IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOS. 18-72689 (L), 19-70490

AMERICAN ELECTRIC POWER SERVICE CORPORATION, ET AL.,

PETITIONERS,

V.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

RESPONDENTS.

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

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BRIEF FOR RESPONDENTS

INTRODUCTION

When providers of communications services deploy the wires and other equipment used to reach their customers, they often attach that equipment to utility poles. Pole attachments are especially critical to the deployment of next-generation broadband services, including 5G wireless services.

Section 224 of the Communications Act generally requires electric utilities to provide cable television systems and telecommunications carriers with "nondiscriminatory access" to their poles. 47 U.S.C. § 224(f)(1). Section 224 grants the Federal Communications Commission broad authority to "regulate the

rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable." *Id.* § 224(b)(1). It also empowers the Commission to "prescribe by rule regulations to carry out the provisions of this section." *Id*. § 224(b)(2).

In the order on review, the FCC made a number of revisions to its pole attachment rules "to facilitate faster, more efficient broadband deployment." *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, 33 FCC Rcd 7705, 7711 ¶ 13 (2018) (ER 1, 7) (*Order*). Petitioners, a group of electric utility companies, contend that some of the Commission's new rules are unlawful. To the contrary, the challenged rules, which expanded on previous reforms, reflected a reasonable and carefully considered exercise of the agency's authority under Section 224. Accordingly, the Court should reject petitioners' claims and uphold the *Order*.

STATEMENT OF JURISDICTION

The *Order* was issued by the FCC on August 3, 2018. In the portion of the *Order* challenged by petitioners, the Commission exercised its authority under Section 224 of the Communications Act to amend its rules regarding pole attachments. *See Order* ¶¶ 13-136 (ER 7-70). A summary of the *Order* was published in the Federal Register on September 14, 2018. *See* 83 Fed. Reg. 46812.

On October 18, 2018, petitioners filed a petition for review of the *Order* in the United States Court of Appeals for the Eleventh Circuit. The petition was timely filed within 60 days of the *Order*'s publication in the Federal Register. *See* 28 U.S.C. § 2344; 47 C.F.R. § 1.4(b)(1). The City of Portland, Oregon had previously filed a petition for review of the *Order* in this Court on October 2, 2018.[1] On March 1, 2019, the Eleventh Circuit granted the FCC's motion to transfer petitioners' petition to this Court pursuant to 28 U.S.C. § 2112(a)(5).

The FCC's adoption of new pole attachment rules constitutes final agency action. This Court has jurisdiction to review petitioners' challenges to the *Order* under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

ISSUES PRESENTED

1. Whether the FCC reasonably exercised its authority under Section 224 of the Communications Act, 47 U.S.C. § 224, when it prohibited utilities from denying pole access to new attachers and overlashers based solely on preexisting violations that those attachers and overlashers did not cause.

[1] *See City of Portland v. FCC*, No. 18-72689. Portland seeks review of another part of the *Order*: a declaratory ruling that state and local moratoria on the deployment of telecommunications services and facilities are barred by Section 253(a) of the Communications Act, 47 U.S.C. § 253(a). *See Order* ¶¶ 140-168 (ER 71-87). Portland's challenge to the *Order* is being briefed separately. *See* Order of Appellate Commissioner Shaw, No. 18-72689 (Apr. 18, 2019).

2. Whether the FCC reasonably exercised its authority under Section 224 when it adopted a rule allowing utilities to require advance notice of overlashing.

3. Whether the FCC reasonably exercised its authority under Section 224 when it allowed attachers to engage in self-help if utilities miss deadlines for completing surveys and make-ready work above the communications space on poles.

4. Whether the FCC reasonably exercised its authority under Section 224 when, for purposes of reviewing complaints alleging unlawful rates, terms, and conditions for pole attachments, the agency adopted a rebuttable presumption that incumbent local exchange carriers are similarly situated to "telecommunications attachers" (*i.e.*, telecommunications carriers and cable television systems).

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in an addendum bound with this brief.

COUNTERSTATEMENT

A. The FCC's Authority To Regulate Pole Attachments

When deploying the lines, wires, and other network equipment they need to reach potential customers, providers of cable television and telecommunications services "have found it convenient, and often essential, to lease space" on utility poles. *Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 330-31 (2002) (*NCTA v. Gulf Power*). To ensure that the owners of utility poles (generally

electric utilities) do not "charge monopoly rents," *ibid*., or otherwise impede cable operators and telephone companies from leasing space on poles, Congress adopted the Pole Attachments Act, which added Section 224 to the Communications Act. *See* Pub. L. No. 95-234, 92 Stat. 33 (1978) (codified at 47 U.S.C. § 224).

Section 224 generally authorizes the Federal Communications Commission to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable" and "to hear and resolve complaints concerning such rates, terms, and conditions." 47 U.S.C. § 224(b)(1). The statute also directs the Commission to "prescribe by rule regulations to carry out the provisions" of Section 224. *Id*. § 224(b)(2).

Enacted in 1978, Section 224 originally applied only to attachments by cable operators. *See NCTA v. Gulf Power*, 534 U.S. at 331. Congress amended the statute in 1996 to extend its reach to attachments by providers of telecommunications services. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 703, 110 Stat. 56, 149-51. As amended, Section 224 empowers the FCC (absent State regulation) to regulate the rates, terms, and conditions for "any attachment by a cable television system or provider of telecommunications service

to a pole, duct, conduit, or right-of-way owned or controlled by a utility." 47 U.S.C. § 224(a)(4) (defining "pole attachment").[2]

The amended Section 224 includes two separate formulas for setting pole attachment rates: one for rates paid by cable operators, 47 U.S.C. § 224(d), and another for rates paid by telecommunications carriers, *id.* § 224(e). *See Implementation of Section 224 of the Act*, 26 FCC Rcd 5240, 5297 ¶ 131 (2011) (*2011 Order*), *aff'd*, *Am. Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183 (D.C. Cir. 2013) (*AEP*).

When the FCC first implemented these formulas, "the telecom rate formula generally resulted in higher pole rental rates than the cable rate formula." *2011 Order*, 26 FCC Rcd at 5297 ¶ 131. Concerned that this rate disparity created "marketplace distortions and barriers to the availability of new broadband facilities and services," *id.* at 5305 ¶ 151, the Commission in 2011 revised its interpretation of Section 224(e) and adopted a lower telecom rate that would generally "recover the same portion of pole costs as the current cable rate." *Id.* at 5244 ¶ 8. The agency explained that closing the gap between the cable rate and the telecom rate would "reduc[e] barriers to the provision of new services" and "enable providers to

[2] If a State certifies that it regulates the rates, terms, and conditions for pole attachments, the FCC has no jurisdiction under Section 224 to regulate pole attachments in that State. *See* 47 U.S.C. § 224(c).

compete on a level playing field" that is not skewed by "arbitrary price differentials." *Id.* at 5303 ¶ 147. On reconsideration, the Commission made further adjustments to its telecom rate rule "to bring cable and telecom rates for pole attachments into parity at the cable-rate level." *Implementation of Section 224 of the Act*, 30 FCC Rcd 13731, 13738 ¶ 16 (2015) (*2015 Order*), *aff'd*, *Ameren Corp. v. FCC*, 865 F.3d 1009 (8th Cir. 2017). Two appellate courts upheld these revisions, holding that the FCC's new telecom rate was based on a reasonable interpretation of the ambiguous term "cost" in Section 224(e). *See Ameren*, 865 F.3d at 1012-14 (affirming the *2015 Order*); *AEP*, 708 F.3d at 188-90 (affirming the *2011 Order*).

Section 224(f), a provision added in 1996, requires a utility to "provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by" the utility. 47 U.S.C. § 224(f)(1). But Congress provided for an exception to this access mandate. Under Section 224(f)(2), an electric utility "may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes." *Id.* § 224(f)(2).

Section 224(f)(2) does not give utilities carte blanche to deny access to their poles. Although the FCC accords "substantial leeway" to utilities in "the practical application" of Section 224(f)(2), it has refused to treat utilities' decisions to deny access as "unreviewable." *2011 Order*, 26 FCC Rcd at 5283-84 ¶ 93. The agency explained that interpreting Section 224(f) to allow "utilities to define the terms and conditions of attachment" would effectively nullify "the grant of rulemaking authority to the Commission" under Section 224(b), rendering that provision "meaningless." *Id*. at 5284 ¶ 93.[3]

In implementing the amended Section 224, the FCC initially determined that incumbent local exchange carriers (ILECs)—as defined in 47 U.S.C. § 251(h)—have "no rights under Section 224 with respect to the poles of [electric] utilities."[4] It based that conclusion on Section 224(a)(5), which provides that "[f]or purposes of this section, the term 'telecommunications carrier' … does not include any

[3] Courts have likewise declined to read Section 224(f)(2) to grant utilities boundless discretion to deny pole access. *See Gulf Power Co. v. FCC*, 669 F.3d 320, 324-25 (D.C. Cir. 2012) (refusing to accept a utility's unproven assertion that its poles were at "full capacity"); *S. Co. v. FCC*, 293 F.3d 1338, 1348-49 (11th Cir. 2002) (rejecting a claim that utilities have "unfettered discretion to determine when capacity is insufficient").

[4] *Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd 6777, 6781 ¶ 5 (1998) (*1998 Order*), *aff'd in part and rev'd in part*, *Gulf Power Co. v. FCC*, 208 F.3d 1263 (11th Cir. 2000), *rev'd*, *NCTA v. Gulf Power*, 534 U.S. 327.

[ILEC]." *Id*. § 224(a)(5). In 2011, however, the Commission reassessed its reading of the statute and found that although ILECs have no right of access to utilities' poles pursuant to Section 224(f)(1), ILECs that obtain such access are entitled to rates, terms, and conditions that are "just and reasonable" in accordance with Section 224(b)(1). *2011 Order*, 26 FCC Rcd at 5327-33 ¶¶ 199-213.

The FCC based its revised reading on the statute's definition of "pole attachment," which includes "any attachment" by a "provider of telecommunications service." 47 U.S.C. § 224(a)(4). The Commission concluded that the phrase "provider of telecommunications service" was "distinct from 'telecommunications carrier' for purposes of [S]ection 224." *2011 Order*, 26 FCC Rcd at 5332 ¶ 210. It reasoned that because ILECs "are 'providers of telecommunications service,' 'pole attachment' as defined in [S]ection 224(a)(4) includes attachments" by ILECs. *Id.* at 5332 ¶ 211. And because Section 224(b) requires the FCC to "regulate the rates, terms, and conditions for *pole attachments*," 47 U.S.C. § 224(b)(1) (emphasis added), the Commission found that under its revised reading of the definition of "pole attachment," it "has a statutory obligation to regulate" the rates, terms, and conditions for ILECs' attachments to

utilities' poles. *2011 Order*, 26 FCC Rcd at 5332 ¶ 211.[5] The D.C. Circuit held that the Commission reasonably construed the statute to authorize FCC regulation of ILEC attachments under Section 224(b). *AEP*, 708 F.3d at 186-88.

B. The Order On Review

Seeking "to accelerate the deployment of next-generation networks and services," the FCC commenced a proceeding in April 2017 to consider changes to its pole attachment rules. *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, 32 FCC Rcd 3266, 3267 ¶ 1 (2017) (ER 141, 142) (*Notice*). It requested comment on proposed reforms designed to "reduce pole attachment costs and speed access to utility poles." *Id.* ¶ 3 (ER 142). Seven months later, it issued a further notice of proposed rulemaking seeking comment on a proposal to codify the FCC's "policy of encouraging the use of overlashing to maximize the [usable] space on utility poles." *Accelerating Wireline Broadband Deployment by Removing Barriers to*

[5] The agency also found that ILECs have no right to "nondiscriminatory access" to poles under Section 224(f)(1) because that provision applies to "telecommunications carriers"—a category that excludes ILECs. *2011 Order*, 26 FCC Rcd at 5329-30 ¶ 207.

Infrastructure Investment, 32 FCC Rcd 11128, 11188-89 ¶¶ 160-162 (2017) (ER 603, 663-64).[6]

Numerous commenters told the Commission that "pole attachment delays and the high costs of attaching to poles" had "deterred them from deploying broadband." *Order* ¶ 8 (ER 5). Based on this record, the agency amended its pole attachment rules "to facilitate faster, more efficient broadband deployment." *Id.* ¶ 13 (ER 7).

Most of the *Order*'s rule revisions relate to the adoption of "a new pole attachment process that includes 'one-touch make-ready' (OTMR)." *Order* ¶ 2 (ER 2); *see id*. ¶¶ 16-76 (ER 10-39). "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." *Id*. ¶ 2 (ER 2). Under the OTMR regime adopted by the *Order*, in cases involving "simple" make-ready work, *see id.* ¶ 17 (ER 10), "new attachers can elect" to take "control of the surveys, notices, and make-ready work necessary to attach their equipment to utility poles." *Id*. ¶ 16 (ER 10).

[6] Overlashing is a technique "whereby a service provider physically ties its wiring to other wiring already secured to [a] pole." *1998 Order*, 13 FCC Rcd at 6805 ¶ 59.

Petitioners do not challenge the OTMR rules. Instead, they seek review of four other revisions to the FCC's pole attachment rules. Those changes concern (1) preexisting violations, (2) overlashing, (3) self-help when there is undue delay, and (4) attachment rates for ILECs.

1. Preexisting Violations

The record in this proceeding showed that "utilities have sometimes held new attachers responsible for the costs of correcting preexisting violations" of safety and construction standards, even though such violations were caused by other attachers. *Order* ¶ 121 (ER 62).[7] To prevent this situation from recurring, the Commission clarified that "new attachers are not responsible for the costs" of fixing existing violations they did not cause. *Ibid.* Applying basic principles of cost causation, the Commission explained that while a "new attachment may precipitate correction of [a] preexisting violation," the violation itself, not the new attachment, "causes the costs." *Ibid.* In the Commission's view, "[h]olding the new attacher liable for preexisting violations unfairly penalizes the new attacher for problems it did not cause, thereby deterring deployment." *Ibid.*

[7] *See* ACA Comments at 48 (RER 56) (utilities "often seek to have new attachers pay to clear existing attachers' violations before they can attach their own equipment"); Lumos Comments at 15 (RER 179) (Lumos was "made to pay for make-ready work to correct preexisting deficiencies").

Consistent with this view, the Commission concluded that "utilities may not deny new attachers access" to poles "solely based on safety concerns arising from a [preexisting] violation." *Order* ¶ 122 (ER 63). In addition, the Commission declared that if an attacher seeks to "overlash" its wires to other wires on a pole, "[a] utility may not deny access … due to a [preexisting] violation on the pole." *Id*. n.429 (ER 59). The agency found that "denying new attachers access" on account of preexisting violations "prevents broadband deployment and does nothing to correct the safety issue." *Id*. ¶ 122 (ER 63).

2. Overlashing

The FCC also adopted a new rule "that allows utilities to establish reasonable advance notice requirements" for overlashing. *Order* ¶ 115 (ER 58). Under this rule, utilities "may require no more than 15 days' advance notice of planned overlashing." 47 C.F.R. § 1.1415(c). After receiving such notice, if a utility "determines that an overlash would create a capacity, safety, reliability, or engineering issue, it must provide specific documentation of the issue to the party seeking to overlash within the [15-day] advance notice period." *Ibid*. That party must then "address any identified issues before continuing with the overlash either by modifying its proposal or by explaining why, in [its] view, a modification is unnecessary." *Ibid*.; *see Order* ¶ 116 (ER 59). The rule does not specify a precise means of conflict resolution in the event that the utility and the overlasher disagree

on whether a safety issue exists. Rather, the Commission "recognize[d] that [its rules] cannot account for every distinct situation and encourage[d] parties to seek superior solutions for themselves through voluntary privately-negotiated solutions." *Order* ¶ 13 (ER7). The Commission had not previously mandated a specific rule for resolving overlashing disputes, and it found that "the record does not demonstrate that significant safety or reliability issues have arisen from the application of the current policy." *Id*. ¶ 117 (ER60).

The rule also codifies the FCC's longstanding policy barring utilities from requiring prior approval for overlashing. *See Order* ¶ 115 (ER 57-58); 47 C.F.R. § 1.1415(a). The agency found that pre-approval requirements for overlashing "unnecessarily increase costs for attachers and delay deployment." *Order* ¶ 117 (ER 60).

To guard against evasion of the ban on pre-approval requirements, the FCC emphasized that utilities may not use advance notice requirements for overlashing to impose "quasi-pre-approval requirements," such as requiring overlashers to perform "engineering studies." *Order* ¶ 119 (ER 61). After receiving notice of an overlash, a utility may "perform an engineering analysis of its own" so long as it "bears the cost of such an analysis." *Id*. n.444 (ER 61). A utility "may not charge a fee to the party seeking to overlash for the utility's review of the proposed

overlash." 47 C.F.R. § 1.1415(c). The Commission proscribed such fees because they "increase the costs of deployment." *Order* ¶ 116 (ER 59).

3. Self-Help Above The Communications Space

"Different vertical portions" of a utility pole "serve different functions." *Order* ¶ 6 (ER 4). The part of the pole near the ground "is unusable for most types of attachments." *Ibid*. The "lower usable space on a pole—the 'communications space'—houses low-voltage communications equipment, including fiber, coaxial cable, and copper wiring." *Ibid*. "The topmost portion of the pole, the 'electric space,' houses high-voltage electrical equipment." *Ibid*.

"Historically, communications equipment attachers" have "used only the communications space" on poles. *Order* ¶ 6 (ER 4). Increasingly, however, mobile wireless providers "are seeking access to areas above the communications space, including the electric space, to attach pole-top small wireless facilities." *Ibid*.

In 2011, the Commission declared that if utilities do "not meet the deadlines" imposed by FCC rules for conducting surveys and completing make-ready work to accommodate new attachments, attachers "may hire [utility-approved] contractors to complete the work in the communications space." *2011 Order*, 26 FCC Rcd at 5265 ¶ 49. Initially, this "self-help remedy" did not apply to attachments "located in, near, or above the electric space." *Id*. at 5262 ¶ 42. The

Commission said that if utilities missed deadlines for surveys and make-ready work above the communications space, "the appropriate avenue for seeking a remedy" was "a complaint filed through the FCC's complaint procedures." *Id.* at 5262 ¶ 43.

"After further consideration and in light of the national importance of a speedy rollout of 5G services," the Commission amended its 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." *Order* ¶ 97 (ER 47-48). In the agency's view, the complaint process was an "insufficient tool" to ensure "compliance with [FCC] deadlines" for survey and make-ready work "above the communications space." *Id*. ¶ 98 (ER 48). If those deadlines were missed, the Commission concluded, attachers would have no "meaningful remedy" without a self-help option. *Ibid*. (quoting Crown Castle Comments at 19 (RER 127)). The agency anticipated that "the availability of self-help above the communications space" would "strongly encourage utilities and existing attachers to meet their make-ready deadlines and give new attachers the tools to deploy quickly" if those deadlines are missed. *Ibid*. The Commission noted that utilities

can "prevent self-help from being invoked by completing make-ready on time." *Id*. ¶ 99 (ER 49).[8]

Recognizing that "[w]ork in the electric space generally is considered more dangerous than work in the communications space," *Order* ¶ 6 (ER 4), the Commission took steps to ensure that the expanded self-help remedy would not compromise "safety and equipment integrity" in the electric space. *Id*. ¶ 99 (ER 48). Specifically, the agency required attachers that "resort to self-help above the communications space" to "use a qualified contractor … pre-approved by the utility" to perform the work. *Ibid*.; *see* 47 C.F.R. § 1.1412(a). Thus, utilities can ensure that contractors used by new attachers will "adhere to utility protocols for working in the electric space." *Order* ¶ 99 (ER 49). In addition, the new rules give utilities "the opportunity to be present when the self-help make-ready work is performed." *Ibid*.; *see* 47 C.F.R. § 1.1411(i)(2)(i).

[8] Utilities must complete make-ready work for most attachments above the communications space within 90 days after notifying existing attachers that may be affected by the work. The deadline for larger orders is 135 days after notification. *See* 47 C.F.R. § 1.1411(e)(2)(ii), (g). Before make-ready work can begin, a utility must conduct a survey of the poles for which access has been requested. This survey must be completed within 45 days (or, in the case of larger orders, within 60 days) after the utility receives a complete pole attachment application. *See id*. § 1.1411(c)(3)(i).

4. Attachment Rates For Incumbent Local Exchange Carriers

When the FCC established procedures in 2011 for pole attachment complaints by ILECs, it recognized that there were "potential differences" between ILECs and other attachers. *2011 Order*, 26 FCC Rcd at 5333 ¶ 214. For that reason, the Commission declined "to adopt comprehensive rules governing [ILECs'] pole attachments, finding it more appropriate to proceed on a case-by-case basis." *Id.* at 5334 ¶ 214. The agency's 2011 rules placed "the burden" on ILECs to show that they were "similarly situated" to other attachers and were therefore entitled to "comparable" rates, terms, and conditions. *See* 47 C.F.R. § 1.1424 (2011).[9]

Historically, the key factor setting ILECs apart from other attachers was that ILECs (like utilities) were themselves pole owners. When ILECs "owned approximately the same number of poles as electric utilities," they could obtain "just and reasonable rates, terms, and conditions" for pole attachments "by negotiating long-term joint use agreements with utilities." *Order* ¶ 124 (ER 64). The Commission understood that these "joint use agreements may provide benefits" to ILECs "that are not typically found in pole attachment agreements

[9] This rule was later redesignated as 47 C.F.R. § 1.1413. *See* 83 Fed. Reg. 44831 (Sept. 4, 2018).

between utilities and other telecommunications attachers" that are not pole owners. *Ibid*.

Over time, however, this distinction between ILECs and other attachers has faded as ILECs' "percentage of pole ownership relative to utilities has dropped." *Order* ¶ 125 (ER 64). The record here reflected this change. A USTelecom survey of 46 states revealed that "for every ILEC pole to which [investor-owned utilities] attach, ILECs attach to three [investor-owned utility] poles. Specifically, ILECs attach to approximately 13.9 million [investor-owned utility] poles, whereas [investor-owned utilities] attach to only 4.6 million ILEC poles." *Id*. n.467 (ER 64) (quoting USTelecom Letter, Nov. 21, 2017, Attachment at 7 (RER 268)). As the number of poles owned by ILECs has decreased, the pole attachment rates paid by ILECs have increased, even though rates for other attachers have fallen. Data produced by USTelecom indicated that ILECs paid utilities an average of $26.12 per pole per year for attachments in 2017—an *increase* (albeit modest) from $26.00 in 2008—while cable and telecommunications attachers on ILEC-owned poles paid rates averaging $3.00 and $3.75 per pole per year, respectively, in 2017—a significant *decrease* from $3.26 and $4.45, respectively, in 2008. USTelecom Letter, Nov. 21, 2017, Attachment at 4 (RER 265); *see Order* ¶ 125 (ER 65).

Based on this evidence, the FCC concluded that "[ILEC] bargaining power vis-à-vis utilities has eroded since 2011." *Order* ¶ 125 (ER 64). In response to "these changed circumstances," it adopted a rebuttable presumption that, "for new and newly-renewed pole attachment agreements" between ILECs and utilities, ILECs "are similarly situated" to "telecommunications attachers" and are entitled to "comparable" rates, terms, and conditions. *Id*. ¶ 126 (ER 65).[10] The Commission also adopted a related presumption that an ILEC "should be charged no higher than the pole attachment rate for telecommunications attachers calculated in accordance with" 47 C.F.R. § 1.1406(e)(2), the FCC rule for setting the telecom rate under Section 224(e). *Order* ¶ 126 (ER 65); *see* 47 C.F.R. § 1.1413(b). The Commission found that these presumptions would "promote broadband deployment" by ensuring "greater rate parity between [ILECs] and their telecommunications competitors." *Id*. ¶ 126 (ER 65).

At the same time, the agency acknowledged that "there may be some cases" in which ILECs "continue to possess greater bargaining power than other attachers." *Order* ¶ 126 (ER 65). In those instances, a utility "can rebut" the new presumptions "in a complaint proceeding by demonstrating that the [ILEC]

[10] In this context, the Commission defined "telecommunications attachers" to include both telecommunications carriers and cable television systems. *See Order* ¶ 123 (ER 64).

receives net benefits that materially advantage the [ILEC] over other telecommunications attachers." *Id*. ¶ 128 (ER 66-67); *see* 47 C.F.R. § 1.1413(b).

If the presumptions are rebutted, the utility and the ILEC may "negotiate the appropriate rate or tradeoffs to account for" any "additional benefits" that differentiate the ILEC from other attachers. *Order* ¶ 128 (ER 67). In that case, however, the telecom rate in effect before the *2011 Order* "is the maximum rate that the utility and [ILEC] may negotiate." *Id*. ¶ 129 (ER 67). The Commission made this rate a hard cap to "provide further certainty within the pole attachment marketplace" and "limit pole attachment litigation." *Ibid*. (quoting USTelecom Comments at 11 (RER 196)).

STANDARD OF REVIEW

Review of the FCC's interpretation of Section 224 of the Communications Act is governed by *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).[11] If "Congress has directly spoken to the precise question at issue," the Court "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. But "if the statute is silent or ambiguous with respect to the specific issue, the question" for the Court is whether the agency has adopted "a permissible construction of the statute." *Id.* at 843; *see also City of Arlington v.*

[11] *See Ameren*, 865 F.3d at 1012-13; *AEP*, 708 F.3d at 186; *S. Co.*, 293 F.3d at 1343.

FCC, 569 U.S. 290, 307 (2013). If the implementing agency's reading of an ambiguous statute is reasonable, the Court must "accept the agency's construction of the statute, even if the agency's reading differs from what the [Court] believes is the best statutory interpretation." *New Edge Network, Inc. v. FCC*, 461 F.3d 1105, 1112 (9th Cir. 2006) (quoting *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005)).

The Administrative Procedure Act requires the Court to uphold the FCC's *Order* unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Under this "deferential" standard of review, "the agency's action carries a presumption of regularity." *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 994 (9th Cir. 2014). "Review under this standard is narrow"; the Court may not "substitute [its] judgment for that of the agency." *Alaska Wilderness League v. Jewell*, 788 F.3d 1212, 1217 (9th Cir. 2015) (internal quotation marks omitted); *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). "The only question" for the Court is whether the FCC "considered the relevant factors and articulated a rational connection between the facts found and the choices made" in the *Order*. *Center for Biological Diversity v. Zinke*, 868 F.3d 1054, 1057 (9th Cir. 2017) (internal quotation marks omitted).

SUMMARY OF ARGUMENT

To prevent electric utilities from imposing exorbitant rates and unreasonable conditions on pole attachers, Congress gave the FCC broad authority to "prescribe by rule regulations to carry out the provisions" of Section 224. 47 U.S.C. § 224(b)(2). The Commission reasonably exercised that authority here. It modified its pole attachment rules to advance an important policy objective: removing obstacles to the swift deployment of broadband services, including wireless 5G services.

Petitioners challenge some of the rule changes that the agency adopted. None of their claims has merit.

I. The record showed that some utilities denied pole access to new attachers until they agreed to fix preexisting violations that they did not cause. To put a stop to this unjust practice, the FCC adopted two rules prohibiting utilities from denying access to attachers and overlashers based on preexisting violations. *See* 47 C.F.R. §§ 1.1411(c)(2), 1.1415(b).

Although petitioners seek to challenge both rules, their claim regarding 47 C.F.R. § 1.1411(c)(2) is procedurally barred because that argument was not first presented to the agency. *See* 47 U.S.C. § 405(a). In any event, there is no merit to petitioners' contention that both rules contravene the "plain language" of Section 224(f)(2). While that provision permits utilities to deny access "for reasons of

safety," *id.* § 224(f)(2), petitioners are wrong to assume that utilities have "unfettered discretion" to define the scope of Section 224(f)(2). *See S. Co.*, 293 F.3d at 1348.

The Commission reasonably determined that it was unfair for utilities to deny access to new attachers and overlashers based solely on preexisting violations. "Simply denying new attachers access … does nothing to correct [any] safety issue" created by preexisting violations, *Order* ¶ 122 (ER 63), and "unfairly penalizes" attachers that are not responsible for the violations. *Id*. ¶ 121 (ER 62). Some utilities had cited preexisting violations as a pretext for denying access indefinitely, seeking to force new attachers to correct preexisting violations they neither caused nor would worsen with their new attachments. The new rules were adopted to stop this inequitable practice, which had become an obstacle to broadband deployment.

II. Petitioners contend that the new overlashing rule is inconsistent with Section 224(f)(2) because it "*appears to* permit an overlasher" to proceed with an overlash "despite a documented safety, capacity, reliability or engineering concern." Br. 28-29 (emphasis added). Judicial review of this issue is precluded by 47 U.S.C. § 405(a) because no party raised the issue with the Commission. In addition, the claim is not ripe for review. As petitioners concede, the rule does not specify how such disputes are to be resolved, but instead encourages parties to seek

solutions through voluntary agreements. Unless and until the FCC adopts a further rule or a concrete dispute materializes, petitioners' claim is unripe. In any event, the rule simply codifies a policy that the D.C. Circuit upheld as permissible under Section 224. *S. Co. Servs., Inc. v. FCC*, 313 F.3d 574, 582 (D.C. Cir. 2002).

The Commission reasonably sought to remove barriers to broadband deployment when it barred utilities from requiring overlashers to conduct engineering studies or submit specifications in advance. *Order* ¶ 119 & n.444 (ER 61). There is no basis for petitioners' assertion that "these restrictions prevent utilities from exercising their statutory rights" under Section 224(f)(2). Br. 32. The new rule shows "due consideration for the utilities' statutory rights" because it does "not preclude" utilities "from negotiating" agreements under which overlashers perform engineering studies and provide specifications in advance. *S. Co. Servs.*, 313 F.3d at 582.

The Commission also reasonably decided that if utilities choose to conduct engineering studies of proposed overlashes, they should bear the cost of such studies. It prohibited utilities from charging fees to overlashers to pay for review of proposed overlashes because such fees "increase the costs of deployment." *Order* ¶ 116 (ER 59). If overlashers were to bear the cost of utilities' engineering studies, utilities would have a strong incentive to perform such studies even when unnecessary.

III. Petitioners argue that the new rule permitting self-help above the communications space is unlawful because the FCC lacks authority to regulate electric utilities' attachments. Br. 34-40. That claim cannot withstand scrutiny.

The FCC reasonably found that the self-help rule "falls well within the Commission's jurisdiction" to implement the access requirements of Section 224(f)(1) because the rule is "designed to facilitate timely and [nondiscriminatory] access to poles." *Order* ¶ 100 (ER 49). The statute's mandate of nondiscriminatory access necessarily entails the rearrangement of existing pole attachments—including utilities' own attachments—to accommodate new attachments. *See Gulf Power*, 669 F.3d at 324.

Petitioners nonetheless maintain that because Section 224 does not expressly mention electric utilities' attachments, Congress unambiguously excluded such attachments from the FCC's purview. Br. 36-38. But statutory silence does not establish unambiguous congressional intent. *See Chevron*, 467 U.S. at 842-43.

In adopting the new self-help rule, the FCC acknowledged that it was reversing its earlier decision to limit self-help to the communications space. The agency reasonably explained why it altered its approach. First, it found that the complaint process had been an "insufficient tool for encouraging compliance with [make-ready] deadlines" above the communications space. *Order* ¶ 98 (ER 48). Second, the Commission concluded that extending the self-help remedy to "work

above the communications space" would help promote the timely "installation of wireless 5G small cells" and the "speedy rollout of 5G services." *Id*. ¶ 97 (ER 47-48).

The Commission also took steps to ensure that self-help work above the communications space would not compromise safety or equipment integrity in the electric space. *Order* ¶ 99 (ER 48-49). Most importantly, it required that any contractor used by an attacher to perform such work must be "qualified" and "pre-approved by the utility." *Ibid*. (ER 49). The Commission further noted that if utilities wished to avert any potential safety risks associated with self-help, they could always "prevent self-help from being invoked by completing make-ready on time." *Ibid*.

IV. Responding to record evidence of a significant decline in ILECs' bargaining power vis-à-vis utilities, the FCC discarded its earlier assumption that ILECs are different from other attachers. Instead, it adopted a rebuttable presumption that ILECs are similarly situated to telecommunications attachers, as well as a rebuttable presumption that ILECs' attachment rates should be no higher than the rate prescribed for telecommunications carriers under Section 224(e). *Order* ¶ 126 (ER 65).

Petitioners assert that the FCC cannot lawfully presume that ILECs are entitled to the Section 224(e) telecom rate because Congress excluded ILECs

"from the types of entities entitled to the [Section] 224(e) rate formula." Br. 52. Petitioners misread the statute. Section 224(e) requires the FCC to adopt a formula for calculating the attachment rates for "telecommunications carriers" (*i.e.*, carriers other than ILECs). But nothing in Section 224 precludes the Commission from concluding that if other attachers (including ILECs) are similarly situated to telecommunications carriers, they should pay the same rates as those carriers.

Petitioners contend that there is inadequate factual support for the presumption that ILECs are similarly situated to other attachers. Br. 46-50. That claim is insubstantial. The agency's sole justification for treating ILECs differently from other attachers in the past was ILECs' superior bargaining power vis-à-vis utilities. Over the past decade, however, ILECs' bargaining power "has eroded … as their percentage of pole ownership relative to utilities has dropped." *Order* ¶ 125 (ER 64). Given these changed circumstances, there was no longer any basis for presuming that ILECs differed from other attachers, and the Commission rightly reversed its earlier presumption. Because the new presumption is rebuttable, it "is not facially invalid." *S. Co. Servs.*, 313 F.3d at 584.

In cases where the new presumption is rebutted, the FCC prescribed the pre-*2011 Order* telecom rate as "the maximum rate that the utility and [ILEC] may negotiate." *Order* ¶ 129 (ER 67). Although petitioners object to the adoption of this "hard cap" (Br. 57-58), Section 224 requires only that ILECs' attachment rates

be "just and reasonable." 47 U.S.C. § 224(b)(1). The capped rate falls well within the broad zone of reasonableness permitted by the statute's "just and reasonable" standard.

ARGUMENT

I. THE FCC'S RULES REGARDING PREEXISTING VIOLATIONS ARE PERMISSIBLE UNDER SECTION 224

The FCC found evidence that utilities sometimes cited preexisting safety violations as grounds for denying pole access to new attachers.[12] In those cases, new attachers faced an unpalatable choice: either "delaying their deployment" until the utility or an existing attacher fixed the preexisting violation or "being forced to make the repair" themselves—and pay to fix problems they did not cause. *Order* n.457 (ER 63). Some utilities even insisted that new attachers must "pay to clear existing attachers' violations before they can attach their own equipment." ACA Comments at 48 (RER 56). And some new attachers felt compelled to accede to such demands.[13]

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[12] *See* Lightower Comments at 12 (RER 245); Crown Castle Letter, July 25, 2018, at 3 (RER 392).

[13] *See* Lightower Comments at 12 (RER 245) (it was "common practice" for utilities to stop processing Lightower's pole attachment applications "until [Lightower] relent[ed] and agree[d] to pay" to fix other attachers' preexisting violations); Lumos Comments at 15 (RER 179) ("Lumos has been made to pay for make-ready work to correct [preexisting] deficiencies")

To foreclose this inequitable practice, the Commission clarified that "new attachers are not responsible … for the costs of correcting preexisting violations." *Order* ¶ 121 (ER 62). Therefore, utilities may not impose such costs on new attachers. The agency explained that forcing a new attacher to bear the costs of fixing preexisting violations "unfairly penalizes the new attacher for problems it did not cause, thereby deterring deployment." *Ibid*. Petitioners do not contest this eminently reasonable conclusion.

To prevent circumvention of this ban on cost-shifting, the FCC's new rules prohibit utilities from denying access to a new attacher "based on a preexisting violation not caused by any prior attachments of the new attacher." 47 C.F.R. § 1.1411(c)(2); *see Order* ¶ 122 (ER 63). The rules also provide that utilities "may not prevent an attacher from overlashing because another existing attacher has not fixed a preexisting violation." 47 C.F.R. § 1.1415(b); *see Order* n.429 (ER 59). The agency imposed these restrictions because it understood that if utilities could deny access until a preexisting violation was rectified, new attachers would be left "in the same unacceptable position" as before—effectively "being forced" to fix someone else's violation before they could attach their own equipment. *Order* n.457 (ER 63).

Petitioners argue that these preexisting violation rules contravene the plain language of Section 224(f)(2). Br. 24-28. While some parties raised that claim in

the proceeding below with respect to the rule governing overlashers, 47 C.F.R. § 1.1415(b), no party argued before the Commission that the rule governing new attachers, 47 C.F.R. § 1.1411(c)(2), violates Section 224(f)(2). Because the FCC "has been afforded no opportunity to pass" on this issue, petitioners' challenge to 47 C.F.R. § 1.1411(c)(2) is not properly before this Court. *See* 47 U.S.C. § 405(a).

Under Section 405 of the Communications Act, the FCC must receive "the 'opportunity to pass' on the merits of any challenges to its orders before review may be sought in the Courts of Appeals." *Fones4All Corp. v. FCC*, 550 F.3d 811, 818 (9th Cir. 2008). In the proceeding below, no party presented the Commission with the argument that Section 224(f)(2) forbids adoption of 47 C.F.R. § 1.1411(c)(2), the rule barring utilities from denying access to new attachers based on preexisting violations.[14] This "failure to exhaust administrative remedies" precludes petitioners from seeking judicial review of the issue as to that rule. *Fones4All*, 550 F.3d at 819.[15]

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[14] Given the parties' silence on this issue, it is unsurprising that "the FCC makes no mention" of Section 224(f)(2) in discussing its adoption of 47 C.F.R. § 1.1411(c)(2). *See* Br. 26 (citing *Order* ¶¶ 121-122 (ER 62-63)).

[15] Petitioners cannot avoid the statutory exhaustion requirement by claiming that exhaustion would have been futile. There is no futility exception to the exhaustion requirement established by Section 405. *Fones4All*, 550 F.3d at 818 (citing *Booth v. Churner*, 532 U.S. 731, 741 n.6 (2001)); *Fones4All Corp. v. FCC*, 561 F.3d 1031, 1033 (9th Cir. 2009).

In any event, petitioners' challenges to both 47 C.F.R. § 1.1411(c)(2) and 47 C.F.R. § 1.1415(b) are unavailing. In asserting that these new rules contradict the "plain language" of Section 224(f)(2), Br. 26, petitioners emphasize that the statute permits utilities to deny access to new attachers "for reasons of safety." Br. 24 (quoting 47 U.S.C. § 224(f)(2)). Petitioners apparently read the statute to grant utilities unbridled discretion to decide when safety concerns justify rejection of proposed attachments. The Eleventh Circuit rejected a similar argument in *Southern Company*, finding nothing in the statutory text to support the claim that "utilities enjoy the unfettered discretion to determine when capacity is insufficient" under Section 224(f)(2). 293 F.3d at 1348. The court there held that Section 224(f)(2), which also authorizes utilities to deny access for "insufficient capacity," does not preclude the FCC from adopting rules "to ensure that when utilities

reserve space on a pole and deny attachers access on the basis of insufficient capacity, capacity is actually insufficient." *Id*. at 1349.[16]

The "reserved space" rules that were upheld in *Southern Company* were designed to prevent utilities from reserving "excessive space indefinitely" to deny attachers access. 293 F.3d at 1348. Those rules—which required utilities to demonstrate a "bona fide" need for reserving pole space—ensured that utilities could not "undermine the plain intent of the nondiscrimination provisions" of Section 224(f)(1) by reserving "excessive space" to "deny attachers space on the basis of 'insufficient capacity.'" *Ibid*.

Similar concerns impelled the FCC to adopt the preexisting violation rules. Under those rules, utilities cannot indefinitely deny access to new attachers or overlashers by citing preexisting violations that remain unaddressed. The record contained evidence that utilities previously denied access to new attachers as a

[16] The court in *Southern Company* also held that the FCC lacked "authority under the plain language of the statute" to require utilities to expand capacity at attachers' request. 293 F.3d at 1346-47. Although petitioners cite that portion of *Southern Company* to support their argument, *see* Br. 28, the Eleventh Circuit's "plain language" ruling was expressly limited to situations where "it is agreed that capacity is insufficient." *S. Co.*, 293 F.3d at 1347. In upholding the FCC's "reserved space" rules, the court concluded that the statutory phrase "insufficient capacity" was ambiguous. *Id.* at 1348. As the Eleventh Circuit recognized, the statutory text does not precisely define the scope of the exception created by Section 224(f)(2). Therefore, contrary to petitioners' assertion, the statute's meaning cannot be discerned at "the first step of the *Chevron* test." Br. 28 (quoting *S. Co.*, 293 F.3d at 1347).

means of pressuring them to pay to repair other attachers' preexisting violations.[17] The agency adopted the new rules to end this type of coercion and to protect new attachers' right to nondiscriminatory access under Section 224(f)(1).

Petitioners assert that these rules create unnecessary safety risks. They suggest that under the rules, utilities will have no choice but to allow attachments that exacerbate safety issues caused by preexisting violations. *See* Br. 25-27. That is incorrect.

As the Commission made clear, "utilities may not deny new attachers access … *solely* based on safety concerns arising from a [preexisting] violation." *Order* ¶ 122 (ER 63) (emphasis added); *see also id*. n.429 (ER 59) (utilities "may not deny access to overlash *due to* a [preexisting] violation" (emphasis added)). It does not follow that new attachers may ignore safety risks caused by their own attachments. To the contrary, under the new OTMR rules, the *Order* contemplates that when new attachers opt for OTMR, they are responsible for fixing any preexisting conditions that (if left unrepaired) could leave a pole unprepared to support their new attachments. *See Order* ¶ 24 (ER14) (OTMR "shift[s]

[17] *See* Lightower Comments at 12 (RER 245) ("all progress" on Lightower's pole attachment applications was "stalled until [Lightower] relent[ed] and agree[d] to pay for" correction of "[preexisting] violations"); ACA Comments at 48 (RER 56) (utilities "often seek to have new attachers pay to clear existing attachers' violations before they can attach their own equipment").

responsibilities from the utility to the new attacher to survey the affected poles … and perform the make-ready work").

The preexisting violation rules simply prevent a utility from requiring a new attacher to address past safety violations even in those circumstances where the pole would accommodate the new attachment without additional safety risk.[18] The Commission reasonably concluded that in those circumstances, denying access to a new attacher solely because of a preexisting violation "unfairly penalizes the new attacher for problems it did not cause," *Order* ¶ 121 (ER 62), "does nothing to correct" any "safety issue" created by the preexisting violation, *id*. ¶ 122 (ER 63), and needlessly "prevents broadband deployment," *ibid.*

The preexisting violation rules rest on a permissible reading of Section 224. That statute generally requires utilities to provide attachers with "nondiscriminatory access" to utility poles. 47 U.S.C. § 224(f)(1). While Section 224(f)(2) carves out an exception to this requirement based on (among other things) safety concerns, utilities do not have "unfettered discretion" to define the scope of that exception. *See S. Co.*, 293 F.3d at 1348. The record showed that utilities were "undermin[ing] the plain intent of the nondiscrimination provisions"

[18] For example, some preexisting violations (*e.g.*, minor construction code infractions) do not create serious safety risks, and additional attachments or overlashes will not substantially increase such minimal risks.

of Section 224(f)(1) by citing preexisting violations as a pretext for denying access indefinitely until new attachers agreed to fix violations they did not cause. *Ibid*. The Commission reasonably found that preexisting violations alone cannot justify depriving new attachers and overlashers of the nondiscriminatory access to which they are entitled under Section 224(f)(1).

II. THE FCC'S OVERLASHING RULE IS PERMISSIBLE UNDER SECTION 224

The Commission's new overlashing rule permits utilities to require that attachers provide up to "15 days' advance notice of planned overlashing." 47 C.F.R. § 1.1415(c); *see Order* ¶ 116 (ER 58). "If after receiving advance notice," a utility "determines that an overlash would create a capacity, safety, reliability, or engineering issue, it must provide specific documentation of the issue to the party seeking to overlash within the [15-day] advance notice period." 47 C.F.R. § 1.1415(c). Upon receiving such documentation, "the party seeking to overlash must address any identified issues before continuing with the overlash either by modifying its proposal or by explaining why, in the party's view, a modification is unnecessary." *Ibid*.; *see Order* ¶ 116 (ER 59). Neither the rule nor the *Order* specifies a precise means of dispute resolution in the event that the overlasher and the utility disagree about whether a safety issue exists.

Petitioners assert that the overlashing rule "is inconsistent with the plain language of [Section] 224" because "the rule *appears to* permit an overlasher" to

override a utility's objections and proceed with an overlash "despite a documented safety, capacity, reliability or engineering concern." Br. 28-29 (emphasis added). Petitioners implicitly acknowledge, however, that the rule is silent on this point: They ask the Court, "at a minimum," to "remand to the FCC" for clarification that utilities "may make the final binding decision, subject to FCC review," as to "whether a proposed overlash would create a capacity, safety, reliability or engineering issue." Br. 29.

The Court should decline to consider this claim for three reasons. First, Section 405 of the Communications Act bars judicial review of the claim because no party gave the Commission an "opportunity to pass" on this issue. *See* 47 U.S.C. § 405(a); *Fones4All*, 550 F.3d at 817-19. Specifically, no party asked the agency to resolve the ambiguity described in petitioners' brief.[19]

Second, petitioners' claim "is not ripe for adjudication" because "it rests upon contingent future events that may not occur as anticipated, or indeed may not

[19] Petitioners may assert that no party could have sought clarification during the proceeding below because the language creating the ambiguity was added to the rule just before the *Order* was released. *Compare* FCC Draft Order, App. A, § 1.1416(b) (RER 374), *with Order*, App. A, § 1.1415(c) (ER 97). Under Section 405, however, "when a petitioner has no reason to raise an argument until the FCC issues an order that makes the issue relevant, the petitioner must file a petition for reconsideration with the Commission before it may seek judicial review." *Globalstar, Inc. v. FCC*, 564 F.3d 476, 484 (D.C. Cir. 2009) (internal quotation marks omitted).

occur at all." *Bova v. City of Medford*, 564 F.3d 1093, 1096 (9th Cir. 2009) (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)). Petitioners argue that the overlashing rule conflicts with Section 224(f)(2) because the rule *could be* construed to permit an overlash even if a utility objects for safety, capacity, reliability, or engineering reasons. But the FCC has not yet read the rule in this manner, and a concrete set of circumstances presenting this issue has not yet materialized. Accordingly, petitioners' claim is not ripe for review. Hence, the Court should "offer no judgment" on the issue. *S. Co. Servs.*, 313 F.3d at 576.

Third, the new overlashing rule is consistent with the agency's longstanding policy of leaving the details of overlashing arrangements to be negotiated between the utility and the overlasher. *See Amendment of Commission's Rules and Policies Governing Pole Attachments*, 16 FCC Rcd 12103, 12141 ¶ 74 (2001). The D.C. Circuit held that the Commission's reliance on private negotiations in this context was permissible and adequately protected utilities' rights under Section 224(f)(2). *S. Co. Servs.*, 313 F.3d at 582. The record in this proceeding reflected that "an advance notice requirement"—unencumbered by any additional pre-approval requirements—"has been sufficient to address safety and reliability concerns." *Order* ¶ 117 (ER60). The new rule simply codified the FCC's past policy of relying on voluntary resolution of overlashing issues. This Court should reject the

utilities' claims for the same reasons that the D.C. Circuit did when it upheld the FCC's 2001 order.

In promulgating the new rule, the Commission emphasized that utilities may not use advance notice requirements to impose "quasi-pre-approval requirements," such as requiring overlashers to conduct "engineering studies," *Order* ¶ 119 (ER 61), or "to submit specifications of the materials to be overlashed" in advance, *id.* n.444 (ER 61). Petitioners maintain that these restrictions are unlawful (Br. 29-32) because they "prevent utilities from exercising their statutory rights under [Section] 224(f)(2)." Br. 32. That assertion is baseless.[20]

Previously, the FCC's rules made no provision for prior notice of overlashing. Challenging that omission in the D.C. Circuit, utilities argued that "without a rule that overlashers give prior notice," utilities could not "exercise their right to deny access" under Section 224(f)(2). *S. Co. Servs.*, 313 F.3d at 582. The D.C. Circuit found "no merit" in that claim. *Ibid.* Although the challenged rules

[20] Insofar as petitioners challenge the ban on requiring advance submission of specifications, that claim has been forfeited because no party presented it to the Commission. *See* 47 U.S.C. § 405(a); *Fones4All*, 550 F.3d at 817-19. To be sure, some utilities asked the agency to "clarify" that "utilities can require an overlasher to submit the specifications of the materials to be overlashed with the notice of overlashing." Utilities Letter, July 26, 2018, at 8 (ER 946). The FCC rejected that proposal. *Order* n.444 (ER 61). But no party argued during the proceeding below (as petitioners do here) that the Commission cannot lawfully bar utilities from requiring overlashers to submit specifications in advance. In any event, for the reasons discussed above, the argument lacks merit.

did not require overlashers "to give prior notice to utilities before overlashing," they also did "not preclude [utilities] from negotiating with pole users to require notice before overlashing." *Ibid*. Therefore, the court concluded, the rules "show[ed] due consideration for the utilities' statutory rights." *Ibid*.

The new overlashing rule is even more accommodating to utilities. Unlike the rules upheld by the D.C. Circuit in 2002, the new rule permits utilities for the first time to require attachers to provide advance notice of overlashing. *Order* ¶¶ 115-116 (ER 57-59). Petitioners complain that the new rule does not allow them to require overlashers to conduct engineering studies or provide specifications in advance. Br. 30-32. But that rule—just like the rules affirmed by the D.C. Circuit—does "not preclude" utilities "from negotiating" such matters "with pole users." *S. Co. Servs.*, 313 F.3d at 582. Utilities and attachers remain free "to reach bargained solutions that differ from [FCC] rules," *Order* ¶ 13 (ER 7), including agreements that require overlashers to perform engineering studies and submit specifications in advance. By allowing for such agreements, the Commission has "show[n] due consideration for the utilities' statutory rights" under Section 224(f)(2). *S. Co. Servs.*, 313 F.3d at 582.

Finally, petitioners argue that it was arbitrary and capricious for the Commission to bar utilities from charging fees to overlashers to cover the cost of reviewing proposed overlashes. Br. 32-33; *see* 47 C.F.R. § 1.1415(c). To the

contrary, the Commission had good reason to prohibit such fees, which would "increase the costs of deployment" for overlashers. *Order* ¶ 116 (ER 59). If utilities were permitted to charge overlashers for the cost of reviewing proposed overlashes, there would be no disincentive for utilities to conduct engineering studies of *all* overlashing proposals, even those that plainly do not justify such additional review. That sort of cost-shifting regime would saddle overlashers with unwarranted cost burdens. The Commission's alternative approach—requiring utilities to bear the cost of their own engineering studies, *see id.* n.444 (ER 61)—increases the likelihood that utilities will conduct such studies only when warranted. The agency has taken the same reasonable approach with respect to OTMR and self-help, requiring utilities to pay their own costs if they choose to review new attachers' OTMR and self-help work. *Id*. ¶ 116 & n.430 (ER 59).[21]

Petitioners argue that "[a]llowing a utility to recover its costs" for reviewing proposed overlashes would be "consistent with the requirements" of Section 224(f)(2). Br. 33. But nothing in Section 224(f)(2) mandates that attachers reimburse utilities for the cost of reviewing proposed overlashes. Given the statute's silence on the issue, the Commission reasonably decided that overlashers

[21] Of course, utilities and attachers "are welcome to reach bargained solutions that differ from [FCC] rules," *Order* ¶ 13 (ER 7), and they may negotiate agreements under which overlashers cover the costs of utilities' review of proposed overlashes.

should not have to pay for analyses conducted by utilities. That decision advances the agency's overarching goal in this proceeding: removing unnecessary impediments to broadband deployment.

III. THE FCC'S RULE PERMITTING SELF-HELP ABOVE THE COMMUNICATIONS SPACE IS PERMISSIBLE UNDER SECTION 224

"In the interest of speeding broadband deployment," the FCC modified its 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 [utilities] or existing attachers have failed to complete make-ready work within the required time frames." *Order* ¶ 96 (ER 47); *see* 47 C.F.R. § 1.1411(i)(2).[22]

Previously, "the only remedy for missed deadlines for work above the communications space" was "filing a complaint with the Commission's

[22] In a footnote in their brief, petitioners claim that the Commission promulgated this rule without providing the notice required by 5 U.S.C. § 553. Br. 34 n.7. The Court should decline to address this claim because "[a]rguments raised only in footnotes … are generally deemed waived." *Estate of Saunders v. Comm'r of Internal Revenue*, 745 F.3d 953, 962 n.8 (9th Cir. 2014). In any event, the claim is unfounded. In the notice initiating this rulemaking, the FCC sought comment on "proposals to speed pole access" by allowing new attachers "to adjust, on an expedited basis, the preexisting equipment of the utility and other [attachers] already on [the] pole." *Notice* ¶ 6 (ER 143). The Commission then received comments and filings "on the issue of self-help above the communications space" from both supporters and opponents of the idea. *Order* n.340 (ER 48). Because the new self-help rule was at a minimum "a logical outgrowth of the notice and comments," it was "validly promulgated." *Hodge v. Dalton*, 107 F.3d 705, 712 (9th Cir. 1997) (internal quotation marks omitted).

Enforcement Bureau." *Order* ¶ 98 (ER 48). But the complaint process had proven to be an "insufficient tool for encouraging compliance with [make-ready] deadlines." *Ibid*. In the Commission's considered judgment, "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" if those deadlines are missed. *Ibid*.

Petitioners maintain that the new self-help rule exceeds the FCC's authority under Section 224 by regulating attachments made by electric utilities. Br. 34-40. They note that such attachments fall outside the statute's definition of "pole attachment," Br. 35 (citing 47 U.S.C. § 224(a)(4)); and they argue that the agency's authority under Section 224 is confined to regulating "the rates, terms, and conditions for pole attachments." *Ibid*. (quoting 47 U.S.C. § 224(b)(1)). Their argument rests on a cramped construction of Section 224.

Section 224 empowers the agency to "prescribe by rule regulations to carry out the provisions of this section." 47 U.S.C. § 224(b)(2). Section 224(f)(1) requires electric utilities to provide cable systems and telecommunications carriers with "nondiscriminatory access" to their poles. *Id*. § 224(f)(1). The FCC reasonably determined that its new self-help rule, which is "designed to facilitate timely and [nondiscriminatory] access" for new attachers, "falls well within the

Commission's jurisdiction" under Section 224(b)(2) to implement the access mandate of Section 224(f)(1). *Order* ¶ 100 (ER 49).

Petitioners nonetheless assert that because Section 224 makes no mention of electric utilities' attachments, Congress unambiguously intended to exclude such attachments from the FCC's purview. Br. 36-38. They base this assertion on the maxim *expressio unius est exclusio alterius* (the expression of one thing implies the exclusion of others). Br. 36 (citing ANTONIN SCALIA & BRIAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 107-11 (2012)). As the D.C. Circuit has explained, however, the *expressio unius* "maxim has little force in the administrative setting, where [courts] defer to an agency's interpretation of a statute unless Congress has directly spoken to the precise question at issue." *Mobile Commc'ns Corp. of Am. v. FCC*, 77 F.3d 1399, 1404-05 (D.C. Cir. 1996) (internal quotation marks omitted); *see Chevron*, 467 U.S. at 842-43.

This Court has repeatedly held that statutory silence does not suffice to establish unambiguous congressional intent under *Chevron*. *See Wells Fargo Bank v. Boutris*, 419 F.3d 949, 959 n.12 (9th Cir. 2005); *Young v. Reno*, 114 F.3d 879, 886 (9th Cir. 1997). These cases illustrate that *expressio unius* "is simply too thin a reed to support the conclusion that Congress has clearly resolved [an] issue." *Mobile Commc'ns*, 77 F.3d at 1405 (internal quotation marks omitted).

Apart from their unwarranted reliance on *expressio unius*, petitioners have no basis for claiming that the FCC lacks authority over electric utilities' pole attachments under Section 224. The "make-ready work" necessary "to accommodate a new attachment" on a pole often involves "rearrangement of existing attachments." *See Gulf Power*, 669 F.3d at 324 (internal quotation marks omitted). In some instances, a new attachment cannot be made unless a utility's own attachments are moved. The Commission reasonably concluded that it could not effectively protect new attachers' right to nondiscriminatory access under Section 224(f)(1) unless it regulated *all* make-ready work, including the readjustment of utilities' own attachments. The new self-help rule is "simply a mechanism for ensuring that the nondiscrimination principle" of Section 224(f)(1) "is fully implemented." *See S. Co.*, 293 F.3d at 1348.[23]

Petitioners claim that the self-help rule "undermines" Section 224(f)(2). Br. 38. Not so. The rule does "not abridge a utility's ability to deny access" on a nondiscriminatory basis for the reasons set forth in Section 224(f)(2). *Order* ¶ 100 (ER 50).

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[23] Petitioners cannot plausibly claim that there is "no limit" to "the FCC's assertion of authority" over electric utilities' attachments. Br. 42. The agency's authority is limited to implementing the provisions of Section 224. The new self-help rule falls comfortably within the FCC's authority under Section 224(b)(2) to adopt rules to implement the nondiscriminatory access mandate of Section 224(f)(1).

Petitioners also contend that when the Commission adopted the new self-help rule, it did not adequately explain its change in course. Br. 40-43. That is incorrect.

When the FCC adopted a self-help remedy for missed make-ready deadlines in 2011, it initially declined to make that remedy available for attachments "located in, near, or above the electric space" because of the "safety concerns related to" such attachments. *2011 Order*, 26 FCC Rcd at 5262 ¶ 42. The agency altered its approach for two reasons. First, the record here showed that the complaint process—the only available remedy under the prior rules for make-ready delays above the communications space—had been an "insufficient tool for encouraging compliance with [make-ready] deadlines." *Order* ¶ 98 (ER 48).[24] Second, recognizing "the national importance of a speedy rollout of 5G services," the Commission reasonably concluded that extending the self-help remedy to "work above the communications space" would help promote the timely "installation of wireless 5G small cells." *Id*. ¶ 97 (ER 47-48).

[24] *See* ACA Comments at 32 (RER 40) ("attachers find the cost of the Commission complaint process to be so great and the benefits so little that they rarely file complaints to protect their rights"); Crown Castle Comments at 19 (RER 127) (without a self-help option, attachers have no "meaningful remedy" for delays in make-ready work above the communications space).

Petitioners argue that the *Order* "articulates no new facts that would moot the safety issues referenced by" the *2011 Order*. Br. 41. But the FCC did not treat those safety issues as "moot." Rather, when it adopted the new self-help rule, it balanced the benefits of the rule against any potential safety concerns, which it sought to mitigate. *See Order* ¶ 99 (ER 48-49).

In particular, the agency required attachers that "resort to self-help above the communications space" to "use a qualified contractor, … pre-approved by the utility, to do the work." *Order* ¶ 99 (ER 49); *see* 47 C.F.R. § 1.1412(a). For this purpose, an attacher must select a contractor from a list of approved contractors designated by the utility. *Order* ¶ 105 (ER 52). Because self-help work above the communications space "poses heightened safety and reliability risks," the Commission found it "especially important to give the utility control over who performs such work." *Id*. ¶ 106 (ER 53). In addition, the new rule requires that attachers give utilities advance notice of self-help work and "the opportunity to be present" when the work is performed. *Order* ¶ 99 (ER 49); *see* 47 C.F.R. § 1.1411(i)(2)(i). Attachers must also notify utilities "no later than 15 days" after self-help make-ready work is completed on a pole so that utilities "have an opportunity to inspect" the work. *Order* ¶ 102 (ER 50); *see* 47 C.F.R. § 1.1411(i)(2)(iii).

In their brief (Br. 40), petitioners make much of the Commission's conclusion in the *2011 Order* that "safety concerns must take priority when communications equipment is installed among or above potentially lethal electric lines." *2011 Order*, 26 FCC Rcd at 5277 ¶ 80. That conclusion led the Commission to "clarify" that attachers may not "use attachment contractors solely of their own choosing" to perform work in the electric space. *Ibid*. The same restriction applies under the new rule. Contractors performing self-help work must be "pre-approved" by utilities. *Order* ¶ 99 (ER 49). Utilities can require those contractors to "adhere to utility protocols for working in the electric space." *Ibid*. These pre-approval requirements directly address petitioners' speculative claims that self-help in the electric space could endanger public safety and cause power outages. *See* Br. 38-39.

With these safeguards in place, the Commission reasonably concluded that it could extend the self-help remedy to attachments above the communications space—and thereby promote expeditious broadband deployment—without compromising "safety and equipment integrity" in the electric space. *Order* ¶ 99 (ER 48). While petitioners disagree with that policy judgment, the agency reasonably explained why it changed its position regarding self-help above the communications space. The Commission "need not demonstrate to [the Court's] satisfaction that the reasons for the new policy are *better* than the reasons for the

old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better[.]" *City of Los Angeles v. Barr*, 929 F.3d 1163, 1182 (9th Cir. 2019) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

Of course, if petitioners believe that the precautions adopted by the agency do not adequately protect against the risks associated with self-help, they can always obviate the need for self-help "by completing make-ready" work "on time," *Order* ¶ 99 (ER 49), in accordance with the deadlines set by the Commission. Petitioners do not challenge the reasonableness of those deadlines.

IV. THE FCC'S RULE CONCERNING POLE ATTACHMENT COMPLAINTS BY ILECS IS PERMISSIBLE UNDER SECTION 224

In 2011, when the FCC first established procedures for reviewing pole attachment complaints by ILECs, it adopted a presumption that ILECs "are not similarly situated" to other attachers. *Order* ¶ 124 (ER 64). The agency "placed the burden on [ILECs] to rebut [that] presumption" if they sought to obtain the same rates, terms, and conditions as other attachers. *Ibid*.

The Commission had presumed that ILECs differed from other attachers because ILECs, like utilities, were pole owners. In the past, ILECs "owned approximately the same number of poles as electric utilities." *Order* ¶ 124 (ER 64). This enabled them to negotiate "long-term joint use agreements with

utilities," which often provided ILECs with benefits "that are not typically found in pole attachment agreements between utilities" and other attachers. *Ibid*.

In this proceeding, however, the FCC found substantial evidence that over the last decade, "[ILEC] pole ownership has declined and [ILEC] pole attachment rates have increased" while rates for other attachers have decreased. *Order* ¶ 126 (ER 65). Based on this evidence, the Commission reasonably concluded that ILECs' "bargaining power vis-à-vis utilities has eroded since 2011." *Id*. ¶ 125 (ER 64). *See AEP*, 708 F.3d at 188 (crediting the Commission's explanation that because the number of ILEC-owned poles has declined, "power companies" have "a far higher proportion of poles and a lesser incentive to share").[25]

In view of "these changed circumstances," the Commission adopted a presumption that, "for new and newly-renewed pole attachment agreements" between ILECs and utilities, ILECs "are similarly situated" to "telecommunications attachers" and are entitled to "comparable" rates, terms, and conditions. *Order* ¶ 126 (ER 65). It also adopted a presumption that, for purposes of determining "comparable" rates in this context, an ILEC may "be charged no higher" than the telecom rate prescribed for telecommunications carriers under

[25] Although petitioners baldly assert that these factual findings are "incorrect" (Br. 47), their brief does not explain why they believe these findings are wrong. *See AEP*, 708 F.3d at 188 (rejecting similar unsubstantiated attack by utilities on FCC's data).

Section 224(e). *Ibid*. A utility can rebut these presumptions "with clear and convincing evidence that [an ILEC] receives net benefits under its pole attachment agreement with the utility that materially advantage the [ILEC] over other telecommunications attachers." *Id*. ¶ 123 (ER 64); *see* 47 C.F.R. § 1.1413(b).

Petitioners contend that the rule incorporating these presumptions "is not due any deference" under *Chevron* because the FCC did not explain "how the rule complies with" Section 224. Br. 43. To the contrary, as the *Order* explained, the Commission determined in 2011 "that it had the authority 'to ensure that [ILECs'] attachments to other utilities' poles are pursuant to rates, terms, and conditions that are just and reasonable.'" *Order* ¶ 124 (ER 64) (quoting *2011 Order*, 26 FCC Rcd at 5330 ¶ 208). Although several utilities (including many of these petitioners) challenged that determination, the D.C. Circuit held that the Commission reasonably construed Section 224 to authorize FCC regulation of the rates, terms, and conditions for ILECs' pole attachments under Section 224(b)(1). *AEP*, 708 F.3d at 186-88. Because the FCC has authority to ensure that attachment rates paid by ILECs are "just and reasonable," 47 U.S.C. § 224(b)(1), it had "ample authority under [Section] 224" to "address outdated rate disparities" between ILECs and similarly situated attachers. *Order* ¶ 135 (ER 69).

Petitioners argue that Section 224(e) precludes the FCC from adopting a presumption that ILECs should be charged the telecom rate for pole attachments.

Br. 51-54. They maintain that the new presumption is "at odds with the statutory exclusion of ILECs from the types of entities entitled to the [Section] 224(e) rate formula." Br. 52. This "argument overlooks the obvious difference between a statutory *requirement* … and a statutory *authorization*." *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 491 (2004).

Section 224(e) requires the FCC to adopt regulations to set the rates "for pole attachments used by telecommunications carriers" (*i.e.*, carriers other than ILECs) when there is "a dispute over such charges." 47 U.S.C. § 224(e)(1). But nothing in that provision prohibits the FCC from prescribing the same rates for other attachers. For example, even though Section 224 mandates the use of different formulas to calculate the cable rate and the telecom rate, *see id.* § 224(d), (e), courts have held that the FCC can permissibly adopt telecom rates that are essentially identical to cable rates. *See AEP*, 708 F.3d at 188-90; *Ameren*, 865 F.3d at 1012-14.

Similarly, nothing in Section 224 unambiguously bars the FCC from concluding that ILECs are entitled to the same attachment rates as similarly situated telecommunications attachers. Thus, the new rule concerning ILECs' rates must be upheld unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844. The rule easily passes that test. By ensuring that ILECs pay the same rates as comparable attachers, the rule is reasonably

designed to produce "just and reasonable" rates for ILECs in accordance with Section 224(b)(1).

Petitioners argue that the rule should receive little deference under *Chevron* because it rests on a statutory interpretation that is inconsistent with the FCC's previous reading of Section 224. Br. 55-56.[26] Under *Chevron*, however, "the mere fact that an agency interpretation contradicts a prior agency position is not fatal." *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 742 (1996). And under this Court's precedent, an agency's revised interpretation of a statute it implements "is entitled to deference 'so long as the agency acknowledges and explains the departure from its prior views.'" *Resident Councils of Washington v. Leavitt*, 500 F.3d 1025, 1036 (9th Cir. 2007) (quoting *Seldovia Native Ass'n v. Lujan*, 904 F.2d 1335, 1346 (9th Cir. 1990)).

In adopting its new rule regarding ILECs, the FCC both acknowledged its change in approach and explained the reason for the change. *See Order* ¶¶ 123-126 (ER 63-65). Previously, the agency had presumed that ILECs were not similarly situated to other attachers because ILECs' pole ownership gave them unique leverage with respect to utilities, enabling them to secure more benefits

[26] To support this argument, petitioners principally rely on a lengthy quotation from an opinion *dissenting* from an en banc decision of this Court. *See* Br. 55 (quoting *Marmolejo-Campos v. Holder*, 558 F.3d 903, 919-20 (9th Cir. 2009) (en banc) (Berzon, J., dissenting)).

through negotiation than other attachers could obtain. *See 2011 Order*, 26 FCC Rcd at 5333-34 ¶ 214; *Order* ¶ 124 (ER 64). The record here convinced the Commission that "reversal" of its earlier presumption was "warranted" because ILECs' "bargaining power vis-à-vis utilities has eroded since 2011." *Order* ¶ 125 (ER 64).

Petitioners assert that there is inadequate factual support for the presumption that ILECs are similarly situated to other attachers. Br. 46-50. The record refutes that claim. It "clearly demonstrates that [ILEC] pole ownership [has] decline[d]" over the past decade. *Order* ¶ 125 (ER 64). Data submitted by USTelecom showed that "for every ILEC pole to which [investor-owned utilities] attach, ILECs attach to three [investor-owned utility] poles." *Id*. n.467 (ER 64) (quoting USTelecom Letter, Nov. 21, 2017, Attachment at 7 (RER 268)). The record also indicates that during this same period, the pole attachment rates paid by ILECs increased while the rates paid by other attachers decreased. According to a survey conducted by USTelecom, ILEC attachers paid utilities an average of $26.12 per pole per year in 2017—an *increase* (albeit modest) from $26.00 in 2008—while cable and telecommunications attachers on ILEC-owned poles paid rates averaging $3.00 and $3.75 per pole per year, respectively, in 2017—a significant *decrease* from $3.26 and $4.45, respectively, in 2008. USTelecom Letter, Nov. 21, 2017, Attachment at 4 (RER 265); *see Order* ¶ 125 (ER 65).

These developments rightly caused the FCC to question the premise that ILECs have superior bargaining power compared to other attachers—the sole justification for its original presumption that ILECs differ from other attachers. The Commission reasonably responded to "these changed circumstances" by replacing its earlier presumption with a new rebuttable presumption that ILECs "are similarly situated" to "telecommunications attachers" and are entitled to "comparable" rates, terms, and conditions for pole attachments. *Order* ¶ 126 (ER 65).

The record evidence of changed circumstances justified the agency's decision to reverse its initial presumption regarding ILECs. *See Nat'l Ass'n of Telecomms. Officers & Advisors v. FCC*, 862 F.3d 18 (D.C. Cir. 2017) (after finding evidence of changed market conditions, the FCC properly reversed its presumption that cable operators are not subject to effective competition). The new presumption rests on "a sound factual connection between the proved and inferred facts." *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 787 (1979). Now that ILECs' bargaining power vis-à-vis utilities has dissipated, there is no longer any basis for presuming that ILECs differ from other attachers. Consequently, the FCC's new presumption that ILECs are similarly situated to telecommunications attachers "is entitled to considerable deference." *Holland Livestock Ranch v. United States*, 714 F.2d 90, 92 (9th Cir. 1983) (internal quotation marks omitted).

Moreover, the rule adopting this presumption "is not facially invalid" because it "merely establishes a *rebuttable* presumption." *S. Co. Servs.*, 313 F.3d at 584. "The possibility that a utility can present information showing" that an ILEC is *not* similarly situated to other attachers "makes it clear that the rule is not facially unreasonable." *Id*. at 584-85.[27]

Lastly, petitioners complain that the Commission placed unreasonable constraints on utilities' ability to negotiate with ILECs in cases where the new presumption is rebutted. Br. 57-58. In those cases, the agency designated the pre-*2011 Order* telecom rate as "the maximum rate that the utility and [ILEC] may negotiate." *Order* ¶ 129 (ER 67). It had previously used this rate "as a reference point in complaint proceedings involving a pole owner and an [ILEC] attacher that is not similarly situated" to other attachers. *2011 Order*, 26 FCC Rcd at 5337 ¶ 218. The Commission decided to "make this rate a hard cap" in order to "provide further certainty within the pole attachment marketplace" and "limit pole attachment litigation." *Order* ¶ 129 (ER 67) (internal quotation marks omitted).

Petitioners claim that this "hard cap" is arbitrary and capricious because it does not "account for the variety of scenarios that might exist in a joint use

[27] Insofar as petitioners seek to mount an "as applied" challenge to the rule, any such challenge is unripe because there is no "live controversy regarding a particular application" of the presumption. *S. Co. Servs.*, 313 F.3d at 582.

agreement between an ILEC and an electric utility." Br. 57. Contrary to petitioners' assertion, the Commission is under no obligation to set rates that account for all such scenarios or provide what the utility considers "sufficient recovery" (Br. 58) in each individual case.

Section 224 simply requires the agency to ensure that ILECs' attachment rates are "just and reasonable." 47 U.S.C. § 224(b)(1). The "generality" of this statutory language "opens a rather large area for the free play of agency discretion." *Orloff v. FCC*, 352 F.3d 415, 420 (D.C. Cir. 2003) (internal quotation marks omitted). Accordingly, this Court's "role in determining whether rates are just and reasonable is limited." *Montana Consumer Council v. FERC*, 659 F.3d 910, 918 (9th Cir. 2011). "The statutory requirement that rates be 'just and reasonable' is obviously incapable of precise judicial definition, and [courts] afford great deference to the Commission in its rate decisions." *Ibid*. (quoting *Morgan Stanley Capital Grp. v. Pub. Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527, 532 (2008)).

Under this deferential standard of review, the Commission's selection of the pre-*2011 Order* telecom rate as a "hard cap" plainly passes muster. Because that rate is "higher … than the regulated rate available to telecommunications carriers and cable operators, it helps account for particular arrangements that provide net advantages to [ILECs] relative to" other attachers. *2011 Order*, 26 FCC Rcd at

5337 ¶ 218. While petitioners speculate that the capped rate may not cover all the "scenarios that might exist" in joint use agreements (Br. 57), the rate falls comfortably within "the broad zone of reasonableness permitted by" the statute's "just and reasonable standard." *Permian Basin Area Rate Cases*, 390 U.S. 747, 770 (1968). The law requires nothing more.[28]

Furthermore, the Commission offered two cogent reasons for adopting the "hard cap." First, it found that setting "an upper bound" on ILECs' attachment rates would "provide further certainty within the pole attachment marketplace." *Order* ¶ 129 (ER 67) (quoting USTelecom Comments at 11 (RER 196)). This sort

[28] Petitioners mistakenly assert that if the "hard cap" caused a utility to recover "less than the incremental cost attributable to [an] ILEC," such an outcome "would be at odds with the Act." Br. 57. The only part of the statute that refers to incremental cost is Section 224(d)(1), which provides that "a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments." 47 U.S.C. § 224(d)(1). But Section 224(d) applies only to rates charged to cable systems. *See id.* § 224(d)(3). Petitioners do not—and cannot—claim that Section 224(d) applies to rates charged to ILECs.

of bright-line rule is a particularly effective tool for removing uncertainty.[29] Second, the Commission concluded that a "hard cap" would "limit pole attachment litigation" between ILECs and utilities. It is well settled that the Commission "may properly consider the avoidance of litigation-related delay when revising its rules." *Omnipoint Corp. v. FCC*, 78 F.3d 620, 633 (D.C. Cir. 1996).

Like the rest of the new rule concerning ILECs' complaints, the "hard cap" is reasonably designed to hasten the deployment of 5G and other broadband services. Petitioners have given the Court no good reason to disturb any part of that rule.

[29] *See, e.g.*, *Howard v. City of Coos Bay*, 871 F.3d 1032, 1040 (9th Cir. 2017) ("[g]iven the importance of certainty and predictability," the Court adopted a "bright-line rule" for assessing when claim preclusion applies (internal quotation marks omitted)); *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1141 (D.C. Cir. 2001) (the FCC adopted a "bright-line" cable attribution rule because it "provides regulatory certainty" and "permits planning of financial transactions" (internal quotation marks omitted)); *BellSouth Corp. v. FCC*, 162 F.3d 1215, 1225 (D.C. Cir. 1999) (strict enforcement of the FCC's bright-line spectrum cap "may be justified by the gain in certainty and administrative ease, even if it appears to result in some hardship in individual cases" (internal quotation marks omitted)).

CONCLUSION

The petition for review should be denied.

Respectfully submitted,

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STATEMENT OF RELATED CASES

The *Order* on review has not previously been the subject of review by this Court or any other court. This case has been consolidated with *City of Portland v. FCC*, No. 18-72689. The two cases are being briefed separately pursuant to the Briefing Order issued on April 18, 2019.

Date: August 22, 2019

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CERTIFICATE OF COMPLIANCE FOR BRIEFS

I certify that this brief contains 13,268 words, excluding the items exempted by Fed. R. App. P. 32(f), and that the brief complies with the typeface requirements of Fed. R. App. P. 32(a)(b) and the type style requirements of Fed. R. App. P. 32(a)(6). I further certify that this brief complies with the word limit of Ninth Circuit Rule 32-1.

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Statutory Addendum

47 U.S.C.A. § 224

§ 224. Pole attachments

(a) Definitions

As used in this section:

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

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

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

(4) The term "pole attachment" means any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility.

(5) For purposes of this section, the term "telecommunications carrier" (as defined in section 153 of this title) does not include any incumbent local exchange carrier as defined in section 251(h) of this title.

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

(1) Subject to the provisions of subsection (c) of this section, the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions. For purposes of enforcing any determinations resulting from complaint procedures established pursuant to this subsection, the Commission shall take such action as it deems appropriate and necessary, including issuing cease and desist orders, as authorized by section 312(b) of this title.

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

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

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

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

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

(B) in so regulating such rates, terms, and conditions, the State has the authority to consider and does consider the interests of the subscribers of the services offered via such attachments, as well as the interests of the consumers of the utility services.

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

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

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

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

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

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

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

capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.

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

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

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

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

(2) A utility shall apportion the cost of providing space on a pole, duct, conduit, or right-of-way other than the usable space among entities so that such apportionment equals two-thirds of the costs of providing space other than the usable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities.

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

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

(f) Nondiscriminatory access

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

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

(g) Imputation to costs of pole attachment rate

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

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

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

(i) Costs of rearranging or replacing attachment

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

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

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

which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

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

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

47 C.F.R. § 1.1411

§ 1.1411 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.

(b) All time limits in this subsection are to be calculated according to § 1.4.

(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 shall determine within 10 business days after receipt of a new attacher's attachment application 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 its response, 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 to the new attacher either by granting access or, consistent with § 1.1403(b), denying access 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). A utility may not deny the new attacher pole access based on a preexisting violation not caused by any prior attachments of the new attacher.

(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 survey, and name of the contractor performing the survey.

(iii) Where a new attacher has conducted a survey pursuant to paragraph (j)(3) of this section, a utility can elect to satisfy its survey obligations in this paragraph by notifying affected attachers of its intent to use the survey conducted by the new attacher pursuant to paragraph (j)(3) of this section 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. A utility relying on a survey conducted pursuant to paragraph (j)(3) of this section to satisfy all of its obligations under paragraph (c)(3)(i) of this section shall have 15 days to make such a notification to affected attachers rather than a 45 day survey period.

(d) Estimate. Where a new attacher's request for access is not denied, a utility shall present to a new attacher a detailed, itemized estimate, on a pole-by-pole basis where requested, of charges to perform all necessary make-ready within 14 days of providing the response required by paragraph (c) of this section, or in the case where a new attacher has performed a survey, within 14 days of receipt by the utility of such survey. Where a pole-by-pole estimate is requested and the utility

incurs fixed costs that are not reasonably calculable on a pole-by-pole basis, the utility present charges on a per-job basis rather than present a pole-by-pole estimate for those fixed cost 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.

(1) A utility may withdraw an outstanding estimate of charges to perform make-ready work beginning 14 days after the estimate is presented.

(2) A 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, if the final cost of the work differs from the estimate, it shall provide the new attacher with a detailed, itemized final invoice of the actual make-ready charges incurred, on a pole-by-pole basis where requested, to accommodate the new attacher's attachment. Where a pole-by-pole estimate is requested and the utility incurs fixed costs that are not reasonably calculable on a pole-by-pole basis, the utility may present charges on a per-job basis rather than present a pole-by-pole invoice for those fixed cost 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.

(4) A utility may not charge a new attacher to bring poles, attachments, or third-party equipment into compliance with current published safety, reliability, and pole owner construction standards guidelines if such poles, attachments, or third-party equipment were out of compliance because of work performed by a party other than the new attacher prior to the new attachment.

(e) Make-ready. Upon receipt of payment specified in paragraph (d)(2) of this section, a utility shall notify immediately and in writing all known entities with existing attachments that may be affected by the make-ready.

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

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

(ii) Set a date for completion of make-ready 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 make-ready specified pursuant to paragraph (e)(1)(i) in this section.

(v) State the name, telephone number, and email 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 90 days after notification is sent (or 135 days in the case of larger orders, as described in paragraph (g) of this section).

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

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

(v) State 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 make-ready specified pursuant to paragraph (e)(1)(i) of this section.

(vi) State the name, telephone number, and email 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) of this section for communications space attachments or paragraph (e)(2)(ii) of this section 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) of this section 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) For the purposes of compliance with the time periods in this section:

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

(2) A utility may add 15 days to the survey period described in paragraph (c) of this section to larger orders up to the lesser of 3000 poles or 5 percent of the utility's poles in a state.

(3) A utility may add 45 days to the make-ready periods described in paragraph (e) of this section to larger orders up to the lesser of 3000 poles or 5 percent of the utility's poles in a state.

(4) A utility shall negotiate in good faith the timing of all requests for 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 identify the affected poles and 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 to complete make-ready on the affected poles and shall resume make-ready without discrimination when it returns to routine operations. A utility cannot delay completion of make-ready because of a preexisting violation on an affected pole not caused by the new attacher.

(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 identify the affected poles and include a detailed explanation of the basis 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 on the affected poles.

(i) Self-help remedy—

(1) Surveys. If a utility fails to complete a survey as specified in paragraph (c)(3)(i) of this section, then a new attacher may conduct the survey in place of the utility and, as specified in § 1.1412, 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 conduct the make-ready in place of the utility and existing attachers, and, as specified in § 1.1412, hire a contractor to complete the 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) 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 fixing the damage; or

(B) Require the new attacher to fix the damage at its expense immediately following notice from the utility or existing attacher.

(iii) 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 at least 90 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 or code violations caused by make-ready conducted by the new attacher on their equipment. If the utility or an existing attacher notifies the new attacher of such damage or code violations, then the utility or existing attacher shall provide adequate documentation of the damage or the code violations. The utility or existing attacher may either complete any necessary remedial work and bill the new attacher for the reasonable costs related to fixing the damage or code violations or require the new attacher to fix the damage or code violations at its expense within 14 days following notice from the utility or existing attacher.

(3) Pole replacements. Self-help shall not be available for pole replacements.

(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) through (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), a utility may object to the designation by the new attacher's contractor that certain make-ready is simple. If the utility objects to the contractor's determination that make-ready is simple,

then it 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, 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 § 1.1412(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.

(ii) [Reserved].

(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 § 1.1412(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 fixing the damage; or

(B) Require the new attacher to fix the damage at its expense immediately following notice from the utility or existing attacher.

(iii) In performing make-ready, if the new attacher or the utility determines that make-ready classified as simple is complex, then that specific make-ready must be halted and the determining party must provide immediate notice to the other party of its determination and the impacted poles. The affected make-ready shall then be governed by paragraphs (d) through (i) of this section and the utility shall provide the notice required by paragraph (e) of this section as soon as reasonably practicable.

(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 at least 90 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 or code violations caused by make-ready conducted by the new attacher on their equipment. If the utility or an existing attacher notifies the new attacher of such damage or code violations, then the utility or existing attacher shall provide adequate documentation of the damage or the code violations. The utility or existing attacher may either complete any necessary remedial work and bill the new attacher for the reasonable costs related to fixing the damage or code violations or require the new attacher to fix the damage or code violations at its expense within 14 days following notice from the utility or existing attacher.

§ 1.1412 Contractors for survey 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 paragraphs (c)(1) through (5) of this section 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, 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 paragraphs (c)(1) through (5) of this section and the utility may not unreasonably withhold its consent.

(1) 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 § 1.1411(i)(1)(ii), (i)(2)(i), (j)(3)(i), and (j)(4).

(2) 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 reasonable 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 § 1.1411(i)(1)(ii), (i)(2)(i), (j)(3)(i), and (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)(1) 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, including work it will perform on facilities owned by existing attachers.

(d) The consulting representative of an electric utility may make final determinations, on a nondiscriminatory basis, where there is insufficient capacity and for reasons of safety, reliability, and generally applicable engineering purposes.

§ 1.1413 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 or renewed after the 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 such 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 § 1.1406(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.

§ 1.1415 Overlashing.

(a) Prior approval. A utility shall not require prior approval for:

(1) An existing attacher that overlashes its existing wires on a pole; or

(2) For third party overlashing of an existing attachment that is conducted with the permission of an existing attacher.

(b) Preexisting violations. A utility may not prevent an attacher from overlashing because another existing attacher has not fixed a preexisting violation. A utility may not require an existing attacher that overlashes its existing wires on a pole to fix preexisting violations caused by another existing attacher.

(c) 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. If after receiving advance notice, the utility determines that an overlash would create a capacity, safety, reliability, or engineering issue, it must provide specific documentation of the issue to the party seeking to overlash within the 15 day advance notice period and the party seeking to overlash must address any identified issues before continuing with the overlash either by modifying its proposal or by explaining why, in the party's view, a modification is unnecessary. A utility may not charge a fee to the party seeking to overlash for the utility's review of the proposed overlash.

(d) Overlashers' responsibility. A party 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 or overlashing work causes safety or engineering standard violations, then the overlashing party is responsible at its expense for any necessary repairs.

(e) Post-overlashing review. An overlashing party shall notify the affected utility within 15 days of completion of the overlash on a particular pole. The notice shall provide the affected utility at least 90 days from receipt in which to inspect the overlash. The utility has 14 days after completion of its inspection to notify the overlashing party of any damage or code violations to its equipment caused by the

overlash. If the utility discovers damage or code violations caused by the overlash on equipment belonging to the utility, then the utility shall inform the overlashing party and provide adequate documentation of the damage or code violations. The utility may either complete any necessary remedial work and bill the overlashing party for the reasonable costs related to fixing the damage or code violations or require the overlashing party to fix the damage or code violations at its expense within 14 days following notice from the utility.

CERTIFICATE OF FILING AND SERVICE

I, James M. Carr, hereby certify that on August 22, 2019, I filed the foregoing Brief for Respondents with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit using the electronic CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and will be served electronically by the CM/ECF system.

/s/ James M. Carr

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