the date set for completion.

(iv) State that the utility may assert its right to 15 additional days to complete make-ready.

(v) State that if make-ready is not completed by the completion date set by the utility in paragraph (e)(2)(ii) in this section (or, if the utility has asserted its 15-day right of control, 15 days later), the new attacher may complete the specified make-ready.

(vi) State the name, telephone number, and e-mail address of a person to contact for more information about the make-ready procedure.

(3) Once a utility provides the notices described in this section, it then must provide the new attacher with a copy of the notices and the existing attachers' contact information and address where the utility sent the notices. The new attacher shall be responsible for coordinating with existing attachers to encourage their completion of make-ready by the dates set forth by the utility in paragraph (e)(1)(ii) for communications space attachments or paragraph (e)(2)(ii) for attachments above the communications space.

(f) A utility shall complete its make-ready in the communications space by the same dates set for existing attachers in paragraph (e)(1)(ii) or its make-ready above the communications space by the same dates for existing attachers in paragraph (e)(2)(ii) of this section (or if the utility has asserted its 15-day right of control, 15 days later).

(g) * * *

(1) A utility shall apply the timeline described in paragraphs (c) through (e) of this section to all requests for attachment up to the lesser of 300 poles or 0.5 percent of the utility's poles in a state.

* * *

(4) A utility shall negotiate in good faith the timing of all requests for attachment larger than the lesser of 3000 poles or 5 percent of the utility's poles in a state.

(5) A utility may treat multiple requests from a single new attacher as one request when the requests are filed within 30 days of one another.

(h) *Deviation from the time limits specified in this section:*

(1) A utility may deviate from the time limits specified in this section before offering an estimate of charges if the parties have no agreement specifying the rates, terms, and conditions of attachment.

(2) A utility may deviate from the time limits specified in this section during performance of make-ready for good and sufficient cause that renders it infeasible for the utility to complete make-ready within the time limits specified in this section. A utility that so deviates shall immediately notify, in writing, the new attacher and affected existing attachers and shall include a detailed explanation of the reason for the deviation and a new completion date. The utility shall deviate from the time limits specified in this section

for a period no longer than necessary and shall resume make-ready without discrimination when it returns to routine operations.

(3) An existing attacher may deviate from the time limits specified in this section during performance of complex make-ready for reasons of safety or service interruption that renders it infeasible for the existing attacher to complete complex make-ready within the time limits specified in this section. An existing attacher that so deviates shall immediately notify, in writing, the new attacher and other affected existing attachers and shall include a detailed explanation of the reason for the deviation and a new completion date, which in no event shall extend beyond 60 days from the date the notice described in paragraph (e)(1) of this section is sent by the utility (or up to 105 days in the case of larger orders described in paragraph (g) of this section). The existing attacher shall deviate from the time limits specified in this section for a period no longer than necessary to complete make-ready.

(i) *Self-help remedy*.

(1) *Surveys*. If a utility fails to respond as specified in paragraph (c) of this section, then a new attacher may, as specified in §1.1413, hire a contractor to complete a survey.

(i) A new attacher shall permit the affected utility and existing attachers to be present for any field inspection conducted as part of the new attacher's survey.

(ii) A new attacher shall use commercially reasonable efforts to provide the affected utility and existing attachers with advance notice of not less than 3 business days of a field inspection as part of any survey it conducts. The notice shall include the date and time of the survey, a description of the work involved, and the name of the contractor being used by the new attacher.

(2) *Make-ready*. If make-ready is not complete by the date specified in paragraph (e) of this section, then a new attacher may, as specified in §1.1413, hire a contractor to complete make-ready.

(i) A new attacher shall permit the affected utility and existing attachers to be present for any make-ready. A new attacher shall use commercially reasonable efforts to provide the affected utility and existing attachers with advance notice of not less than 5 days of the impending make-ready. The notice shall include the date and time of the make-ready, a description of the work involved, and the name of the contractor being used by the new attacher.

(ii) A new attacher shall notify the affected utility and existing attachers within 15 days after completion of make-ready on a particular pole. The notice shall provide the affected utility and existing attachers 30 days from receipt in which to inspect the make-ready. The affected utility and existing attachers have 14 days after completion of their inspection to notify the new attacher of any damage caused by make-ready conducted by the new attacher on their equipment. If the utility or existing attachers discover damage caused by make-ready conducted by the new attacher on equipment belonging to the utility or an existing attacher, then the utility or existing attacher may either (A) complete any necessary remedial work and bill the new attacher for the reasonable costs related to fix the damage, or (B) require the new attacher to fix the damage at its expense within 14 days following notice from the utility or existing attacher.

(j) One-*touch make-ready option*. For attachments involving simple make-ready, new attachers may elect to proceed with the process described in this paragraph in lieu of the attachment process described in paragraphs (c)-(f) and (i) of this section.

(1) Attachment Application.

(i) A new attacher electing the one-touch make-ready process must elect the one-touch make-ready process in writing in its attachment application and must identify the simple make-ready that it will perform. It is the responsibility of the new attacher to ensure that its contractor determines whether the make-ready requested in an attachment application is simple.

(ii) The utility shall review the new attacher's attachment application for completeness before reviewing the application on its merits. An attachment application is considered complete if it provides the utility with the information necessary under its procedures, as specified in a master service agreement or in publicly-released requirements at the time of submission of the application, to make an informed decision on the application.

(A) A utility has 10 business days after receipt of a new attacher's attachment application in which to determine whether the application is complete and notify the attacher of that decision. If the utility does not respond within 10 business days after receipt of the application, or if the utility rejects the application as incomplete but fails to specify any reasons in the application, then the application is deemed complete.

(B) If the utility timely notifies the new attacher that its attachment application is not complete, then the utility must specify all reasons for finding it incomplete. Any resubmitted application need only address the utility's reasons for finding the application incomplete and shall be deemed complete within 5 business days after its resubmission, unless the utility specifies to the new attacher which reasons were not addressed and how the resubmitted application did not sufficiently address the reasons. The applicant may follow the resubmission procedure in this paragraph as many times as it chooses so long as in each case it makes a bona fide attempt to correct the reasons identified by the utility, and in each case the deadline set forth in this paragraph shall apply to the utility's review.

(2) *Application Review on the Merits*. The utility shall review on the merits a complete application requesting one-touch make-ready and respond to the new attacher either granting or denying an application within 15 days of the utility's receipt of a complete application (or within 30 days in the case of larger orders as described in paragraph (g) of this section).

(i) If the utility denies the application on its merits, then its decision shall be specific, shall include all relevant evidence and information supporting its decision, and shall explain how such evidence and information relate to a denial of access for reasons of lack of capacity, safety, reliability, or engineering standards.

(ii) Within the 15-day application review period (or within 30 days in the case of larger orders as described in paragraph (g) of this section), an electric utility may object to the designation by the new attacher's contractor that certain make-ready is simple. If the electric utility objects to the contractor's determination that make-ready is simple, then it is deemed complex. The electric utility's objection is final and determinative so long as it is specific and in writing, includes all relevant evidence and information supporting its decision, made in good faith, and explains how such evidence and information relate to a determination that the make-ready is not simple.

(3) *Surveys*. The new attacher is responsible for all surveys required as part of the one-touch make-ready process and shall use a contractor as specified in §1.1413(b).

(i) The new attacher shall permit the utility and any existing attachers on the affected poles to be present for any field inspection conducted as part of the new attacher's surveys. The new attacher shall use commercially reasonable efforts to provide the utility and affected existing attachers with advance notice of not less than 3 business days of a field inspection as part of any survey and shall provide the

date, time, and location of the surveys, and name of the contractor performing the surveys.

(4) *Make-ready*. If the new attacher's attachment application is approved and if it has provided 15 days prior written notice of the make-ready to the affected utility and existing attachers, the new attacher may proceed with make-ready using a contractor in the manner specified for simple make-ready in §1.1413(b).

(i) The prior written notice shall include the date and time of the make-ready, a description of the work involved, the name of the contractor being used by the new attacher, and provide the affected utility and existing attachers a reasonable opportunity to be present for any make-ready.

(ii) The new attacher shall notify an affected utility or existing attacher immediately if make-ready damages the equipment of a utility or an existing attacher or causes an outage that is reasonably likely to interrupt the service of a utility or existing attacher. Upon receiving notice from the new attacher, the utility or existing attacher may either (A) complete any necessary remedial work and bill the new attacher for the reasonable costs related to fix the damage, or (B) require the new attacher to fix the damage at its expense within 14 days following notice from the utility or existing attacher.

(5) *Post-make-ready timeline*. A new attacher shall notify the affected utility and existing attachers within 15 days after completion of make-ready on a particular pole. The notice shall provide the affected utility and existing attachers 30 days from receipt in which to inspect the make-ready. The affected utility and existing attachers have 14 days after completion of their inspection to notify the new attacher of any damage caused by make-ready conducted by the new attacher on their equipment. If the utility or existing attacher notifies the new attacher of such damage, then the utility or existing attacher can either complete any necessary remedial work and bill the new attacher for the reasonable costs related to fix the damage or require the new attacher to fix the damage at its expense within 14 days following notice from the utility or existing attacher.

7. Amend section 1.1413 by revising paragraphs (a), (b), and (c) to read as follows:

§ 1.1413 Contractors for surveys and make-ready.

(a) *Contractors for self-help complex and above the communications space.make-ready.* A utility shall make available and keep up-to-date a reasonably sufficient list of contractors it authorizes to perform self-help surveys and make-ready that is complex and self-help surveys and make-ready that is above the communications space on its poles. The new attacher must use a contractor from this list to perform self-help work that is complex or above the communications space. New and existing attachers may request the addition to the list of any contractor that meets the minimum qualifications in §§1.1413(c)(1)-(5) and the utility may not unreasonably withhold its consent.

(b) *Contractors for simple work.* A utility may, but is not required to, keep up-to-date a reasonably sufficient list of contractors it authorizes to perform surveys and simple make-ready. If a utility provides such a list, and requires that a new attacher use a contractor from the list to perform surveys or simple make-ready, then the new attacher must choose a contractor from the list to perform the work. New and existing attachers may request the addition to the list of any contractor that meets the minimum qualifications in §§1.1413(c)(1)-(5) and the utility may not unreasonably withhold its consent.

(i) If the utility does not provide a list of approved contractors for surveys or simple make-ready or no utility-approved contractor is available within a reasonable time period, then the new attacher may choose its own qualified contractor that meets the requirements in paragraph (c) of this section. When choosing a contractor that is not on a utility-provided list, the new attacher must certify to the utility that its

contractor meets the minimum qualifications described in paragraph (c) of this section when providing notices required by §§1.1412(i)(1)(ii), 1.1412(i)(2)(i), 1.1412(j)(3)(i), and 1.1412(j)(4).

(ii) The utility may disqualify any contractor chosen by the new attacher that is not on a utility-provided list, but such disqualification must be based on safety or reliability concerns related to the contractor's failure to meet any of the minimum qualifications described in paragraph (c) of this section or to meet the utility's publicly available and commercially reasonable safety or reliability standards. The utility must provide notice of its contractor objection within the notice periods provided by the new attacher in §§1.1412(i)(1)(ii), 1.1412(i)(2)(i), 1.1412(j)(3)(i), and 1.1412(j)(4) and in its objection must identify at least one available qualified contractor.

(c) *Contractor minimum qualification requirements*. Utilities must ensure that contractors on a utility-provided list, and new attachers must ensure that contractors they select pursuant to paragraph (b)(i) of this section, meet the following minimum requirements:

(1) The contractor has agreed to follow published safety and operational guidelines of the utility, if available, but if unavailable, the contractor shall agree to follow National Electrical Safety Code (NESC) guidelines;

(2) The contractor has acknowledged that it knows how to read and follow licensed-engineered pole designs for make-ready, if required by the utility;

(3) The contractor has agreed to follow all local, state, and federal laws and regulations including, but not limited to, the rules regarding Qualified and Competent Persons under the requirements of the Occupational and Safety Health Administration (OSHA) rules;

(4) The contractor has agreed to meet or exceed any uniformly applied and reasonable safety and reliability thresholds set by the utility, if made available; and

(5) The contractor is adequately insured or will establish an adequate performance bond for the make-ready it will perform.

* * * * *

8. Amend section 1.1414 by revising to read as follows:

§ 1.1414 Complaints by incumbent local exchange carriers.

(a) A complaint by an incumbent local exchange carrier (as defined in 47 U.S.C. 251(h)) or an association of incumbent local exchange carriers alleging that it has been denied access to a pole, duct, conduit, or right-of-way owned or controlled by a local exchange carrier or that a utility's rate, term, or condition for a pole attachment is not just and reasonable shall follow the same complaint procedures specified for other pole attachment complaints in this part.

(b) In complaint proceedings challenging utility pole attachment rates, terms, and conditions for pole attachment contracts entered into after [INSERT EFFECTIVE DATE OF THIS SECTION], there is a presumption that an incumbent local exchange carrier (or an association of incumbent local exchange carriers) is similarly situated to an attacher that is a telecommunications carrier (as defined in 47 U.S.C. 251(a)(5)) or a cable television system providing telecommunications services for purposes of obtaining comparable rates, terms, or conditions. In complaint proceedings challenging pole attachment rates, there is a presumption that incumbent local exchange carriers (or an association of incumbent local exchange carriers) may be charged no higher than the rate determined in accordance with § 1.1407(e)(2). A utility can rebut either or both of the two presumptions in this paragraph (b) with clear and convincing evidence that the incumbent local exchange carrier receives benefits under its pole attachment agreement with a

utility that materially advantages the incumbent local exchange carrier over other telecommunications carriers or cable television systems providing telecommunications services on the same poles.

9. Add section 1.1416 to read as follows:

§ 1.1416 Overlashing.

(a) *Prior approval.* A utility shall not require prior approval for an existing attacher that overlashes its existing wires on a pole.

(b) *Advance notice.* A utility may require no more than 15 days' advance notice of planned overlashing. If a utility requires advance notice for overlashing, then the utility must provide existing attachers with advance written notice of the notice requirement or include the notice requirement in the attachment agreement with the existing attacher. A utility may deny access to the pole for overlashing within the 15-day advance notice period so long as the denial is accompanied by specific documentation demonstrating that the overlash creates a capacity, safety, reliability, or engineering issue.

(c) *Overlashers' Responsibility.* An existing attacher that engages in overlashing is responsible for its own equipment and shall ensure that it complies with reasonable safety, reliability, and engineering practices. If damage to a pole or other existing attachment results from overlashing, then the existing attacher is responsible at its expense for any necessary repairs.

APPENDIX B

Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[1] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated into the Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment (*Wireline Infrastructure Notice*) and into the Report and Order and Declaratory Ruling, and Further Notice of Proposed Rulemaking (*Wireline Infrastructure Order*) for the wireline infrastructure proceeding.[2] The Commission sought written public comment on the proposals in the *Wireline Infrastructure Notice* and in the *Wireline Infrastructure Order*, including comment on the IRFA. The Commission received no comments on the IRFA. Because the Commission amends its rules in this Order, the Commission has included this Final Regulatory Flexibility Analysis (FRFA). This present FRFA conforms to the RFA.[3]

A. Need for, and Objectives of, the Rules

2. In the *Wireline Infrastructure Notice*, the Commission continued its efforts to close the digital divide by removing barriers to broadband infrastructure investment. To this end, the Commission proposed numerous regulatory reforms to existing rules and procedures regarding pole attachments.[4]

3. On November 16, 2017, the Commission adopted the *Wireline Infrastructure Order*, which enacted reforms to pole attachment rules that: (1) bar utility pole owners from charging for certain capital costs that already have been recovered from make-ready fees;[5] (2) set a 180-day shot clock for resolution of pole access complaints;[6] and (3) grant incumbent local exchange carriers (LECs) reciprocal access to infrastructure controlled by other LECs.[7] In addition, the Commission adopted reforms to speed the replacement of copper with fiber and Internet Protocol (OP) technologies.[8] In the *Further Notice of Proposed Rulemaking*, the Commission sought comment on (1) additional steps to streamline the process for retiring legacy services and network change disclosure and discontinuance processes;[9] (2) the treatment of overlashing by utilities;[10] and (3) what actions the Commission can take to facilitate the rebuilding and repairing of broadband infrastructure after natural disasters.[11]

4. Concurrently, the Commission's Broadband Deployment Advisory Committee (BDAC), a federal advisory committee chartered in 2017, formed five active working groups, as well as an ad hoc

[1] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996).

[2] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, 32 FCC Rcd 3266 (2017) (*Wireline Infrastructure Notice*).

[3] *See* 5 U.S.C. § 604.

[4] *See Wireline Infrastructure Notice*, 32 FCC Rcd at 3266.

[5] *See Wireline Infrastructure* Order, 32 FCC Rcd at 11131-32, paras. 7-8.

[6] *See id*. at 11132-34, paras. 9-14.

[7] *See id*. at 11134-37, paras. 51-21.

[8] *See id*. at 11137-87, paras. 22-155.

[9] *See id*. at 11187-94, paras. 156-159, 163-177.

[10] *See id*. at 11188-89, paras. 160-62.

[11] *See id*. at 11194, paras. 178-79.

committee on rates and fees, to address the issues raised in the *Wireline Infrastructure Notice*.[12] During five public meetings, BDAC adopted recommendations related to competitive access to broadband infrastructure.[13] These recommendations informed the Commission's policy decisions on pole attachment reform.

5. Pursuant to the objectives set forth in the *Wireline Infrastructure Notice*, this *Report and Order* and *Declaratory Ruling* (*Order*) adopts changes to Commission rules regarding pole attachments. The Order adopts changes to the current pole attachment rules that: (1) allow new attachers to perform all work, not reasonably likely to cause a service outage or facility damage, to prepare poles for new wireline attachments (make-ready work) in the communications space of a pole;[14] (2) adopt a substantially shortened timeline for such application review and make-ready work (OTMR pole attachment timeline);[15] (3) require new attachers to use a utility-approved contractor if a utility makes available a list of qualified contractors authorized to perform simple make ready work in the communications space of its pole and requires new attachers to choose contractors from this list to perform simple make-ready work;[16] (4) create a more efficient pole attachment timeline;[17] (5) enhance the new attacher's existing self-help remedy for surveys and make-ready work by extending it to all attachments (both wireless and wireline) above the communications space of a pole;[18] (6) require new attachers to use utility-approved contractors when utilities and existing attachers miss their deadlines and the new attacher elects self-help to complete surveys and make-ready work that is complex or that involves work above the communications space on a pole;[19] (7) require utilities to provide new attachers with detailed, itemized estimates and final invoices for all required make-ready work;[20] (8) codify the Commission's existing precedent that prohibits a pre-approval requirement for overlashing, and adopt a rule that allows utilities to establish reasonable advance notice requirements of up to 15 days for overlashing and holds overlashers responsible for ensuring that their practices and equipment do not cause safety or engineering issues;[21] and (9) establish a rebuttable presumption that, for newly-negotiated pole attachment agreements between LECs and utilities, incumbent LECs will receive comparable pole attachment rates, terms, and conditions as similarly-situated telecommunications carriers or cable television system providing telecommunications services.[22] The modifications to our pole attachment rules will facilitate deployment to and reduce barriers to access infrastructure by reducing costs and delays typically associated with the pole attachment process. Ultimately, these pole attachment reforms will contribute to increased broadband deployment, decreased costs for consumers, and increased service speeds.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

6. The Commission did not receive comments addressing the rules and policies proposed in the IRFAs in either the *Wireline Infrastructure Notice* or the *Wireline Infrastructure Order*.

[12] *See supra* section I.

[13] *See supra* section I.

[14] *See supra* section III.A.1.a.

[15] *See supra* section III.A.1.c.

[16] *See supra* section III.A.1.b.

[17] *See supra* section III.A.2.a.

[18] *See supra* section III.A.2.b.

[19] *See supra* section III.A.2.c.

[20] *See supra* section III.A.2.d.

[21] *See supra* section III.A.3.

[22] *See supra* section III.C.

C. Response to Comments by the Chief Counsel for Advocacy of the SBA

7. Pursuant to the Small Business Jobs Act of 2010, which amended the RFA, the Commission is required to respond to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration (SBA), and to provide a detailed statement of any change made to the proposed rules as a result of those comments.[23]

8. The Chief Counsel did not file any comments in response to this proceeding.

D. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

9. The RFA directs agencies to provide a description and, where feasible, an estimate of the number of small entities that may be affected by the final rules adopted pursuant to the *Order*.[24] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[25] In addition, the term "small business" has the same meaning as the term "small-business concern" under the Small Business Act.[26] A "small-business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[27]

10. The changes to our pole attachment rules affect obligations on utilities that own poles, telecommunications carriers and cable television systems that seek to attach equipment to utility poles, and other LECs that own poles.[28]

11. *Small Businesses, Small Organizations, Small Governmental Jurisdictions*. Our actions, over time, may affect small entities that are not easily categorized at present. We therefore describe here, at the outset, three comprehensive small entity size standards that could be directly affected herein.[29] First, while there are industry specific size standards for small businesses that are used in the regulatory flexibility analysis, according to data from the SBA's Office of Advocacy, in general a small business is an independent business having fewer than 500 employees.[30] These types of small businesses represent 99.9% of all businesses in the United States which translates to 29.6 million businesses.[31]

12. Next, the type of small entity described as a "small organization" is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."[32]

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[23] 5 U.S.C. § 604 (a)(3)

[24] *See* 5 U.S.C. § 604(a)(4).

[25] *See* 5 U.S.C. § 601(6).

[26] *See* 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[27] *See* 15 U.S.C. § 632.

[28] The definitions of utility and telecommunications carrier for purposes of our pole attachment rules are found in 47 U.S.C. § 224(a)(1) and (a)(5), respectively.

[29] *See* 5 U.S.C. § 601(3)-(6).

[30] *See* SBA, Office of Advocacy, "Frequently Asked Questions, Question 1 – What is a small business?" https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2017-WEB.pdf (Aug. 2017)

[31] *See* SBA, Office of Advocacy, "Frequently Asked Questions, Question 2- How many small business are there in the U.S.?" https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2017-WEB.pdf (Aug. 2017).

[32] 5 U.S.C. § 601(4).

Nationwide, as of August 2016, there were approximately 356,494 small organizations based on registration and tax data filed by nonprofits with the Internal Revenue Service (IRS).[33]

13. Finally, the small entity described as a "small governmental jurisdiction" is defined generally as "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand."[34] U.S. Census Bureau data from the 2012 Census of Governments[35] indicate that there were 90,056 local governmental jurisdictions consisting of general purpose governments and special purpose governments in the United States.[36] Of this number there were 37,132 general purpose governments (county[37], municipal and town or township[38]) with populations of less than 50,000 and 12,184 special purpose governments (independent school districts[39] and special districts[40]) with populations of less than 50,000. The 2012 U.S. Census Bureau data for most types of governments in the local government category show that the majority of these governments have populations of less than 50,000.[41] Based on this data we estimate that at least 49,316 local government jurisdictions fall in the category of "small governmental jurisdictions."[42]

[33] Data from the Urban Institute, National Center for Charitable Statistics (NCCS) reporting on nonprofit organizations registered with the IRS was used to estimate the number of small organizations. Reports generated using the NCCS online database indicated that as of August 2016 there were 356,494 registered nonprofits with total revenues of less than $100,000. Of this number, 326,897 entities filed tax returns with 65,113 registered nonprofits reporting total revenues of $50,000 or less on the IRS Form 990-N for Small Exempt Organizations and 261,784 nonprofits reporting total revenues of $100,000 or less on some other version of the IRS Form 990 within 24 months of the August 2016 data release date. *See* http://nccsweb.urban.org/tablewiz/bmf.php where the report showing this data can be generated by selecting the following data fields: Show: "Registered Nonprofit Organizations"; By: "Total Revenue Level (years 1995, Aug to 2016, Aug)"; and For: "2016, Aug" then selecting "Show Results".

[34] 5 U.S.C. § 601(5).

[35] *See* 13 U.S.C. § 161. The Census of Government is conducted every five years compiling data for years ending with "2" and "7." *See also* Program Description Census of Government, https://factfinder.census.gov/faces/affhelp/jsf/pages/metadata.xhtml?lang=en&type=program&id=program.en.COG# .

[36] *See* U.S. Census Bureau, 2012 Census of Governments, Local Governments by Type and State: 2012 - United States-State, https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG02.US01. Local governmental jurisdictions are classified in two categories - General purpose governments (county, municipal and town or township) and Special purpose governments (special districts and independent school districts).

[37] *See* U.S. Census Bureau, 2012 Census of Governments, County Governments by Population-Size Group and State: 2012 - United States-States, https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG06.US01. There were 2,114 county governments with populations less than 50,000.

[38] *See* U.S. Census Bureau, 2012 Census of Governments, Subcounty General-Purpose Governments by Population-Size Group and State: 2012 - United States – States, https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG07.US01. There were 18,811 municipal and 16,207 town and township governments with populations less than 50,000.

[39] *See* U.S. Census Bureau, 2012 Census of Governments, Elementary and Secondary School Systems by Enrollment-Size Group and State: 2012 - United States-States, https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG11.US01. There were 12,184 independent school districts with enrollment populations less than 50,000.

[40] *See* U.S. Census Bureau, 2012 Census of Governments, Special District Governments by Function and State: 2012 - United States-States, https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG09.US01. The U.S. Census Bureau data did not provide a population breakout for special district governments.

[41] *See* U.S. Census Bureau, 2012 Census of Governments, County Governments by Population-Size Group and State: 2012 - United States-States, https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG06.US01; Subcounty General-Purpose Governments by Population-Size Group and State: 2012 - United States–States,

14. *Wired Telecommunications Carriers.* The U.S. Census Bureau defines this industry as "establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired communications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services, wired (cable) audio and video programming distribution, and wired broadband internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry."[43] The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees.[44] Census data for 2012 show that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees.[45] Thus, under this size standard, the majority of firms in this industry can be considered small.

15. *Local Exchange Carriers (LECs).* Neither the Commission nor the SBA has developed a size standard for small businesses applicable to local exchange services. The closest applicable NAICS Code category is for Wired Telecommunications Carriers, as defined in paragraph 14 of this FRFA. Under that size standard, such a business is small if it has 1,500 or fewer employees.[46] Census data for 2012 show that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees.[47] The Commission therefore estimates that most providers of local exchange carrier service are small entities that may be affected by the rules adopted.

16. *Incumbent Local Exchange Carriers (incumbent LECs).* Neither the Commission nor the SBA has developed a small business size standard for incumbent local exchange services. The closest applicable NAICS Code category is Wired Telecommunications Carriers as defined in paragraph 14 of this FRFA. Under that size standard, such a business is small if it has 1,500 or fewer employees.[48] According to Commission data, 3,117 firms operated in that year. Of this total, 3,083 operated with fewer than 1,000 employees.[49] Consequently, the Commission estimates that most providers of incumbent local

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https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG07.US01; and Elementary and Secondary School Systems by Enrollment-Size Group and State: 2012 - United States-States, https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG11.US01. While U.S. Census Bureau data did not provide a population breakout for special district governments, if the population of less than 50,000 for this category of local government is consistent with the other types of local governments the majority of the 38, 266 special district governments have populations of less than 50,000.

[42] *Id.*

[43] U.S. Census Bureau, 2012 NAICS Definitions, "517311 Wired Telecommunications Categories," http://www.census.gov/cgi-bin/sssd/naics/naicsrch.

[44] *See* 13 C.F.R. § 120.201, NAICS Code 517311.

[45] 2012 U.S. Economic Census, NAICS Code 517311, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ2&prodType=table.

[46] *See* 13 C.F.R. § 120.201, NAICS Code 517311, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ2&prodType=table.

[47] 2012 U.S. Economic Census, NAICS Code 517311, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ2&prodType=table.

[48] *See* 13 C.F.R. § 120.201, NAICS Code 517311.

[49] 2012 U.S. Economic Census, NAICS Code 517311,

exchange service are small businesses that may be affected by the rules and policies adopted. One thousand three hundred and seven (1,307) Incumbent Local Exchange Carriers reported that they were incumbent local exchange service providers.[50] Of this total, an estimated 1,006 have 1,500 or fewer employees.[51]

17. *Competitive Local Exchange Carriers (competitive LECs), Competitive Access Providers (CAPs), Shared-Tenant Service Providers, and Other Local Service Providers.* Neither the Commission nor the SBA has developed a small business size standard for these service providers. The appropriate NAICS Code category is Wired Telecommunications Carriers, as defined in paragraph 14 of this FRFA. Under that size standard, such a business is small if it has 1,500 or fewer employees. U.S. Census data for 2012 indicate that 3,117 firms operated during that year. Of that number, 3,083 operated with fewer than 1,000 employees.[52] Based on this data, the Commission concludes that the majority of Competitive LECs, CAPs, Shared-Tenant Service Providers, and Other Local Service Providers are small entities. According to Commission data, 1,442 carriers reported that they were engaged in the provision of either competitive local exchange services or competitive access provider services.[53] Of these 1,442 carriers, an estimated 1,256 have 1,500 or fewer employees. In addition, 17 carriers have reported that they are Shared-Tenant Service Providers, and all 17 are estimated to have 1,500 or fewer employees.[54] In addition, 72 carriers have reported that they are Other Local Service Providers.[55] Of this total, 70 have 1,500 or fewer employees.[56] Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, Shared-Tenant Service Providers, and Other Local Service Providers are small entities that may be affected by the adopted rules.

18. *Interexchange Carriers (IXCs).* Neither the Commission nor the SBA has developed a definition for Interexchange Carriers. The closest NAICS Code category is Wired Telecommunications Carriers as defined in paragraph 14 of this FRFA. The applicable size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees.[57] According to Commission data, 359 companies reported that their primary telecommunications service activity was the provision of interexchange services.[58] Of this total, an estimated 317 have 1,500 or fewer employees and 42 have more than 1,500 employees.[59] Consequently, the Commission estimates that the majority of interexchange service providers are small entities that may be affected by the adopted rules.

19. *Other Toll Carriers.* Neither the Commission nor the SBA has developed a size standard for small businesses applicable to Other Toll Carriers. This category includes toll carriers that do not fall

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http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ2&prodType=table.

[50] *See* Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, Trends in Telephone Service at 5-5, Tbl. 5.3 (2010), (*Trends in Telephone Service*).

[51] *Id.*

[52] http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ5&prodType=table.

[53] *See* Trends in Telephone Service at 5-5, Tbl. 5.3.

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] 13 C.F.R. § 121.201, NAICS Code 517311.

[58] *See* Trends in Telephone Service at 5-5, Tbl. 5.3.

[59] *Id.*

within the categories of interexchange carriers, operator service providers, prepaid calling card providers, satellite service carriers, or toll resellers. The closest applicable NAICS Code category is for Wired Telecommunications Carriers, as defined in paragraph 14 of this FRFA. Under that size standard, such a business is small if it has 1,500 or fewer employees.[60] Census data for 2012 shows that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees.[61] Thus, under this category and the associated small business size standard, the majority of Other Toll Carriers can be considered small. According to Commission data, 284 companies reported that their primary telecommunications service activity was the provision of other toll carriage.[62] Of these, an estimated 279 have 1,500 or fewer employees.[63] Consequently, the Commission estimates that most Other Toll Carriers that may be affected by our rules are small.

20. *Wireless Telecommunications Carriers (Except Satellite).* This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves, such as cellular services, paging services, wireless internet access, and wireless video services.[64] The appropriate size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees. For this industry, Census data for 2012 show that there were 967 firms that operated for the entire year. Of this total, 955 firms had fewer than 1,000 employees.[65] Thus under this category and the associated size standard, the Commission estimates that the majority of wireless telecommunications carriers (except satellite) are small entities. Similarly, according to internally developed Commission data, 413 carriers reported that they were engaged in the provision of wireless telephony, including cellular service, Personal Communications Service (PCS), and Specialized Mobile Radio (SMR) services.[66] Of this total, an estimated 261 have 1,500 or fewer employees.[67] Consequently, the Commission estimates that approximately half of these firms can be considered small. Thus, using available data, we estimate that the majority of wireless firms can be considered small.

21. *Cable Companies and Systems (Rate Regulation).* The Commission has developed its own small business size standards for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers nationwide.[68] Industry data indicate that there are currently 4,600 active cable systems in the United States.[69] Of this total, all but nine cable operators nationwide are small under the 400,000-subscriber size standard.[70] In addition,

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[60] 13 C.F.R. § 121.201, NAICS Code 517311.

[61] http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ5&prodType=table.

[62] *See* Trends in Telephone Service at 5-5, Tbl. 5.3.

[63] *Id*.

[64] NAICS Code 517210. *See* https://www.census.gov/econ/isp/sampler.php?naicscode=517210&naicslevel=6#.

[65] http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ5&prodType=table.

[66] *See* Trends in Telephone Service at 5-5, Tbl. 5.3.

[67] *Id*.

[68] 47 C.F.R. § 76.901(e)

[69] Federal Communications Commission, Assessment and Collection of Regulatory Fees for Fiscal Year 2014; Assessment and Collection of Regulatory Fees for Fiscal Year 2013; and Procedures for Assessment and Collection of Regulatory Fees, 80 Fed. Reg. 66815 (Oct. 30, 2015) (citing Aug. 15, 2015 Report from the Media Bureau based on data contained in the Commission's Cable Operations and Licensing System (COALS)). *See* www.fcc.gov/coals.

[70] *See* SNL KAGAN, https://www.snl.com/interactiveX/MyInteractive.aspx?mode=4&CDID=A-821-38606&KLPT=8 (subscription required).

under the Commission's rate regulation rules, a "small system" is a cable system serving 15,000 or fewer subscribers.[71] Current Commission records show 4,600 cable systems nationwide.[72] Of this total, 3,900 cable systems have fewer than 15,000 subscribers, and 700 systems have 15,000 or more subscribers, based on the same records.[73] Thus, under this standard as well, we estimate that most cable systems are small entities.

22. *Cable System Operators (Telecom Act Standard).* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than one percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000 are approximately 52,403,705 cable video subscribers in the United States today.[74] Accordingly, an operator serving fewer than 524,037 subscribers shall be deemed a small operator if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate.[75] Based on available data, we find that all but nine incumbent cable operators are small entities under this size standard.[76] We clarify that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million.[77] Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed $250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under *the* definition in the Communications Act.

23. *All Other Telecommunications.* "All Other Telecommunications" is defined as follows: "This U.S. industry is comprised of establishments that are primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Establishments providing Internet services or voice over Internet protocol (VoIP) services via client supplied telecommunications connections are also included in this industry."[78] The SBA has developed a small business size standard for "All Other Telecommunications," which consists of all such firms with

[71] 47 C.F.R. § 76.901(c).

[72] Federal Communications Commission, Assessment and Collection of Regulatory Fees for Fiscal Year 2014; Assessment and Collection of Regulatory Fees for Fiscal Year 2013; and Procedures for Assessment and Collection of Regulatory Fees, 80 Fed. Reg. 66815 (Oct. 30, 2015) (citing August 15, 2015 Report from the Media Bureau based on data contained in the Commission's Cable Operations and Licensing System (COALS). *See* www.fcc.gov/coals.

[73] *Id*.

[74] *Assessment and Collection of Regulatory Fees for Fiscal Year 2016, Notice of Proposed Rulemaking*, 31 FCC Rcd 5757, Appendix E para. 23 (2016) (citing Office of Management and Budget (OMB) Memorandum M-10-06, Open Government Directive, Dec. 8, 2009).

[75] 47 C.F.R. § 76.901(f).

[76] *Assessment & Collection of Regulatory Fees for Fiscal Year 2016*, Notice of Proposed Rulemaking, 31 FCC Rcd 5757, Appx. E para. 23 (2016).

[77] The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to section 76.901(f) of the Commission's rules. *See* 47 C.F.R. § 76.901(f).

[78] https://www.census.gov/econ/isp/sampler.php?naicscode=517919&naicslevel=6.

gross annual receipts of $32.5 million or less.[79] For this category, Census Bureau data for 2012 show that there were 1,442 firms that operated for the entire year. Of those firms, a total of 1,400 had annual receipts less than $25 million.[80] Consequently, we conclude that the majority of All Other Telecommunications firms can be considered small.

24. *Electric Power Generation, Transmission and Distribution.* The Census Bureau defines this category as follows: "This industry group comprises establishments primarily engaged in generating, transmitting, and/or distributing electric power. Establishments in this industry group may perform one or more of the following activities: (1) operate generation facilities that produce electric energy; (2) operate transmission systems that convey the electricity from the generation facility to the distribution system; and (3) operate distribution systems that convey electric power received from the generation facility or the transmission system to the final consumer."[81] This category includes electric power distribution, hydroelectric power generation, fossil fuel power generation, nuclear electric power generation, solar power generation, and wind power generation. The SBA has developed a small business size standard for firms in this category based on the number of employees working in a given business.[82] According to Census Bureau data for 2012, there were 1,742 firms in this category that operated for the entire year.[83]

25. *Natural Gas Distribution.* This economic census category comprises: "(1) establishments primarily engaged in operating gas distribution systems (e.g., mains, meters); (2) establishments known as gas marketers that buy gas from the well and sell it to a distribution system; (3) establishments known as gas brokers or agents that arrange the sale of gas over gas distribution systems operated by others; and (4) establishments primarily engaged in transmitting and distributing gas to final consumers."[84] The SBA has developed a small business size standard for this industry, which is all such firms having 1,000 or fewer employees.[85] According to Census Bureau data for 2012, there were 422 firms in this category that operated for the entire year.[86] Of this total, 399 firms had employment of fewer

[79] 13 C.F.R. § 121.201; NAICS Code 517919.

[80] U.S. Census Bureau, *2012 Economic Census of the United States*, Table EC0751SSSZ1, Information: Subject Series - Establishment and Firm Size: Receipts Size of Firms for the United States: 2012 NAICS Code 517919, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ1&prodType=table.

[81] U.S. Census Bureau, 2017 NAICS Definitions, "2211 Electric Power Generation, Transmission and Distribution," https://www.census.gov/eos/www/naics/2017NAICS/2017_NAICS_Manual.pdf.

[82] U.S. Small Business Administration, Table of Small Business Size Standards Matched to North American Classification System Codes, "Sector 22 - Utilities" at 5 (2016), https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf.

[83] U.S. Census Bureau, 2012 Economic Census, Subject Series: Utilities, "Establishment and Firm Size: Summary Statistics by Employment Size of Firms for the U.S.: 2012," NAICS codes 221111, 221112, 221113, 221114, 221115, 221116, 221117, 221118, 22112,221121, (issued Mar. 2016), https://www.census.gov/data/tables/2012/econ/census/utilities.html.

[84] U.S. Census Bureau, 2017 NAICS Definitions, "221210 Natural Gas Distribution," https://www.census.gov/eos/www/naics/2017NAICS/2017_NAICS_Manual.pdf .

[85] U.S. Small Business Administration, Table of Small Business Size Standards Matched to North American Classification System Codes, "Sector 22 - Utilities" at 5 (2016), https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf.

[86] U.S. Census Bureau, 2012 Economic Census, Subject Series: Utilities, "Establishment and Firm Size: Summary Statistics by Employment Size of Firms for the U.S.: 2012," NAICS code 2212 (issued Mar. 2016), https://www.census.gov/data/tables/2012/econ/census/utilities.html.

than 1,000 employees, 23 firms had employment of 1,000 employees or more, and 37 firms were not operational.[87] Thus, the majority of firms in this category can be considered small.

26. *Water Supply and Irrigation Systems*. This economic census category "comprises establishments primarily engaged in operating water treatment plants and/or operating water supply systems. The water supply system may include pumping stations, aqueducts, and/or distribution mains. The water may be used for drinking, irrigation, or other uses."[88] The SBA has developed a small business size standard for this industry, which is all such firms having $27.5 million or less in annual receipts.[89] According to Census Bureau data for 2012, there were 3,261 firms in this category that operated for the entire year.[90] Of this total, 3,035 firms had annual sales of less than $25 million[91] Thus, the majority of firms in this category can be considered small.

E. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

27. *One-Touch Make Ready (OTMR) Alternative Pole Attachment Process.* The Order adopts an OTMR pole attachment alternative to the Commission's existing pole attachment timeline. New attachers may perform all simple make-ready work required to accommodate new wireline attachments in the communications space on a pole. First, any OTMR work will be performed by a utility-approved contractor, although a new attacher can use its own qualified contractor to perform OTMR work when the utility does not provide a list of approved contractors. Second, new attachers must provide advanced notice and allow representatives of existing attachers and the utility a reasonable opportunity to be present when OTMR surveys and make-ready work are performed. Third, new attachers must allow existing attachers and the utility the ability to inspect and request any corrective measures soon after the new attacher performs the OTMR work.

28. The Order sets forth that the OTMR process begins upon utility receipt of a complete application by a new attacher to attach to its facilities. A complete application is defined as one that provides the utility with the information necessary under its procedures, as specified in a master service agreement or in publicly-released requirements at the time of submission of the application, to begin to survey the affected poles. The Order further establishes that a utility has ten business days after receipt of a pole attachment application to determine if the application is complete and notify the attacher of that decision. If the utility notifies the attacher that its application is not complete within the ten business-day review period, then the utility must specify where and how the application is deficient. If the utility provides no response within ten business days, or if the utility rejects the application as incomplete but fails to specify any deficiencies in the application, then the application is deemed complete. If the utility timely notifies the attacher that its application is incomplete and specifies the deficiencies, then a resubmitted application is only required to address the enumerated issues and will be deemed complete

[87] *Id*.

[88] U.S. Census Bureau, 2017 NAICS Definitions, "221310 Water Supply and Irrigation Systems," https://www.census.gov/eos/www/naics/2017NAICS/2017_NAICS_Manual.pdf.

[89] U.S. Small Business Administration, Table of Small Business Size Standards Matched to North American Classification System Codes, "Sector 22 - Utilities" at 5 (2016), https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf.

[90] U.S. Census Bureau, 2012 Economic Census, Subject Series: Utilities, "Establishment and Firm Size: Summary Statistics by Employment Size of Firms for the U.S.: 2012," NAICS code 221310 (issued Mar. 2016), https://www.census.gov/data/tables/2012/econ/census/utilities.html.

[91] U.S. Census Bureau, 2012 Economic Census, Subject Series: Utilities, "Establishment and Firm Size: Summary Statistics by Revenue Size of Firms for the U.S.: 2012," NAICS code 221310 (issued Mar. 2016), https://www.census.gov/data/tables/2012/econ/census/utilities.html.

within five business days after its resubmission, unless the utility specifies which deficiencies were not addressed. A new attacher may follow the resubmission procedure as many times as it chooses, so long as in each case it makes a bona fide attempt to correct the issues identified by the utility. A utility must respond to new attachers within 15 days of receiving complete pole attachment, or within 30 days for larger requests.

29. The Order further provides that under the OTMR process, it is the responsibility of the new attacher to conduct a survey of the affected poles to determine the make-ready work to be performed. In performing a field inspection as part of any pre-construction survey, the new attacher must permit representatives of the utility and any existing attachers potentially affected by the proposed make-ready work to be present for the survey, using commercially reasonable efforts to provide advance notice of the date, time, and location of the survey of not less than three (3) business days. The Order requires that the new attacher ensures that its contractor determines whether the make-ready work identified in the survey is simple or complex, subject to an electric utility's right to reasonably object to the determination. The new attacher – if it wants to use the OTMR process and is eligible to do so based on the survey – must elect OTMR in its pole attachment application and identify in its application the simple make-ready work to be performed. The Order requires an electric utility that wishes to object to a simple make-ready determination to raise such an objection during the 15-day application review period (or within 30 days in the case of larger orders). Any such objection by the electric utility is final and determinative, so long as it is specific and in writing, includes all relevant evidence and information supporting its decision, made in good faith, and explains how such evidence and information relate to a determination that the make-ready is not simple. In this case, the work is deemed complex and must follow the existing pole attachment timeline that is modified in this Order. If the make-ready work involves a mix of simple and complex work, then the new attacher may elect to bifurcate the work and must submit separate applications for simple and complex work.

30. The Order provides that the new attacher can elect to proceed with the necessary simple make-ready work by giving 15 days' prior written notice to the utility and all affected existing attachers. The new attacher may provide the required 15-day notice any time after the utility deems its pole attachment application complete. If the new attacher cannot start make-ready work on the date specified in its 15-day notice, then the new attacher must provide 15 days' advance notice of its revised make-ready date. The new attacher's notice must provide representatives of the utility and existing attachers: (1) the date and time of the make-ready work, (2) a description of the make-ready work involved, (3) a reasonable opportunity to be present when the make-ready work is being performed, and (4) the name of the contractor chosen by the new attacher to perform the make-ready work. Further, the new attacher must notify the existing attacher immediately if the new attacher's contractor damages another company's or the utility's equipment or causes an outage that is reasonably likely to interrupt the provision of service. Finally, the Order requires the new attacher to provide notice to the utility and affected existing attachers within 15 days after OTMR make-ready work is completed on a particular pole. The new attacher may batch in one post-make-ready notice all poles completed in a particular 15-day span. In its post-make-ready notice, the new attacher must provide the utility and existing attachers at least a 30-day period for the inspection of make-ready work performed by the new attacher's contractors. The Order requires the utility and the existing attachers to notify the new attacher of any damage caused to their equipment by the new attacher's make-ready work within 14 days after any post-make ready inspection. The utility or existing attacher can either complete any necessary remedial work and bill the new attacher for reasonable costs to fix the damage, or require the new attacher to fix the damage at its expense within 14 days following notice from the utility or existing attacher.

31. The Order also establishes that new attachers must use a utility-approved contractor to perform OTMR if a utility makes available a list of qualified contractors authorized to perform simple make-ready work in the communications space of its poles and requires new attachers to choose contractors from this list to perform simple make-ready work. New and existing attachers may request that contractors meeting the minimum qualification requirements be added to the utility's list and utilities

may not unreasonably withhold consent to add a new contractor to the list. To be reasonable, a utility's decision to withhold consent must be prompt, set forth in writing that describes the basis for rejection, nondiscriminatory, and based on fair application of commercially reasonable requirements for contractors relating to issues of safety or reliability. If the use of an approved contractor is not required by the utility or no approved contractor is available within a reasonable time period, then the Order allows new attachers to use qualified contractors of their choosing to perform simple make-ready work in the communications space of poles. New attachers must provide the name of their chosen contractor in the three-business-day advance notice for surveys or the 15-day notices sent to utilities and existing attachers in advance of commencing OTMR work. The utility may veto any contractor chosen by the new attacher as long as the veto is based on safety and reliability concerns related to the contractor's failure to meet any of the minimum qualifications or the utility's previously posted safety standards, and the utility identifies at least one qualified contractor available to do the work. The utility must exercise its veto within either the three-business-day notice period for surveys or the 15-day notice period for make-ready. The objection by the utility is determinative and final.

32. The utility or new attacher must certify to the utility, within either the three-business-day notice period for surveys or the 15-day notice period for make-ready, that any contractors perform OTMR meet the following minimum requirements: (1) follow published safety and operational guidelines of the utility, if available, but if unavailable, the contractor agrees to follow NESC guidelines; (2) read and follow licensed-engineered pole designs for make-ready work, if required by the utility; (3) follow all local, state, and federal laws and regulations including, but not limited to, the rules regarding Qualified and Competent Persons under the requirements of the Occupational and Safety Health Administration (OSHA) rules; (4) meet or exceed any uniformly applied and reasonable safety record thresholds set by the utility, if made available, *i.e.*, the contractor does not have an unsafe record of significant safety violations or worksite accidents; and (5) be adequately insured or be able to establish an adequate performance bond for the make-ready work it will perform. The utility may mandate additional commercially reasonable requirements for contractors relating to issues of safety and reliability, but such requirements must be non-discriminatory, in writing, and publicly-available (i.e., on the utility's website).

33. *Existing Pole Attachment Process Reforms.* The Order makes targeted changes to the Commission's existing pole attachment timeline for attachments that are not eligible for the OTMR process and attachers that prefer the existing process. These reforms include revising the definition of a complete pole attachment application and establishing a timeline for a utility's determination whether application is complete; requiring utilities to provide at least three business days' advance notice of any surveys to the new attacher; shortening the existing make-ready deadline by 30 days for attachments above the communications space; establishing a 30-day deadline for all make-ready work in the communications space; streamlining the utility's notice requirements; requiring utilities to provide detailed estimates and final invoices to new attachers regarding make-ready costs; enhancing the new attacher's self-help remedy by making the remedy available for surveys and make-ready work for all attachments anywhere on the pole in the event that the utility or the existing attachers fail to meet the required deadlines; and revising the contractor selection process for a new attacher's self-help work.

34. The Order retains the existing requirement that the pole attachment timeline begins upon utility receipt of a complete application to attach facilities to its poles, but revises the definition of a complete application to an application that provides the utility with the information necessary under its procedures, as specified in a master service agreement or in publicly-released requirements at the time of submission, to begin to survey the affected poles. The Order then adopts the same timeline as set out in the OTMR-process for a utility to determine whether a pole attachment application is complete.

35. The Order also requires a utility to permit the new attacher and any existing attachers potentially affected by the new attachment to be present for any pole surveys. The utility must use commercially reasonable efforts to provide at least three business days' advance notice of any surveys to the new attacher and each existing attacher, including the date, time, location of the survey, and the name of the contractor performing the survey. The Order provides that the utility may meet the survey

requirement of our existing timeline by electing to use surveys previously prepared on the poles in question by new attachers.

36. The Order amends the existing make-ready timeline by (1) reducing the deadlines for both simple and complex make-ready work from 60 to 30 days (and from 105 to 75 for large requests in the communications space); (2) reducing the make-ready deadline from 90 to 60 days (and from 135 to 105 days for large requests) for a make-ready work above the communications space; (3) eliminating the optional 15-day extension for the utility to complete communications space make-ready work. However, for all attachments, the Order retains as a safeguard our existing rule allowing utilities to deviate from the make-ready timelines for good and sufficient cause when it is infeasible for the utility to complete make-ready work within the prescribed timeframe. An existing attacher can provide written notice to the new attacher before the 30-day complex make-ready deadline explaining in detail the need for an extension and providing a new completion date, which cannot extend beyond 60 days from the date of the utility make-ready notice to existing attachers (or 105 days in the case of larger orders). If complex make-ready is not complete within 60 days from the date that the existing attacher sends notice to the new attacher, the new attacher can complete the work using a utility-approved contractor. Existing attachers must act in good faith in obtaining an extension. The Order also provides that when a utility provides the required make-ready notice to existing attachers, then it must provide the new attacher with a copy of the notice, plus the contact information of existing attachers to which the notices were sent, and thereafter the new attacher (rather than the utility) must take responsibility for encouraging and coordinating with existing attachers to ensure completion of make-ready work on a timely basis.

37. Expanding upon the Commission's existing make-ready cost estimate requirement for utilities, the Order requires a utility to provide a new attacher with a detailed, itemized estimate of charges to perform all necessary make-ready work, as well as detailed and itemized post-make-ready work invoices. As part of the detailed estimate, the utility is required to disclose to the new attacher its projected material, labor, and other related costs that form the basis of its estimate, including specifying what, if any costs, the utility is passing through to the new attacher from the utility's use of a third-party contractor. The Order provides that the utility must detail all make-ready cost estimates and final invoices on a per-pole basis. However, if in compiling the estimate (or invoice) the utility determines that make-ready charges will (or did) not vary from pole-to-pole, the utility may aggregate individual charges (i.e., present one charge for labor, one charge for projected materials, etc.) rather than present a pole-by-pole estimate.

38. To increase broadband deployment, the Order modifies our existing pole attachment rules by extending a new attacher's self-help remedy for surveys and make-ready work to all attachments above the communications space, including the installation of wireless 5G small cells, when the utility or existing attachers have not met make-ready work deadlines. To address the safety concerns of utilities with regard to self-help work, the Order requires that new attachers, when invoking the self-help remedy, (1) use a utility-approved contractor to do the make-ready work; (2) provide no less than five days' notice of the impending survey or make-ready work to the utility and existing attachers and give them a reasonable opportunity to be present when new attachers (or their contractors) perform the work; (3) provide notice to the utility and existing attachers no later than 15 days after make-ready is complete on a particular pole so that they have an opportunity to inspect the make-ready work. The advance notice must include the date and time of the work, nature of the work, and the name of the contractor being used by the new attacher.

39. The Order adopts a contractor selection process for self-help that requires a new attacher electing self-help for simple work in the communications space to select a contractor from a utility-maintained list of qualified contractors that meet the same safety and reliability criteria as contractors authorized to perform OTMR work, where such a list is available. New and existing attachers may request the addition to the list of any contractor that meets the minimum qualification requirements and the utility may not unreasonably withhold consent. If no list is available or no approved contractor is available within a reasonable time period, the new attacher must select a contractor that meets the same

safety and reliability criteria as contractors authorized to perform OTMR work and any additional non-discriminatory, written, and publicly-available criteria relating to safety and reliability that the utility specifies. The utility may veto the new attacher's contractor selection so long as such veto is prompt, set forth in writing that describes the basis for rejection, nondiscriminatory, and based on fair application of commercially reasonable requirements for contractors relating to issues of safety and reliability. Additionally, the utility must offer another available, qualified contractor. For complex work and work above the communications space, the Order requires (1) the utility to make available and keep up-to-date reasonably sufficient list of contractors it authorizes to perform complex and non-communications space self-help surveys and make-ready work; and (2) the new attacher to choose a contractor from the utility's list. New and existing attachers may request that qualified contractors be added to the utility's list and that the utility may not unreasonably withhold its consent for such additions. A utility's decision to withhold consent must be prompt, set forth in writing that describes the basis for the rejection, nondiscriminatory, and based on fair application of commercially reasonable requirements for contractors relating to issues of safety.

40. *Additional Pole Attachment Reforms.* The Order codifies the Commission's existing precedent that prohibits a pre-approval requirement for overlashing. In addition, the Order adopts a rule on overlashing that allows utilities to establish a reasonable 15-day advance notice requirement, and holds overlashers responsible for ensuring that their practices and equipment do not cause safety or engineering issues. If after receiving advance notice, a utility determines that the noticed overlash would be inconsistent with generally applicable engineering practices or would compromise the pole's safety or reliability, it may deny access to the pole for the overlash within the 15-day advance notice period so long as such denial is accompanied by specific documentation demonstrating that the overlash creates a capacity, safety, reliability, or engineering issue. The Order also establishes a presumption that incumbent LECs will receive comparable pole attachment rates, terms, and conditions as a similarly-situated telecommunications carrier or a cable television system providing telecommunications services, unless the utility can rebut the presumption with clear and convincing evidence that the incumbent LEC receives benefits under its pole attachment agreement with the utility, that materially advantage the incumbent LEC over similarly-situated telecommunications attachers. If the presumption is rebutted, the pre-*2011 Pole Attachment Order* telecommunications carrier rate is the maximum rate that the utility and incumbent LEC may negotiate This revised presumption would not apply to existing joint use agreements between utilities and incumbent LECs, but would apply to new joint use agreements entered into after the effective date of the new rule.

F. Steps Taken to Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

41. In this Order, the Commission modifies its pole attachment rules to improve the efficiency and transparency of the pole attachment process, as well as to increase access to infrastructure for certain types of broadband providers. Overall, we believe the actions in this document will reduce burdens on the affected carriers, including any small entities.

42. The Order also finds that adopting our alternative OTMR process will reduce delays and costs for new attachers, enhance competition, improve public safety and reliability of networks, and accelerate broadband buildout. As detailed in the Order, the Commission rejects alternative proposals, such as "right-touch, make-ready" and NCTA's "ASAP" proposal – which merely modify the current framework. These approaches diffuse responsibility among parties that lack the new attacher's incentive to ensure that the work is done quickly, cost effectively, and properly. Further, these proposals fail to address the existing problems created by sequential make-ready, such as numerous separate climbs and construction stoppages in the public-rights-of-way.

43. As described in the Order, applying targeted changes to the existing pole attachment process, such as a more efficient pole attachment timeline, detailed and itemized estimates and final invoices on a per-pole basis, and an enhanced self-help remedy, will increase broadband deployment by

reducing the number of unreasonable delays, and encouraging transparency and collaboration between all interested parties at an early stage in the pole attachment process. The Order also concluded that codifying the Commission's existing precedent prohibiting a pre-approval requirement for overlashing, and adopting a rule allowing utilities to require advance notice of overlashing will eliminate the industry uncertainty that currently exists regarding overlashing, a practice that is essential to broadband deployment. In addition, by establishing a rebuttable presumption that incumbent LECs receive the Commission-established pole attachment rate for telecommunications carriers, the Order sought to increase incumbent LEC access to infrastructure by addressing the bargaining disparity between utilities and incumbent LECs through modifying the greater pole attachment rates that LECs pay in comparison to their telecommunications competitors.

G. Report to Congress

44. The Commission will send a copy of the *Report and Order*, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.[92] In addition, the Commission will send a copy of the *Report and Order*, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the Order and FRFA (or summaries thereof) will also be published in the Federal Register.[93]

[92] *See* 5 U.S.C. § 801(a)(1)(A).

[93] *See* 5 U.S.C. § 604(b).