February 23, 2022

FCC FACT SHEET[*]

Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment

Second Further Notice of Proposed Rulemaking – WC Docket No. 17-84

Background: Section 224(b) of the Communications Act of 1934, as amended, grants the Commission the authority to regulate the rates, terms, and conditions of pole attachments. Access to poles in a quick, easy, safe, predictable, and affordable way can help speed the deployment of broadband infrastructure and enhance the ability of utilities and attachers to successfully negotiate pole attachment agreements.

Utility poles may need to be replaced for a variety of reasons and the Commission's rules allocate responsibility for pole replacement costs based on cost causation principles. This *Second Further Notice of Proposed Rulemaking* (*Second Further Notice*), if adopted, would seek comment on questions concerning the allocation of pole replacement costs and the resolution of pole attachment disputes generally to determine whether additional Commission action is necessary.

What the *Second Further Notice* Would Do:

- The *Second Further Notice*, if adopted, would seek comment on ways to facilitate the resolution of pole replacement and pole attachment rate disputes, including with respect to:
    - Situations in which a pole replacement is not "necessitated solely" by a new attachment request, whether and to what extent utilities directly benefit from various types of pole replacements, and if the Commission should establish standards for when utilities should be required to pay a proportional share of pole replacement costs;
    - The costs and benefits of early pole retirements, specifically (1) whether requiring utilities to pay a portion of the costs of a pole replacement would better align the economic incentives between communications attachers and utilities, and (2) whether such a requirement would positively or negatively affect negotiations of pole attachment agreements and broadband deployment;
    - Measures the Commission could adopt to avoid and expedite the resolution of pole replacement disputes; and
    - The scope of refunds ordered by the Commission when it determines that a pole attachment rate, term, or condition is unjust and unreasonable.

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

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

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

SECOND FURTHER NOTICE OF PROPOSED RULEMAKING*

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

Comment Date: [30 days after publication in the Federal Register]
Reply Comment Date: [45 days after publication in the Federal Register]

By the Commission:

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I. INTRODUCTION

1. Section 224(b) of the Communications Act of 1934, as amended (Act), grants the Commission the authority to regulate the rates, terms, and conditions of pole attachments.[1] Since 2011, the Commission has undertaken a series of reforms of its pole attachment rules with the aim of making access to poles faster, easier, safer, more predictable, and more affordable to help speed the deployment of broadband infrastructure and enhance the ability of utilities and attachers to successfully negotiate pole

* This document has been circulated for tentative consideration by the Commission at its March 16, 2022 open meeting. The issues referenced in this document and the Commission's ultimate resolution of those issues remain under consideration and subject to change. This document does not constitute any official action by the Commission. However, the Chairwoman has determined that, in the interest of promoting the public's ability to understand the nature and scope of issues under consideration, the public interest would be served by making this document publicly available. The FCC's *ex parte* rules apply and presentations are subject to "permit-but-disclose" *ex parte* rules. *See, e.g.*, 47 C.F.R. §§ 1.1206, 1.1200(a). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules, including the general prohibition on presentations (written and oral) on matters listed on the Sunshine Agenda, which is typically released a week prior to the Commission's meeting. *See* 47 CFR §§ 1.1200(a), 1.1203.

[1] 47 U.S.C. § 224(b).

attachment agreements.[2] In this Second Further Notice of Proposed Rulemaking (Second Further Notice), we seek comment on whether further reforms are necessary to provide regulatory certainty with regard to pole replacements, specifically with regard to the allocation of costs for pole replacements.

2. In January 2021, the Wireline Competition Bureau (Bureau) issued the *Pole Replacement Declaratory Ruling*, clarifying that it is unreasonable and inconsistent with section 224 of the Communications Act, the Commission's rules, and past Commission precedent, for utilities to impose the entire cost of a pole replacement on a requesting attacher when the attacher is not the sole cause of a pole replacement.[3] The Bureau found that the clarification in the *Pole Replacement Declaratory Ruling* was necessary to address inconsistent utility practices with respect to the allocation of pole replacement costs.[4]

3. We issue this Second Further Notice to seek comment on the universe of situations where the requesting attacher should not be required to pay for the full cost of a pole replacement and the proper allocation of costs among utilities and attachers in those situations. We also seek comment on whether the Commission should require utilities to share information with potential attachers concerning the condition and replacement status of their poles and other measures that may help avoid or expedite the resolution of disputes between the parties.

II. BACKGROUND

4. Over the years, the Commission has addressed cost allocation and cost causation principles as they relate to pole replacements. In 1996, as part of its implementation of sections 224(h)[5] and 224(i)[6] of the Act, the Commission determined that when a modification, such as a pole replacement, is undertaken for the benefit of a particular party, under cost causation principles, the benefiting party is obligated to assume the cost of the modification.[7] The Commission also found that when a utility decides

[2] *See, e.g.*, *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240 (2011) (*2011 Pole Attachment Order*); *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Order on Reconsideration, 30 FCC Rcd 13731 (2015); *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking, 32 FCC Rcd 11128 (2017) (*2017 Wireline Infrastructure Order*); *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, WT Docket No. 17-79, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705 (2018) (*2018 Wireline Infrastructure Order*); *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Declaratory Ruling, 35 FCC Rcd 7936 (WCB 2020) (*2020 Declaratory Ruling*).

[3] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Declaratory Ruling, 36 FCC Rcd 776, 777, at para. 3 (WCB 2021) (*Pole Replacement Declaratory Ruling*).

[4] *Id.* at 777, 779-81, paras. 3, 6, 8.

[5] Section 224(h) states that "[w]henever 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." 47 U.S.C. § 224(h).

[6] Section 224(i) states that "[a]n 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)." 47 U.S.C. § 224(i).

[7] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket Nos. 96-98, 95-185, Report and Order, 11 FCC Rcd 15499, 16077, 16096, paras. 1166, 1211 (1996) (*Local Competition Order*).

to modify a pole for its own benefit, and no other attachers derive a benefit from the modification, the utility would bear the full cost of the new pole in that situation.[8] The Commission also adopted a cost sharing principle for when an existing attacher uses a modification by another party as an opportunity to add to or modify its own attachments.[9] It then extended this principle to utilities and other attachers seeking to use modifications as an opportunity to bring their own facilities into compliance with safety or other requirements and reiterated that principle in the *2018 Wireline Infrastructure Order*.[10]

5. On July 16, 2020, NCTA—the Internet & Television Association filed a Petition asking the Commission to clarify its rules in the context of pole replacements.[11] Specifically, NCTA asked the Commission to declare that: (1) pole owners must share in the cost of pole replacements in unserved areas pursuant to section 224 of the Communications Act, section 1.1408(b) of the Commission's rules, and Commission precedent; (2) pole attachment complaints arising in unserved areas should be prioritized through placement on the Accelerated Docket under section 1.736 of the Commission's rules; and (3) section 1.1407(b) of the Commission's rules authorizes the Commission to order a pole owner to complete a pole replacement within a specified time frame or designate an authorized contractor to do so.[12] NCTA argues that without Commission action, the costs and operational challenges associated with pole replacements will inhibit attachers from deploying broadband services to Americans in unserved areas.[13]

6. The Bureau declined to act on NCTA's Petition, finding that "it is more appropriate to address questions concerning the allocation of pole replacement costs within the context of a rulemaking, which provides the Commission with greater flexibility to tailor regulatory solutions."[14] It found, however, that the record developed in response to the NCTA Petition revealed inconsistent practices by utilities with regard to cost responsibility for pole replacements.[15] Accordingly, the *Pole Replacement Declaratory Ruling* clarified that, pursuant to section 1.1408(b) of the Commission's rules and prior precedent, "utilities may not require requesting attachers to pay the entire cost of pole replacements that are not solely caused by the new attacher and, thus, may not avoid responsibility for pole replacement costs by postponing replacements until new attachment requests are submitted."[16]

[8] *Id.* at 16077, para. 1166.

[9] *Id.* ("Other parties with attachments would not share in the cost [of a modification], unless they expanded their own use of the facilities at the same time.").

[10] *Id.* at 16096-97, para. 1212 ("A utility or other party that uses a modification as an opportunity to bring its facilities into compliance with applicable safety or other requirements will be deemed to be sharing in the modification and will be responsible for its share of the modification cost."); *2018 Wireline Infrastructure Order*, 33 FCC Rcd at 7766, para. 121 (clarifying that new attachers "are not responsible for the costs associated with bringing poles or third-party equipment into compliance with current safety and pole owner construction standards to the extent such poles or third-party equipment were out of compliance prior to the new attachment").

[11] NCTA, Petition for Expedited Declaratory Ruling, WC Docket No. 17-84 (filed July 16, 2020), https://www.fcc.gov/ecfs/filing/107161552527661 (NCTA Petition). Unless otherwise noted, the citations herein to comments, replies, and *ex parte* presentations are to such documents filed in response to the NCTA Petition in WC Docket No. 17-84.

[12] *Id.* at 9-31.

[13] *Id.* at 5-9.

[14] *Pole Replacement Declaratory Ruling*, 36 FCC Rcd at 776, para. 2.

[15] *Id*.

[16] *Id.* at 779, para. 6.

III. DISCUSSION

7. In this Second Further Notice, we seek comment on ways to eliminate or expedite the resolution of pole replacement disputes by establishing clear standards for when and how utilities and attachers must share in the costs of a pole replacement that is precipitated by a new attachment request. In the *Pole Replacement Declaratory Ruling*, the Bureau found that it would be contrary to the Commission's rules and policies to require a new attacher to pay the entire cost of a pole replacement when a pole already requires replacement (e.g., because the pole is out of compliance with current safety and utility construction standards or it has been red-tagged[17]) at the time a request for a new or modified attachment is made.[18] According to the Bureau, even if the new attacher might benefit from that type of pole replacement, it is not "necessitated solely as a result" of the new attachment pursuant to the language in section 1.1408(b) of our rules and therefore the utility may not impose all make-ready costs of that pole replacement on the new attacher.[19] The Bureau based its clarification on the cost causation and cost sharing principles codified in section 1.1408(b).[20] We affirm the Bureau's findings in the *Pole Replacement Declaratory Ruling* as consistent with section 224, the Commission's rules, and past Commission precedent.

8. The record developed in response to the NCTA Petition indicates significant disagreement between utilities and attachers about when a pole replacement is not "necessitated solely" by a new attachment when the circumstances do not involve a preexisting violation or red-tagged pole.[21]

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[17] For our purposes here, a "red-tagged" pole is one found to be non-compliant with safety standards and placed on a utility's replacement schedule. *2018 Wireline Infrastructure Order*, 33 FCC Rcd at 7766, n.450.

[18] *Pole Replacement Declaratory Ruling*, 36 FCC Rcd at 780-81, para. 8.

[19] *Id*. (relying on 47 CFR § 1.1408(b)).

[20] *Id.* As the Bureau noted, the first two sentences of section 1.1408(b) set out the principle of cost sharing, stating that "[t]he cost of modifying a facility shall be borne by all parties that obtain access to the facility as a result of the modification and by all parties that directly benefit from the modification. Each party described in the preceding sentence shall share proportionately in the cost of the modification." *Id.* at 779, para. 7 (quoting 47 CFR § 1.1408(b)). The Bureau stated that this cost sharing language must be read in tandem with the cost causation language of the fourth sentence of section 1.1408(b), which states, "[n]otwithstanding the foregoing, a party with a preexisting attachment to a pole, conduit, duct 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 necessitated solely as a result of an additional attachment or the modification of an existing attachment sought by another party." *Id*. (quoting 47 CFR § 1.1408(b)). The Bureau clarified that when the principles of cost causation and sharing are read together, "section 1.1408(b) stands for the proposition that parties benefitting from a modification share proportionately in the costs of that modification, unless such a modification is necessitated solely as a result of an additional or modified attachment of another party, in which case that party bears the costs of the modification." *Id*. at 779-80, para. 7.

[21] *Compare* NCTA Petition at 10 (arguing that "it is unjust and unreasonable for the pole owner to use the new attachment as an opportunity to upgrade the utility's own facilities and shift the entire cost to the new attacher. In such circumstances, the cost should be allocated fairly and proportionately between the pole owner and the new attacher to distinguish between the true economic costs associated with the attachment and the costs associated with 'betterment,' *i.e.*, improving the utility's facilities."); Crown Castle Comments at 8 ("Despite the Commission's Rules and policy that a new attaching entity should not bear the full costs of replacing poles as a condition of access, utilities routinely insist 'that a new attacher pay the full cost to replace an old pole with a new, upgraded one.'") *with* Xcel Energy Comments at 2-3 ("It is clearly established through the Commission's rules, policies, and precedent – as well as the legislative history of Section 224 – that attachers are expected and required to bear the entire amount of those capital costs that arise from the make-ready process, including pole replacements, in order to accommodate new attachments regardless of whether there is a benefit to the utility."); Edison Electric Institute et al. Comments at 14 ("[T]his is contrary to the Commission's long-standing policies under Section 224 that allow utilities to recover all of the costs of a modification that are attributable to new pole attachments. The Commission has long recognized that these costs are solely caused by the new attaching entity, which is solely responsible for reimbursing utilities for these costs.").

We seek comment on these more ambiguous situations and the role the Commission should take in providing further guidance regarding pole replacements.[22] We also take this opportunity to seek comment on additional scenarios in which financial responsibility for pole replacements should be shared by attachers and utilities and how those costs should be apportioned. Additionally, we seek comment on the scope of utility liability for pole attachment rate refunds when rates are found to be unjust and unreasonable.[23]

A. Determining the Applicability of Cost Causation and Cost Sharing

9. In the *Pole Replacement Declaratory Ruling*, the Bureau clarified, pursuant to the language in section 1.1408(b) of our rules, that when a new attachment request precipitates a pole replacement, but the pole must also be replaced for other reasons, the pole replacement is not "necessitated solely" by the new attachment and all of the parties that benefit from the replacement must share proportionally in the cost, including utilities.[24] Under this standard, and consistent with the *2018 Wireline Infrastructure Order*,[25] the Bureau made clear that this standard applies when the pole must be replaced due to a preexisting violation or because it has been red-tagged.[26]

10. We seek comment on whether there are additional situations in which a pole replacement is not "necessitated solely" by a new attachment request. Is it possible for a *future* planned pole replacement to serve as grounds for concluding that the pole must be replaced for other reasons at the time of the new attachment request? If so, in what circumstances? For example, if the utility has already scheduled the requested pole for replacement one or two years after the new attachment request is made, could we deem that known and scheduled replacement as *necessary* at the time that the new attachment request is made and therefore consider the replacement of the pole to not be "necessitated solely" by the new attachment?[27] Should the Commission codify a definition of "necessitated solely" for the purposes of section 1.1408(b) and, if so, what should that definition be? When considering situations "necessitated solely" by a need to create capacity for a new attachment, should the term "capacity" refer to both

[22] We note some commenters argue that the Commission lacks the legal authority to "shift the cost of pole replacements caused solely by attachers to pole owners." Letter from Aryeh Fishman, Associate G.C., EEI, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 17-84, 19-126, at 2 (filed Dec. 16, 2021); Letter from Randy Clarke, Vice President Federal Regulatory Affairs, Lumen, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84 (filed Jan. 15, 2021) (documenting the legal and policy issues in the NCTA Petition)).

[23] *See* Petition for Declaratory Ruling of The Edison Electric Institute, WC Docket No. 17-84, at 1 (filed April 20, 2021) (EEI Petition) (asking the Commission to clarify "(1) that the 'applicable statute of limitations' under Rule 1.1407(a)(3) is the same as the two-year limitations period set forth in 47 U.S.C. § 415(b), and (2) that it is not 'appropriate' for complainants to recover refunds for periods that precede good faith notice of a dispute"), https://www.fcc.gov/ecfs/filing/10420059605067.

[24] *Pole Replacement Declaratory Ruling*, 36 FCC Rcd at 780-81, para. 8.

[25] *2018 Wireline Infrastructure Order*, 33 FCC Rcd at 7766, para. 121 & n.450.

[26] *Pole Replacement Declaratory Ruling*, 36 FCC Rcd at 780-81, para. 8.

[27] *See, e.g.,* Electric Utilities Comments at 12 & n.8 ("[I]n order to bring uniformity and clarity to the issue for purposes of this proceeding, the Electric Utilities are willing to stipulate that where a pole has been identified by the utility as requiring replacement within a six month period, and where an attacher subsequently applies to attach to that pole, the pole owner should pay for the replacement pole."); POWER Coalition Comments at 9 ("In all cases . . . it is not the practice of any POWER Coalition member to require a third party attacher to bear the cost of a pole replacement if the requested pole already is identified for replacement at the time of the access request."); Xcel Energy Comments at 9 ("[I]f a communications provider requests access for a new attachment to a pole that has been "red tagged" for replacement (i.e., is scheduled to be replaced within one year), Xcel Energy will coordinate the replacement of that pole with the communications provider's construction schedule and perform the replacement at Xcel Energy's own expense. In such cases, the new attacher would be responsible only for the incremental cost difference if accommodating the new attachment requires a pole that is taller and/or stronger than a pole sufficient to meet Xcel Energy's own needs.").

additional space needed to accommodate the new attachment and/or the need for a stronger pole to increase loading capacity? Should the Commission codify a definition of "red tagging" or other terminology that distinguishes between priority replacements that need to be performed immediately due to the status of a pole from non-priority replacements that may be implemented at a later time?

11. Even if a pole replacement is necessitated for a reason other than a new attachment request, section 1.1408(b) requires existing attachers (including the utility) to pay a proportional share of the replacement costs only if they "directly benefit" from the replacement.[28] The Commission has previously determined that an incidental benefit is not sufficient to hold these attachers accountable for the pole replacement costs.[29] When addressing additional circumstances to which the clarification in the *Pole Replacement Declaratory Ruling* should apply, if any, we ask that commenters specify whether any benefits that accrue to existing attachers are direct versus incidental and how they define those terms for the purposes of their arguments. We ask that commenters be clear about the criteria that distinguish a direct benefit from an incidental benefit and cite all economic and legal authorities that support their positions.

12. We seek comments specifically addressing whether a utility directly benefits from a pole replacement that is necessary to correct a preexisting violation that the utility did not cause. As stated in the *2018 Wireline Infrastructure Order*, utilities may not hold new attachers responsible for the costs of correcting a preexisting violation.[30] That does not necessarily mean, however, that the utility is ultimately responsible for all of the costs in all cases. Rather, the party that is responsible for the violation is responsible for the costs of correcting the violation, and the utility is authorized to seek recovery from the violating party.[31] What are the circumstances under which existing attachers, as opposed to utilities, may be responsible for preexisting violations that require an entire pole to be replaced? In such situations, are there ways that a utility directly benefits from a pole replacement that corrects a preexisting violation within the meaning of the first two sentences of section 1.1408(b), even if it did not cause the violation? For instance, in concluding that a utility may not hold a new attacher responsible for costs arising from the correction of safety violations caused by other attachers, the former Cable Services Bureau determined that it was up to the utility "to require other attachers to reimburse [the new attacher] or otherwise pay for corrections of safety violations."[32] In the *2018 Wireline Infrastructure Order*, the Commission found that a utility may not hold a new attacher responsible for the costs of a preexisting violation caused by another attacher or delay the completion of make-ready to accommodate a new attachment while it "attempts to identify or collect from the party who should pay for correction of the preexisting violation."[33] In the context of pole replacements, should we construe these precedents to mean that the utility is responsible for the costs of correcting the violation vis-à-vis the new attacher, and, therefore, directly benefits when the pole replacement needed to accommodate the new attachment

[28] 47 CFR § 1.1408(b).

[29] *See Local Competition Order*, 11 FCC Rcd at 16097-98, paras. 1213, 1216 ("We recognize that limiting cost burdens to entities that initiate a modification, or piggyback on another's modification, may confer incidental benefits on other parties with preexisting attachments on the newly modified facility. Nevertheless, if a modification would not have occurred absent the action of the initiating party, the cost should not be borne by those that did not take advantage of the opportunity by modifying their own facilities.").

[30] *2018 Wireline Infrastructure Order*, 33 FCC Rcd at 7766, para. 121.

[31] *Id.* at 7767, para. 122.

[32] *Cavalier Telephone, LLC v. Virginia Electric and Power Co.*, Order and Request for Information, 15 FCC Rcd 9563, 9570-71, para. 16 (CSB 2000), *vacated by settlement*, 17 FCC Rcd 24414 (EB 2002) (*Cavalier Telephone Order*); *see also Kansas City Cable Partners d/b/a Time Warner Cable of Kansas City v. Kansas City Power & Light Company*, Consolidated Order, 14 FCC Rcd 11599, 11606, para. 19 (CSB 1999) (*Kansas City Order*) ("Correction of the pre-existing code violation is reasonably the responsibility of [the pole owner]. . . .").

[33] *2018 Wireline Infrastructure Order*, 33 FCC Rcd at 7767, para. 122.

corrects the violation? If so, does that financial responsibility and direct benefit require the utility to share in the costs of the replacement under section 1.1408(b)?

13. We also seek comment on how to identify and quantify the costs of a pole replacement that are proportional to the direct benefit obtained by a utility from a pole replacement that is not necessitated solely by a new attachment request. We remain committed to the long-standing principle that when "capital costs would not have been incurred 'but for' the pole attachment demand . . . the attacher—the cost causer—pays for these costs."[34] In the context of make-ready charges for a new attachment,[35] that includes the "direct incremental costs of making space available to the [attacher],"[36] but excludes costs that are not required to accommodate the new attachment.[37]

14. How should we distinguish the incremental costs attributable to the new attacher from the costs that should be attributable to utilities when a pole replacement is necessary to make space for the new attachment *and* for a reason that directly benefits the utility? In the context of a pole that also needs to be replaced to correct a preexisting violation or because it has been red-tagged, should the new attacher be responsible for the difference in cost between a taller or stronger pole needed to accommodate its attachment and what it would cost to replace the existing pole with one of the same type and size or strength?[38] Is there a different way to apportion the cost of the new pole between its owner and the new attacher? How should other costs associated with pole replacements, such as the cost of transferring existing attachments to the new pole, be apportioned between the utility and new attacher? We ask that commenters submit data and documents describing and substantiating the precise costs of pole replacements in each scenario addressed above and specify the party that causes them to be incurred.

15. Finally, we seek comment on whether we should revise our cost allocation rules to modify or replace the direct benefit versus incidental benefit standard set forth in section 1.1408(b). Is there a more equitable and efficient standard for determining when parties should share in the costs of modifying a facility? What are the costs and benefits of applying an alternate standard? We ask that commenters proposing alternate standards detail how costs would be allocated under the proposed standard's terms in real-world scenarios, specifically addressing the economic and operational impacts on

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[34] *2011 Pole Attachment Order*, 26 FCC Rcd at 5301, para. 143 & n.426 (2011); *see also Kansas City Order*, 14 FCC Rcd at 11607, para. 21 (stating that a new attacher "should be responsible only for the actual costs for make-ready or change-out work which is made necessary because of [the new] attachments").

[35] Make-ready is "the modification or replacement of a utility pole, or of the lines or equipment on the utility pole, to accommodate additional facilities on the utility pole." 47 CFR § 1.1402(o). Make-ready charges to prepare a pole for a new attachment are "non-recurring costs for which the utility is directly compensated and as such are excluded from expenses used in the rate calculation." *2017 Wireline Infrastructure Order*, 32 FCC Rcd at 11131, para. 7.

[36] *Alabama Cable Telecomm. Ass'n et al. v. Alabama Power Co.*, Order, 16 FCC Rcd 12209, 12231, para. 48 (2001); *2011 Pole Attachment Order*, 26 FCC Rcd at 5301, 5322, paras. 143, 185 ("The attacher causes the pole owner to incur costs if measures such as rearrangement or bracketing are performed, or if there is no space available on an existing pole to accommodate an attachment. . . . Pole owners have the opportunity to recover through make-ready fees all of the capital costs caused by third-party attachers."); *see also* Xcel Energy Comments at 9 (stating that when it has scheduled a pole for reinforcement or replacement within one year, "the new attacher would be responsible only for the incremental cost difference if accommodating the new attachment requires a pole that is taller and/or stronger than a pole sufficient to meet Xcel Energy's own needs").

[37] *Salsgiver Communications, Inc. v. North Pittsburgh Tel. Co.*, Memorandum Opinion and Order, 22 FCC Rcd 20536, 20546, para. 29 & n.87 (EB 2007) ("[C]osts not required to accommodate the attacher may not be imposed on the attacher.").

[38] *See* Xcel Energy Comments at 9, n.16 ("For example, if a 35-foot pole would be sufficient for Xcel Energy's needs, but a 40-foot pole is needed to accommodate the new attachment, the new attacher would be responsible only for the difference in cost between a 35-foot pole and a 40-foot pole. However, if a 35-foot pole could accommodate both Xcel Energy and the new attachment, the new attacher would not be responsible for any costs of the replacement.").

the parties, including whether the standard would allow utilities to fully recover the costs of establishing additional capacity on their poles. We also ask that commenters explain whether any proposed alternate standard would promote or deter broadband deployment or the ability of utilities and attachers to successfully negotiate pole attachment agreements, including whether it would lead to an increase or decrease in pole attachment disputes.

B. Allocating Costs When Utilities Directly Benefit from Pole Replacements

16. Attachers have represented to the Commission that utilities often seek to hold them responsible for *all* costs of replacing a pole that is needed to make space for a new attachment, even if all of those costs are not needed to accommodate the new attachment (e.g., pole upgrades, increasing capacity beyond the needs of the new attachment).[39] While some utilities indicate that this is not the case and that new rules in this area are unnecessary,[40] others have not denied it or have attempted to justify it with a broad interpretation of the Commission's cost causation policy, i.e., but for the new attachment request, the pole replacement would not have occurred at all, so the attacher should pay all costs of the replacement.[41] Stated differently, some utilities contend that while implementing a pole replacement *is* necessitated solely by the new attachment, they should be able to enhance the pole in some way that is *not* necessitated by the new attachment without incurring financial responsibility for those enhancements. Attachers have also argued that utilities receive a windfall when they hold new attachers responsible for all the costs of a pole replacement because it eliminates or reduces the costs they would have otherwise had to pay to replace the pole in the future (i.e., financial responsibility for the utility's deteriorating and aging infrastructure is shifted to the attacher).[42] In particular, the white paper submitted by Charter's

[39] *See, e.g.,* NCTA Petition at 10; Crown Castle Comments at 8; Charter Comments at 3 ("Despite the repeated admonitions that make-ready charges must be reasonable and limited to the costs actually caused by an attachment, pole owners frequently leverage their superior bargaining position to insist that an attacher seeking access must purchase a new pole for the utility and pay for its installation in full as a condition of attachment.").

[40] *See* POWER Coalition Comments at 2, 17-18 ("[T]he Commission has interpreted [section 224(h) of the Act], and its own rule to require simply that if a pole owner uses the opportunity of a modification requested by a third party to modify its own facility (for example, the comply with applicable safety requirements), it shares in the total costs associated with the modification."); Coalition of Concerned Utilities Reply at 4 ("No party disputes that utility pole owners are responsible for maintaining poles, and for making necessary repairs, upgrades and pole replacements."); Xcel Energy Reply at 3 ("The record also disproves the baseless and unfounded allegations made in the Petition and by its supporters that utilities deliberately underinvest in the maintenance and upkeep of their pole infrastructure in order to 'offload' these costs onto new attachers.").

[41] Coalition of Concerned Utilities Comments at 29 (arguing that "40-year-old Commission precedent and four decades of industry practice" support "pole owners [being] reimbursed in full for pole replacements by communications attachers"); Xcel Energy Comments at 2-3; Edison Electric Institute et al. Comments at 14.

[42] NCTA Petition at 8, 14 ("NCTA members regularly encounter demands by pole owners that they pay the *full cost* of replacing aging poles as a condition of access—even though (in the absence of the new attachment or overlash) the utility would have had to replace the same pole at its own cost in the near future, or (in many cases) should have already done so." (emphasis in original)); Crown Castle Comments at 4-5 ("Crown Castle supports NCTA's assertion that the costs associated with replacing poles, including purchasing and installing the replacement pole and removing the existing pole, would be incurred by the pole owner during the natural life of the pole, independent of any attachment . . . [so that] a new attacher 'is only precipitating the earlier incurrence of these costs, not causing them, and should therefore not bear them in full'" (quoting NCTA Petition at 18)); ACA Connects Comments at 5 ("Where a utility has failed to maintain its poles, where poles are or will soon be scheduled for replacement, or earlier attachments involve safety violations, the replacement of a pole to accommodate a new attachment may trigger an attempt by the pole owner to impose the costs of maintaining its own infrastructure on the new attacher, contrary to longstanding Commission precedent. A utility receives an unlawful windfall when it does so, especially where poles are fully or largely depreciated or have deteriorated and are no longer safe."); Charter Comments at 3 ("As a practical matter, the common utility practice of charging the full replacement cost of a pole to the attacher means that the utility recovers far more than the costs that the attachment actually causes—the pole owner also

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economist, Dr. Patricia Kravtin, states that "since the future replacement of the pole from the utility's perspective is 'an inevitable event' that it would eventually have to pay for itself, the practice of transferring the full cost of that replacement onto new attachers (who must either pay to obtain access or choose to abandon their investment plans) results in burdens to the attaching entity far exceeding the costs they actually cause the pole owner to incur over a more meaningful time horizon."[43] Utilities counter that the early retirement of their poles precipitated by a new attachment comes at a cost—the value they lose in a capital asset that has not yet reached the end of its useful life—and that under the Commission's cost causation policy, they are entitled to compensation for the unrealized value of a pole that would otherwise remain in service.[44]

17. While we acknowledge that the economic and legal arguments made by utilities could have merit,[45] we are concerned by the frequent statements in the record that attachers are being required to absorb costs that are not caused by their attachments and/or result in attachers assuming financial responsibility for a utility's capital assets.[46] Our concern is rooted in the potential impact on the

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obtains the additional windfall from advancing the upgrade of its facilities and shifting the entire cost of that upgrade onto the attacher.").

[43] Charter Comments at Attach., Patricia D. Kravtin, The Economic Case for a More Cost Causative Approach to Make-Ready Charges Associated with Pole Replacement in Unserved/Rural Areas: Long Overdue, But Particularly Critical Now in Light of the Pressing Need to Close the Digital Divide, at 9 (2020). There is much debate in the record on the conclusions reached by Dr. Kravtin regarding cost allocation and cost causation principles as they are applied to pole replacements. *Compare, e.g.,* Crown Castle Reply at 13 ("The economic analysis in the expert report of Patricia D. Kravtin, submitted by Charter, further rebuts the arguments by pole owners that they have no economic incentive to demand pole replacements.") *with* Electric Utilities Reply at 11-13. We seek comment on the conclusions reached by Dr. Kravtin as they relate to the cost allocations and causes of pole replacements.

[44] Coalition of Concerned Utilities Comments at 13, 24-25 (arguing that "the premature replacement of pole plant when that capital has a greater need elsewhere is not a 'prudent' capital expenditure and so likely could not be included in a utility's rate base at all"); POWER Coalition Comments at 19 ("[P]remature pole replacement (*i.e.*, a replacement that occurs before a pole's end of life) is economically inefficient, and a detriment to the utility pole owner and its ratepayers, unless the associated costs are fully covered by the party that will reap the benefit of the new pole.").

[45] *See, e.g.,* Letter from Aryeh Fishman, Assoc. General Counsel, Edison Electric Institute, and Brian M. O'Hara, Sr. Dir. Regulatory Issues, NRECA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 4 (filed Dec. 17, 2020) (Edison Electric Institute/NRECA Dec. 17, 2020 *Ex Parte* Letter) ("In cases of insufficient capacity, where a pole owner requires replacement of a pole with a larger, stronger, or higher class of a pole, such work is performed solely to create capacity for the new attachment. This is not an exclusive modification or an 'upgrade' that is unnecessary or unreasonably required to accommodate the new attachment. When there is a need for a pole to be replaced because of lack of capacity, the new pole still must ensure safety, reliability and resiliency. Therefore, to accommodate the new load, the new pole must meet all applicable standards and requirements at the time of installation and the attaching entity is the cost-causer of this work. Under the Commission's policy, in this scenario, because the replacement of the pole is triggered by insufficient capacity, the attacher is the direct beneficiary and may incur up to the full cost of the work that would otherwise not be performed but for its request. Unless the pole owner uses the opportunity to add to or modify its own facility for its own exclusive use, it does not directly benefit from the pole replacement and does not bear any share of the pole replacement costs.").

[46] *See, e.g.,* NCTA Petition at 10 (stating that it "is unjust and unreasonable for the pole owner to use the new attachment as an opportunity to upgrade the utility's own facilities and shift the entire cost to the new attacher"); Crown Castle Comments at 5-7 (describing "an underlying problem of utilities attempting to impose costs on new attachers for maintaining pole plant that the utility has failed to timely perform itself. Put simply, Crown Castle has repeatedly encountered utilities who have not invested in maintaining their pole plant, leaving deteriorating poles standing long after they should have been replaced in the normal course. . . . Utilities have an independent duty to maintain their poles and cannot shift pole maintenance responsibilities to their attachers"); Charter Comments at 15 ("In practical terms, pole owners are adding, to the costs caused by the attacher, *additional* costs associated with their own facilities upgrades, which the attacher did not cause." (emphasis in original)); ExteNet Comments at 4-5
(continued….)

deployment of broadband networks if the financial resources available for deployments are depleted by these costs.[47] That said, we are keenly aware of the need to carefully examine the impact any changes to our cost allocation rules may have on the ability of utilities to fully recover the costs of expanding capacity to accommodate new attachments[48] to avoid the unintended consequence of increased attachment denials.[49]

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("The need for replacement may be . . . due to the pole's age and condition or because the pole lacks sufficient strength to support ExteNet's attachment. However, ExteNet often encounters a third reason: the utility simply wants the pole replaced, even though ExteNet's engineers have determined that the pole's condition and capacity is sufficient to support ExteNet's attachment. In such a case, ExteNet must choose between paying for the replacement pole or disputing the utility's demand and delaying the project."); Letter from John Windhausen Jr., Executive Director, SHLB Coalition, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at Attach., Pole Attachment Principles to Expedite Broadband Deployment to Anchor Institutions and Their Communities June 28, 2021, at 2, para. 6 (filed Jan. 31, 2022) **("**Imposing the entire pole replacement costs on new or existing attachers unfairly subsidizes the pole owner's plant (as the pole owner would have otherwise been responsible for replacement) and unreasonably drives up the cost of new broadband and communications deployment.").

[47] *See, e.g.,* NCTA Petition at 16-17; ACA Connects Comments at 10 ("Like NCTA, ACA Connects members and other service providers reported that some utilities inflate their make-ready charges by including costs for work unrelated to their attachments, including for pole replacement work. . . . These fees alone regularly exceeded the ACA Connects member's estimated return on investment, resulting in the member forgoing buildouts entirely or engaging in more expensive underground deployments to avoid unjust and unreasonable make-ready charges."); Altice USA Comments at 2-3 ("As a condition of Altice attaching its equipment, pole owners commonly require Altice to pay the full cost of replacing poles, many of which are old and/or already crowded. Because they can be relatively significant in the context of the cost of a new build, pole replacement costs can undermine the return on investment for a particular build or at least delay the project, as Altice considers alternate, more cost-effective routes."); *see also 2011 Pole Attachment Order*, 26 FCC Rcd at 5241, para. 3 ("[L]ack of reliable, timely, and affordable access to physical infrastructure—particularly utility poles—is often a significant barrier to deploying wireline and wireless services.").

[48] Coalition of Concerned Utilities Comments at 11 ("Since the Commission began regulating pole attachments following the 1978 Pole Attachment Act, the Commission has held that utilities must be reimbursed for out-of-pocket costs incurred to accommodate new attachers.") (also quoting *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, CC Docket No. 78-144, Memorandum Opinion and Second Report and Order, 72 FCC 2d 59, 79, para. 29 (1979) ("As indicated in the legislative history, pre-construction, survey, engineering, make-ready, and change-out (non-betterment) costs are included in additional costs but only to the extent they are out-of-pocket expenses specifically attributable to CATV attachments or facilities.")); *2011 Pole Attachment Order*, 26 FCC Rcd at 5321, para. 183 (noting "Congress's understanding that pole attachments generally do not impose any capital costs on utilities that are not recovered fully in make-ready charges: 'Thus the only added cost to the utility resulting from the pole attachment would be administrative costs.'" (quoting 123 Cong. Rec. H5079-81 (daily ed. May 25, 1977) (statement of Rep. Wirth)).

[49] Section 224 does not provide the Commission with authority to require utilities to replace poles when additional capacity is needed to accommodate a new attachment. 47 U.S.C. § 224(f)(2); *Southern Company v. FCC*, 293 F.3d 1338, 1346-47 (11th Cir. 2002) ("Section 224(f)(2) carves out a plain exception to the general rule that a utility must make its plant available to third-party attachers. When it is agreed that capacity is insufficient, there is no obligation to provide third parties with access to that particular 'pole, duct, conduit, or right-of-way.'"); *2018 Wireline Infrastructure Order*, 33 FCC Rcd at 7753-54, para. 100; *2011 Pole Attachment Order*, 26 FCC Rcd at 5284, para. 95 ("As the court noted in *Southern Company*, mandating the construction of new capacity is beyond the Commission's authority."); *see also* Coalition of Concerned Utilities Comments at 8-9 (stating that "[t]he Pole Attachment Act clearly allows utilities to deny access to their facilities for lack of capacity"). Utility commenters argue that "[i]f utilities are no longer compensated for pole replacements and can no longer control the pole replacement process, many utility pole owners will decide they can no longer economically or safely replace poles on a voluntary basis for new attachers. The 'clarification' would deny new attachers access to poles that require replacement to accommodate them." Coalition of Concerned Utilities Comments at 17; *see also* Xcel Energy Comments at 15.

18. To evaluate and resolve these competing concerns, we seek comment on whether the Commission should revise its pole attachment rules to expressly recognize that utilities directly benefit from pole replacements that are precipitated by a new attachment request and establish clear standards for when and how utilities should be required to pay a proportional share of the total pole replacement costs.[50] Would clear standards on these points expedite cost dispute resolution between the parties? Or, are any disputes likely to be fact-specific and better addressed in adjudicatory proceedings? Are further cost allocation rules for pole replacements unnecessary and/or could they result in more attachment requests being denied as some utilities claim?[51]

1. Responsibility for Pole Upgrades and Modifications Unrelated to New Attachments

19. Attachers have represented to the Commission that, when a pole replacement is needed to expand capacity for a new attachment, utilities use that pole replacement as an opportunity to upgrade a pole (e.g., increase its class or grade) or expand their own use of the pole in a manner that is unrelated to the new attachment (e.g., expand capacity for future use by the utility itself or to rent to a different attacher).[52] When that occurs, attachers represent that they are held accountable for the cost of upgrade/expanded use modifications made at the same time as the make-ready for their new attachments.[53] According to NCTA, utilities insist that they are entitled to shift those costs to the new attacher because, even if the upgrade/expanded use modifications are not required to effectuate the new attachment, the utility would not have made them if a pole replacement had not been required to

[50] We limit our inquiries to situations where a pole replacement is needed to accommodate a new attachment due to lack of capacity. We are aware of allegations by attachers that some utilities erroneously or disingenuously claim that an existing pole lacks capacity to accommodate a new attachment and insist that the pole must be replaced at the attacher's cost. *See* ExteNet Comments at 4-5. The rules clearly prohibit such conduct by utilities, and the Commission is fully capable of adjudicating such disputes through its complaint process, *see generally Kansas City Order*, and we believe that is the appropriate avenue for attachers asserting such claims to seek relief.

[51] *See* Electric Utilities Comments at 19; Coalition of Concerned Utilities Comments at 17; Xcel Energy Comments at 15; Edison Electric Institute/NRECA Dec. 17, 2020 *Ex Parte* Letter at 4; Letter from Robin F. Bromberg, Counsel to Georgia Power Co. et al., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2 (filed Jan. 29, 2021) (Georgia Power et al. Jan. 29, 2021 *Ex Parte* Letter); Letter from Patrick R. Halley, Sr. V.P. Policy & Advocacy and G.C., USTelecom, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 1-2 (filed Jan. 14, 2022) (arguing that the Commission should not commence a rulemaking because "[t]he Commission's current allocation of pole replacement costs dates back over 25 years. The rules are clear that the cost causer is responsible for pole make-ready charges, including pole replacements when necessary.").

[52] NCTA Petition at 10; Crown Castle Comments at 9 ("Crown Castle has also encountered numerous situations where the pole owner demands that the new attaching party pay the full cost to install a larger, higher category pole than is required to accommodate the new attachment."); Charter Reply at 7 ("Several commenters have also raised concerns that pole owners continue to engage in practices already prohibited under the Commission's previous orders. These practices include . . . demanding that the new attacher pay to install a larger, higher category pole than is required to accommodate the attachment.").

[53] NCTA Petition at 14 ("[U]nder section 224(b) of the Commission's rules, pole owners may not assign to an attacher pole upgrade costs resulting in betterment to the owner simply because it was performed in connection with make-ready."); Charter Comments at 15 ("In practical terms, pole owners are adding, to the costs caused by the attacher, additional costs associated with their own facilities upgrades, which the attacher did not cause."); Crown Castle Comments at 2, 9 (stating that "Crown Castle has also encountered numerous situations where the pole owner demands that the new attaching party pay the full cost to install a larger, higher category pole than is required to accommodate the new attachment. Essentially, this situation is a utility upgrading its plant—not merely accommodating a new attachment—at the expense of the new attaching party"); INCOMPAS Comments at 12 ("While the FCC's Third Wireline Infrastructure Order has made some headway on pole attachment issues, utility companies are still finding new ways to squeeze broadband companies for costs that they did not cause, for upgrade investments that disproportionately benefit the utility, and for setting rates and safety standards in a way that conflicts with the underlying premise of the FCC's pole attachment and cost allocation rules.").

accommodate the new attachment.[54] Attachers argue that, under the Commission's rules and precedent, they may not be held accountable for such costs because they are not necessitated by the new attachment.[55] Utilities who shift the costs of upgrade/expanded use modifications to new attachers claim that,[56] as described above, the pole replacement required to accommodate the new attachment is the "but for" cause of those modification costs.[57]

20. We seek comment on whether utilities directly benefit when they use pole replacements precipitated by an attachment request to upgrade or enhance their poles and whether utilities should pay a proportional share of the total pole replacement costs. As an initial matter, we seek comment on whether the Commission's existing cost allocation rules and precedent require clarification on this point. Section 1.1408(b) of the Commission's rules states, in pertinent part, that "[t]he costs of modifying a facility shall be borne . . . by all parties that directly benefit from the modification," and that each party that directly benefits from the modification shall share proportionally in its costs, but it then qualifies that language by stating, "[*n*]*otwithstanding the foregoing*, a party with a preexisting attachment to a pole . . . shall not be required to bear any of the costs of rearranging or replacing its attachment if such rearrangement or replacement is necessitated solely as a result of an additional attachment . . . sought by another party."[58] If a pole upgrade is necessitated at the time a pole is replaced to create capacity for a new attachment, does the text of section 1.1408(b) allocate all costs of the pole replacement, including those for unrelated upgrade/expansion modifications, to the new attacher? Or does it merely shield other attachers, and not the utility, from bearing any upgrade costs?

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[54] NCTA Petition at 8; *see also* Edison Electric Institute et al. Comments at 3.

[55] NCTA Petition at 10; Crown Castle Comments at 12 ("Notably, the Commission should clarify that in cases where a pole owner performs a pole replacement to accommodate an attachment, it is unjust and unreasonable for the pole owner to use the new attachment as an opportunity to upgrade the utility's own facilities . . . and shift the entire cost to the new attacher."); Charter Comments at 15.

[56] We note that some utilities have represented to the Commission that they do not hold new attachers responsible for pole upgrades that are not required by a new attachment and that new rules are unnecessary in this area. POWER Coalition Comments at 2 (stating that "if a pole replacement must be performed to cure a violation, or because the pole's physical condition has deteriorated to the point that a safety or reliability concern exists, the costs associated with the pole replacement are instead borne by the utility pole owner"); Xcel Energy Comments at 9 ("[I]f a communications provider requests access for a new attachment to a pole that has been 'red tagged' for replacement (i.e., is scheduled to be replaced within one year), Xcel Energy will coordinate the replacement of that pole with the communications provider's construction schedule and perform the replacement at Xcel Energy's own expense.").

[57] Xcel Energy Comments at 9-10 ("[W]hen a new attacher requests access that requires the replacement of a pole that is not otherwise scheduled for replacement, the attacher is responsible for the full cost of that replacement, which is outside of the ordinary course of business and would not be necessary but for the attacher's request . . . . By demanding replacement of a pole years or even decades before it is necessary for an electric utility to do so for its own operational needs, a new attacher is not 'precipitating the early incurrence' of these costs, but is in fact *causing* these costs." (emphasis in original)); Edison Electric Institute et al. Comments at 20 ("The Commission's longstanding policy has thus been that the pole owner recovers the entire associated capital costs through make-ready fees, thus the additional costs that form the basis for the statutory minimum are the costs of access to the pole that would not have been incurred by the utility 'but for' the pole attachment request.").

[58] 47 CFR § 1.1408(b) (emphasis added). We note that the text of section 1.1408(b) does not appear to include replacing a pole after receiving a modification request as an instance of "piggybacking." The third sentence of the rule states that "[a] party with a preexisting attachment to the modified facility shall be deemed to directly benefit from a modification if, after receiving notification of such modification . . . it adds to or modifies its *attachment*." *Id*. (emphasis added). While a "facility" may include a pole and a "modification" includes replacing a pole, *see Local Competition Order,* 11 FCC Rcd at 16077, para. 1166, adding to or modifying an *attachment* is not the same thing as installing a new, upgraded pole. 47 U.S.C. § 224(a)(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." (emphasis added)).

21. In the *Local Competition Order*, the Commission stated that an attacher is responsible for the entire cost of a new pole needed to create new capacity for its attachment "unless [other parties with attachments] expanded their own use of the facilities at the same time."[59] In the latter event, the other parties that expanded their own use of the facilities would need to share in the cost of the new pole.[60] This language is broader than the text of section 1.1408(b) of the Commission's rules. Whereas the rule text speaks to pole replacements that are "necessitated solely as a result of" the new attachment,[61] the language in the *Local Competition Order* addresses situations where the pole replacement is an "opportunity" for the utility and other attachers to "expand their own *use*" of the new pole.[62]

22. We seek comment on how to reconcile these cost attribution standards in the Commission's rules and precedent in the context of a utility using a pole replacement that is "necessitated solely" by a new attachment request as an opportunity to upgrade the requested pole in a manner that is not required by the new attachment. Does section 1.1408(b) of our rules limit the cost-sharing statements in our precedent? Do the statements in our precedent establish a cost-sharing standard for a set of facts that is not contemplated by the codified rule?

23. Should the Commission address this issue by revising section 1.1408(b) to expressly create a presumption that utilities directly benefit when they use a pole replacement precipitated by a new attachment request as an opportunity to upgrade the pole or expand it for its own use and should, therefore, pay a proportional share of the pole replacement costs? If so, what are the specific circumstances to which such a presumption would apply? Specifically, we seek comment on when an upgrade or expanded use of a pole by a utility confers an incidental versus direct benefit to a utility. For instance, NCTA and other commenters urge us to require utilities to share in the costs of a pole replacement that results in the utility obtaining excess capacity for its own use.[63] The Commission has

[59] *Local Competition Order,* 11 FCC Rcd at 16077, para. 1166 ("If . . . a cable operator seeks to make an attachment on a facility that has no available capacity, the operator would bear the full cost of modifying the facility to create new capacity, such as by replacing an existing pole with a taller pole. Other parties with attachments would not share in the cost, unless they expanded their own use of the facilities at the same time."); *see also 2011 Pole Attachment Order*, 26 FCC Rcd at 5301, para. 143 ("Likewise, a pole owner recovers the entire capital cost of a new pole through make-ready charges from the new attacher when a new pole is installed to enable the attachment.").

[60] *Local Competition Order,* 11 FCC Rcd at 16077, para. 1166; *see also id.* at 16096, para. 1212 ("[I]f an entity uses a proposed modification as an opportunity to adjust its preexisting attachment, the 'piggybacking' entity should share in the overall cost of the modification to reflect its contribution to the resulting structural change.").

[61] 47 CFR § 1.1408(b).

[62] *Id.* at 16077, para. 1166 (emphasis added); *see also id.* at 16096-97, para. 1212 ("A utility or other party that uses a modification as an opportunity to bring its facilities into compliance with applicable safety or other requirements will be deemed to be sharing in the modification and will be responsible for its share of the modification cost.").

[63] *See* NCTA Petition at 22 ("If the new pole has greater capacity than the existing one, the utility further benefits from the opportunity to earn additional rents from later attachers, or to use the additional capacity for its own purposes, whether (in the case of an electric utility) in providing its core electric services or in facilitating the utility's own future entry into broadband markets."); Altice USA Comments at 3 ("The pole owner not only benefits in the form of a brand new, stronger and often taller pole for its own core electric utility purposes, but it also then has added capacity for future income producing attachments. Allowing pole owners to continue shifting the entire cost of pole replacements to attachers unjustly enriches the utilities and undermines ubiquitous broadband deployment."); ACA Connects Comments at 18-19 (stating that "as NCTA explains, exchanging older poles for newer ones confers benefits on the pole owner . . . [including] opportunities to bring in additional revenues"); Charter Comments at 37 ("Although Congress, and this Commission in its 1987 Order, recognized the concept of betterment/nonbetterment as it applied to make-ready cost allocations years ago, betterment concepts are often ignored in practice, despite the fact that the betterment gains to the utility from pole replacements are multifold. They include . . . revenue-enhancing benefits, including enhanced rental opportunities from the increased capacity on the new replacement pole.").

previously stated that, while that excess capacity may confer benefits on utilities,[64] utilities are not under any obligation to share the future revenue they may receive due to that excess capacity, even if they did not share in the costs of the modification that created the excess capacity.[65] Further, the Commission found that excess pole capacity could be "particularly cumbersome" if it remains unused for extended periods.[66] Should these statements be understood to mean that the Commission has considered excess pole capacity to be an incidental benefit of a pole replacement rather than a direct benefit? Are there grounds for the Commission to conclude that excess capacity resulting from a pole replacement is a direct benefit to utilities and they should, therefore, share in the replacement costs? Are there other benefits that a utility obtains when a pole is replaced to accommodate a new attachment that the Commission should treat as incidental as opposed to direct? Or, as utilities claim, is it unnecessary to modify our rules to address cost allocation when utilities use a new attachment request that precipitates a pole replacement as an opportunity to upgrade the pole or expand it for its own use?[67] In addressing these questions, we ask that commenters be specific with respect to how they are defining incidental and direct benefits, their economic bases for those definitions, and how they apply or do not apply to each circumstance proposed as a benefit to utilities.

24. If the Commission were to adopt the presumption described above, what would be a proportional allocation of the costs of a pole replacement that is precipitated by a new attacher and then used as an opportunity for the utility to upgrade or expand its use of the pole? What are the incremental costs of upgrading the class or grade of the taller pole being installed to accommodate the new attachment? Should the new attacher be responsible for the difference in cost between a taller pole of a

[64] *See 2011 Pole Attachment Order*, 26 FCC Rcd at 5322-23, para. 187 ("[B]ecause poles typically come in standard sizes, the utility is likely to obtain, at no cost to itself, capacity above and beyond the additional foot of pole space needed to accommodate the typical third-party attachment. The utility benefits from the extra capacity because it can use that capacity to supply is own services, rent the capacity to other third-party attachers and realize additional revenues, and/or save or defer some of the cost of periodic pole replacement needed to provide its own services.").

[65] *Local Competition Order*, 11 FCC Rcd at 16098, para. 1216 ("We recognize that in some cases a facility modification will create excess capacity that eventually becomes a source of revenue for the facility owner, even though the owner did not share in the costs of the modification.").

[66] *Id.* at 16097, para. 1213 ("We recognize that limiting cost burdens to entities that initiate a modification, or piggyback on another's modification, may confer incidental benefits on other parties with preexisting attachments on the newly modified facility. Nevertheless, if a modification would not have occurred absent the action of the initiating party, the cost should not be borne by those that did not take advantage of the opportunity by modifying their own facilities . . . . As for pole owners themselves, the imposition of cost burdens for modifications they do not initiate could be particularly cumbersome if excess space created by modifications remained unused for extended periods."); *see also* Electric Utilities Comments at 27 ("[C]reating excess capacity on utility poles does not necessarily mean that new attachers will flock to attach to them."); POWER Coalition Comments at 18 ("[E]ven if added space or capacity could itself be perceived as a benefit to the utility pole owner, the benefit would be incidental in nature, as the need for the taller pole was **caused** by a third party's attachment request, and was not the choice of the pole owner." (emphasis in original)); Edison Electric Institute et al. Comments at 3 (claiming that pole owners should not be responsible for pole replacement costs based on vague, indefinite and unquantifiable benefits, especially when these benefits are incidental to accommodating pole access requests).

[67] *See, e.g.,* POWER Coalition Comments at 2, 17-18 (stating that the Act and the Commission's rules already require that "if a pole owner uses the opportunity of a modification requested by a third party to modify its own facility (for example, to comply with applicable safety requirements), it shares in the total costs associated with the modification"); Electric Utilities Comments at 12 & n.8 (stating that "the Electric Utilities are willing to stipulate that where a pole has been identified by the utility as requiring replacement within a six month period, and where an attacher subsequently applies to attach to that pole, the pole owner should pay for the replacement pole"); Xcel Energy Comments at 9 (stating that for "red tagged" poles, "Xcel Energy will coordinate the replacement of that pole with the communications provider's construction schedule and perform the replacement at Xcel Energy's own expense."); Coalition of Concerned Utilities Reply at 4 ("No party disputes that utility pole owners are responsible for maintaining poles, and for making necessary repairs, upgrades and pole replacements.").

same type as the existing pole and the upgraded pole, along with other typical make-ready costs of a new attachment (e.g., the cost of transferring existing attachments to the new pole)? If not, what measure should be used? If the Commission revisits its position on the installation of excess pole capacity, should those costs be apportioned in a manner similar to when multiple attachers use an attachment request to upgrade their existing facilities, requiring expanded pole capacity, i.e., a ratio of the new space on the taller pole occupied by the new attacher to the total amount of excess capacity on the taller pole?[68]

25. We also seek comment on whether adopting a presumption that utilities directly benefit from pole replacements precipitated by a new attachment when the utility uses the pole replacement as an opportunity to upgrade or expand its use of the pole would have a positive or negative effect on pole attachment negotiations and, relatedly, the deployment of broadband facilities. Would it facilitate and expedite successful negotiations by eliminating areas of dispute? Conversely, would it increase the frequency of pole attachment denials and delay the deployment of broadband networks due to utility concerns that they will not be fully compensated for the costs caused by the attachments? Are there potential adverse impacts for utility ratepayers? If so, would any of these adverse impacts be lessened if the Commission were to recognize specific circumstances under which the presumption could be rebutted? What would those circumstances be? What evidentiary showing would utilities need to make to substantiate that circumstances exist to rebut the presumption? Do these considerations vary based on whether the pole is located in an "unserved area," and, if so, how should that term be defined in this context?

26. Additionally, we seek comment on how the last sentence of section 1.1408(b) should be interpreted with respect to pole replacements. That sentence states, "If a party makes an attachment to the facility after the completion of the modification, such party shall share proportionately in the cost of the modification if such modification rendered possible the added attachment."[69] What time period is reasonable "after" the pole replacement occurs for the subsequent attacher to share in the costs of the pole replacement? Would any subsequent attachment to a new pole be considered "rendered possible" by the pole replacement even if it occurred a significant time later?

2. Costs and Benefits of Early Pole Retirement

27. According to NCTA and other attachers, "[p]oles, like other utility infrastructure, have a finite life and require maintenance and intermittent replacement. Replacing an older pole with a new one necessarily allows the utility to defer the next scheduled replacement, including transfer of its facilities to the new pole, and reduces maintenance costs."[70] In NCTA's view, "where existing utility infrastructure is . . . near the end of its useful life, it is unjust and unreasonable [under section 224(b) of the Act] for

[68] *Local Competition Order*, 11 FCC Rcd at 16096, para. 1211 ("Where multiple parties join in the modification, each party's proportionate share of the total cost shall be based on the ratio of the amount of new space occupied by that party to the total amount of new space occupied by all of the parties joining in the modification. For example, a [competitive access provider's (CAP)] access request might require the installation of a new pole that is five feet taller than the old pole, even though the CAP needs only two feet of space. At the same time, a cable operator may claim one foot of the newly-created capacity. If these were the only parties participating in the modification, the CAP would pay two-thirds of the modification costs and the cable operator one-third.").

[69] 47 CFR § 1.1408(b).

[70] *See* NCTA Petition at 22; *see also* ACA Connects Comments at 18-19 ("Because all poles have finite lives, the replacement of a pole enables a utility to defer — for many decades — another replacement of that asset. With that benefit comes the lower maintenance costs of a newer pole, and a variety of opportunities to bring in additional revenues."); Charter Comments at 37-38 ("[T]he betterment gains to the utility from pole replacements are multifold. They include: Capital cost savings associated with future planned plant upgrades and cyclical replacement programs; Operational cost savings in the form of lower maintenance and operating expenses inherent to features of the new, upgraded/higher-class replacement pole, or as a result of the earlier time shift of the removal and installation of the new pole, given the generally rising costs of labor and material over time as measured by published industry cost indices.").

pole owners to shift the entire cost of a pole replacement to a new attacher when the pole owner itself derives the predominant financial gain, including in the form of betterment, from replacing and upgrading the pole."[71] Attachers argue that utilities should, therefore, be required to pay a proportional share of pole replacement costs whenever a pole is replaced to accommodate a new attachment,[72] and irrespective of whether they have otherwise improved the pole.

28. Utilities counter that the attachers' position is barred by section 1.1408(b) of the Commission's rules, which mandates that new attachers bear the costs of pole replacements necessitated solely as a result of their new attachments.[73] They also assert that the attachers misstate or misunderstand the process and economics of scheduling a pole for replacement.[74] The record indicates that utilities use

[71] NCTA Petition at 10; *see also* WIA Comments at 3 ("[B]ecause the pole owner continues to benefit from ownership of the pole, shifting all of the costs to the attacher would 'exceed just compensation' because the attacher has 'increase[d] the utility's asset value.'" (quoting NCTA Petition at 12) (internal quotation marks omitted)); Altice USA Comments at 3 ("The pole owner not only benefits in the form of a brand new, stronger and often taller pole for its own core electric utility purposes, but it also then has added capacity for future income producing attachments. Allowing pole owners to continue shifting the entire cost of pole replacements to attachers unjustly enriches the utilities . . . ."); Charter Comments at 11 ("[P]ole replacements bestow a significant amount of 'betterment' value on the utility . . . that would not exist 'but for' the new attachment request . . . . [R]equiring attachers to pay for this betterment value creates significant economic inefficiencies and is not consistent with just and reasonable pole attachment rates, terms, and conditions."). NCTA also argues that shifting the entire cost of a pole replacement to a new attacher is inconsistent with section 224(f) of the Act because it discriminates against new attachers "seeking to bring broadband to an unserved area by imposing unjust and unreasonable conditions upon access." NCTA Petition at 15.

[72] NCTA Petition at 19; ACA Connects Comments at 17 ("We thus agree with NCTA that a 'just and reasonable' allocation of pole replacement costs cannot allocate these [replacement] costs in their entirety (if at all) to an attaching party whose request for pole access initiates replacement of a pole. Rather, the attaching party should bear only any incremental costs it 'causes' in replacing the pole."); Crown Castle Comments at 2 ("Crown Castle agrees with NCTA, generally, and supports its request that the Commission reaffirm that the costs of replacing or upgrading a pole, including correcting pre-existing conditions, may not be shifted entirely to the newest entity to attach to a utility pole . . . . The cost should be allocated fairly and proportionately between the pole owner, any existing attachers, and the new attacher to distinguish between the true economic costs associated with the attachment and the costs associated with 'betterment,' i.e., improving the utility's facilities.").

[73] 47 CFR § 1.1408(b); Edison Electric Institute et al. Comments at 14 ("NCTA's argument hinges on the notion that pole owners are direct beneficiaries of pole replacements under 47 C.F.R. § 1.1408(b) of the Commission's Rules; however, this is contrary to the Commission's long-standing policies under Section 224 that allow utilities to recover all of the costs of a modification that are attributable to new pole attachments. The Commission has long recognized that these costs are solely caused by the new attaching entity, which is solely responsible for reimbursing utilities for these costs."); Coalition of Concerned Utilities Comments at 29 ("[T]he Petition's 'clarification' request runs contrary to 40-year-old Commission precedent and four decades of industry practice, pursuant to which pole owners have been reimbursed in full for pole replacements by communications attachers."); Xcel Energy Comments at 2-3 ("[W]hen an attacher requests access that requires the replacement of a pole that is not otherwise scheduled for replacement, the attacher is responsible for the full cost of that replacement, which would not be necessary but for the attacher's request. It is clearly established through the Commission's rules, policies, and precedent—as well as the legislative history of Section 224—that attachers are expected and required to bear the entire amount of those capital costs that arise from the make-ready process, including pole replacements, in order to accommodate new attachments regardless of whether there is a benefit to the utility.").

[74] *See* POWER Coalition Comments at 16 (arguing that "in cases where a pole is replaced before it has reached its end of life, the utility pole owner receives no direct benefit from the pole replacement that would prompt a requirement to share in its costs – and in fact, may be burdened by it"); Xcel Energy Comments at 10 ("Although every pole will, in theory, require replacement at some point in the future as part of a utility's regular maintenance schedule, that point might be anywhere from ten to fifty years away or longer . . . . By demanding replacement of a pole years or even decades before it is necessary for an electric utility to do so for its own operational needs, a new attacher is not 'precipitating the earlier incurrence' of these costs, but is in fact causing these costs."); Coalition of Concerned Utilities Comments at 24 ("Utilities currently replace aging pole plant on a regular maintenance schedule

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internal pole replacement programs to determine when a pole needs to be replaced because it is unsafe, unreliable, or unfit.[75] These programs involve inspections scheduled at periodic intervals during which the condition of a pole is evaluated.[76] If the pole is deemed to be in poor condition or reaching the end of its useful life—a status that utilities emphasize is distinct from a pole's age[77]—the utility will schedule it for replacement.[78] The timing of that replacement appears to vary based on the provisions of a particular utility's replacement program, but a pole that is deteriorating but still safe and serviceable may not be scheduled for replacement for a period of years after the inspection.[79] For example, the POWER Coalition explains that its members conduct their inspections at 8-10 year cycles and that if it is determined that a pole is not likely to remain serviceable until the next cycle (i.e., for another 8-10 years), it will be replaced in one to two years.[80] Utilities argue that when those pole replacements are accelerated to create capacity for new attachments, they lose the value of their capital asset that is being retired before it has reached the end of its useful life.[81] For these reasons, utilities dispute that they obtain a benefit

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that is subject to the utility's control . . . . [A]ccelerating the replacement of poles by several decades prior to the end of their useful life is an incremental burden on electric utilities and their electric customers because they still have to replace all the other poles that actually have reached the end of their useful life.").

[75] POWER Coalition Comments at 8-9; Electric Utilities Comments at 12 n.8; Coalition of Concerned Utilities Comments at 23-24 ("Utilities currently replace aging pole plant on a regular maintenance schedule that is subject to the utility's control."); Xcel Energy Comments at 8 ("Xcel Energy also has an established pole inspection and maintenance program to ensure the integrity and resiliency of its system.").

[76] Electric Utilities Comments at 17; POWER Coalition Comments at 8-9; Xcel Energy Comments at 8-9; Coalition of Concerned Utilities Comments at 23 ("Based on regular inspections and in compliance with industry standards and state regulatory requirements, utilities each year replace a percentage of their aging pole plant.").

[77] Xcel Energy Comments at 5 ("[T]he actual service life of a pole is based entirely on the pole's *condition*—regardless of its age or its depreciated value—and recent surveys and studies have found that actual pole service lives generally exceed their depreciation service lives by a significant margin." (emphasis in original)); POWER Coalition Comments at 7-8, 19; Electric Utilities Comments at 22.

[78] POWER Coalition Comments at 4 ("[U]tility pole owners typically inspect their plant at scheduled intervals, and proactively replace poles as they reach their end of life. Such measures allow utility pole owners to maximize the return on their infrastructure investment, but at the same time, avoid the attendant risks as utility poles physically deteriorate over time."); Electric Utilities Comments at 17; Xcel Energy Comments at 9; Coalition of Concerned Utilities Comments at 24 ("Utilities currently replace aging pole plant on a regular maintenance schedule that is subject to the utility's control.").

[79] POWER Coalition Comments at 8-9; Xcel Energy Comments at 9; Electric Utilities Comments at 22 ("Depending on the condition of the pole, as revealed through the inspection process, a pole can last much longer than the average useful life. . . . There are many poles across the Electric Utilities distribution networks that are well beyond average service life but have many years of useful life remaining.").

[80] The POWER Coalition states that poles that are not climbable will be replaced in 30 days. POWER Coalition Comments at 9. Xcel Energy states that it inspects all of its distribution poles at least once every twelve years, and poles that require reinforcement or replacement are reinforced or replaced within one year. Xcel Energy Comments at 9.

[81] POWER Coalition Comments at 7; Electric Utilities Comments at 26 ("[T]he fact that an electric utility might be required to replace a pole anyway in 15 to 20 years is of no financial solace to the electric utility or its current ratepayers. The timing of infrastructure investment is a critical component in regulatory ratemaking. For example, if an electric utility reasonably projects a need for additional generation capacity in year 2040, but it will only take five years to obtain permits and construct the new generation facilities, it does not make financial sense for the electric utility or its ratepayers to begin the project now. The proper time for the electric utility to incur the costs is closer in time to the actual need."); Coalition of Concerned Utilities Comments at 24 (arguing that "accelerating the date by which a pole is replaced and facilities are transferred would deprive utilities of the time value of money by requiring them to spend money now on an unnecessary pole replacement that they otherwise would not have to spend until 10, 20, 30 or more years from now").

when a pole is replaced before the end of its useful life.[82] Rather, they argue that requiring a new attacher to pay the costs of the pole replacement ensures that utilities are compensated for, among other things,[83] the lost value of an asset that would otherwise remain in service for years.[84] Some utilities have also indicated that state-level oversight of their capital budgets and spending cycles limits their flexibility to assume increased capital expenditures in a given year to accommodate communications deployments.[85]

29. We seek additional information and documents that will better substantiate the economic, legal, and practical implications of potentially revising our rules governing cost sharing. We are particularly interested in additional information and analyses that expand the economic arguments made by utilities and attachers, including those addressing their respective economic incentives and how our rules do or do not effectively align them. We recognize that our current cost sharing rules have been interpreted to shift the financial responsibility of utilities for maintaining and replacing their capital assets to attachers,[86] and that this shift inflates attachers' pole attachment costs.[87] We also recognize that the

[82] *See* POWER Coalition Comments at 16 (arguing that "in cases where a pole is replaced before it has reached its end of life, the utility pole owner receives no direct benefit from the pole replacement that would prompt a requirement to share in its costs – and in fact, may be burdened by it"); Coalition of Concerned Utilities Comments at 27-28 (noting that "even the State or Maine, which is the sole jurisdiction the Petition cites to support its request to modify pole replacement cost allocations, presumes that utility pole owners do not benefit from pole replacements"); Xcel Energy Reply at 7-8 ("The so-called 'efficiencies' and 'benefits' that Charter and others claim would be achieved by shifting the cost of premature pole replacements onto the electric utilities are thus entirely illusory.").

[83] Utilities are compensated for the cost of communications pole attachments through upfront fees for costs that would not be incurred by the utility "but for" the attachments (e.g., pre-construction surveys, engineering, make-ready and pole replacements necessary to accommodate a new attachment), *2011 Pole Attachment Order*, 26 FCC Rcd at 5296, para. 128, and through rental rates that "reflect a portion of operating expenses and capital costs that a utility incurs in owning and maintaining poles." *Id*.

[84] POWER Coalition Comments at 7 ("Because IOUs seek to maximize their infrastructure investment for the benefit of their ratepayers, a pole is not considered to reach its 'end of life' unless it is deemed to unsafe, unreliable, or unfit for further use."); Electric Utilities Comments at 22 ("Depending on the condition of the pole, as revealed through the inspection process, a pole can last much longer than the average useful life . . . allocating any of the cost of the accelerated replacement to the electric utility would deprive the electric utility of its ability to use that capital over the actual remaining useful life of the replaced pole."); Coalition of Concerned Utilities Comments at 28 ("[T]he speculative, questionable and/or nonexistent 'benefits' the Petition alleges do not outweigh the very real costs associated with wasting money to prematurely replace a perfectly good asset.").

[85] *See* Xcel Energy Comments at 13 (explaining that utilities must be able to fully recover additional capital costs of pole attachments because "Xcel Energy and other electric utilities establish their capital budgets and spending cycles based on an assessment of their own business and operational needs, and these budgets and spending cycles are subject to state regulatory oversight and approval. With this regulatory oversight comes capital preservation obligations and a mandate for efficient capital management, along with an obligation to minimize the impact of these budgets on electric ratepayers as much as is reasonably possible."); Coalition of Concerned Utilities Comments at 20.

[86] Crown Castle Comments at 8 ("When pole owners attempt to impose the entire cost of replacing poles on a new attacher, they are improperly seeking to shift the entire cost of the work that the pole owner should have performed or would have been required to perform itself."); Charter Comments at 10 (arguing that "since a utility today receives a windfall whenever a new attacher pays for the full replacement costs of a pole, the utility faces incentives to overstate the necessity of pole replacements or induce premature retirements in order to transfer these costs to the attacher"); ACA Connects Comments at 5 (arguing that "the replacement of a pole to accommodate a new attachment may trigger an attempt by the pole owner to impose the costs of maintaining its own infrastructure on the new attacher, contrary to longstanding Commission precedent").

[87] *See* WIA Comments at 2 ("Make-ready costs, like pole replacements, are a substantial expense for broadband deployment. As a result, excessive make-ready costs can present a major hindrance to building out networks in unserved or underserved areas."); Charter Comments at 4-5 ("Charter can confirm from its own experience that the

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ability of utilities to deny access to their poles due to insufficient capacity,[88] together with the substantial cost to attachers having to deploy underground infrastructure in lieu of an attachment,[89] potentially confers significant leverage to utilities that may disadvantage attachers in negotiations to obtain what they believe is an equitable allocation of pole replacement costs.[90] Utilities counter that if they are prevented from fully realizing the value of their infrastructure assets when a new attachment request requires the early retirement of an otherwise serviceable pole, there is little incentive for them to approve the request.[91]

30. We seek comment on whether revising our pole attachment rules to require utilities to pay some portion of the costs of replacing a pole that is necessitated solely to accommodate a new attachment would better align the economic incentives of the parties, or whether it would, as some

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cost of pole replacements factors significantly into its expenditures in bringing broadband to unserved, rural areas, and operates as a barrier towards further network expansion in those areas."); ACA Connects Comments at 4 (arguing that "utilities often charge unjust and unreasonable pole replacement fees that impede the deployment of network infrastructure through new attachments").

[88] 47 U.S.C. § 224(f)(2); *Southern Company v. FCC*, 293 F.3d 1338, 1346 (11th Cir. 2002); *2018 Wireline Infrastructure Order*, 33 FCC Rcd at 7754, para. 100; *2011 Pole Attachment Order*, 26 FCC Rcd at 5284, para. 95.

[89] *See 2011 Pole Attachment Order*, 26 FCC Rcd at 5242, para. 4 ("When Congress granted the Commission authority to regulate pole attachments, it recognized the unique economic characteristics that shape relationships between pole owners and attachers. Congress concluded that '[o]wing to a variety of factors, including environmental or zoning restrictions' and the very significant costs of erecting a separate pole network or entrenching cable underground, 'there is often no practical alternative [for network deployment] except to utilize available space on existing poles.'") (quoting S. Rep. No. 580, 95th Congress, 1st Sess. at 13 (1977) (1977 Senate Report)); *see also* Crown Castle Comments at 10 (stating with respect to one deployment for which aerially was deemed cost prohibitive, "[a]lthough Crown Castle was able to deploy its facilities underground, that is still significantly more costly than the aerial attachment that should have been available (for example, in lieu of the approximately $150,000 to replace the utility's poles, Crown Castle spent approximately $62,000 to dig trenches and place the facilities underground—a sum that is still nearly ten times higher than would have been the typical make-ready cost for aerial attachment)."); ACA Connects Comments at 5 (stating that "pole replacement fees that seek a recovery of the entire cost to replace the pole and transfer the existing attachments may cause service providers to abandon deployments or pursue attachment alternatives like undergrounding that tend to be more expensive than aerial attachments"); Coalition of Concerned Utilities Comments at 17-18 ("It is generally understood that installing cables underground is more expensive and time consuming than attaching them to poles.").

[90] *See* ExteNet Comments at 5 ("Where, as is often the case, the cost of replacing the pole is outweighed by the cost of the dispute and the resulting delay (plus the loss of goodwill with the utility) ExteNet reluctantly acquiesces to the utility's demand."); INCOMPAS Comments at 12 ("Broadband attachers are being taken advantage of by utilities because there is currently an economic advantage to do so through the lack of clarity on pole replacement cost apportionment."); Charter Comments at 28 ("A third-party attacher has effectively no practical, feasible alternative to paying the make-ready charges: the alternatives of going underground is often prohibitively high, and as is well established, the building of a duplicative network of poles simply not feasible. In theory and in practice, the utility as monopoly owner of the pole network has extraordinary leverage over the attacher.").

[91] *See* Electric Utilities Comments at 19 ("[E]lectric utilities are generally supportive of capacity expansion because electric utilities, at present, are reimbursed for their actual cost to replace the pole . . . . NCTA's proposed rule, if granted, would put electric utilities in the undesirable position of either absorbing the vast majority of make-ready pole replacement costs or denying access altogether."); Coalition of Concerned Utilities Comments at 24 (arguing that "depleting funds and diverting resources from a capital budget that is designed to meet carefully planned, vital electric system reliability infrastructure investments, in favor of the premature replacement of distribution poles, would be unwise, a waste of money, and potentially unrecoverable in utility rate cases"); Edison Electric Institute/NRECA Dec. 17, 2020 *Ex Parte* Letter at 4 ("If a company were to be limited to cost recovery under the NCTA Petition, the very likely result would be that it would no longer be feasible for that company to agree to voluntarily replace poles to expand capacity.").

utilities suggest, simply incent utilities to deny access to the pole in this circumstance.[92] If we were to revise our rules on this point, what standards or formula should be used to apportion the costs between the utility, the new attacher, and any other existing attachers? Should we adopt NCTA's suggestion that new attachers be responsible for the remaining net book value of the pole being replaced, measured by the average depreciated bare pole investment derived using the Commission's pole attachment rate formula?[93] If we were to adopt that standard, what, if any, additional costs would need to be allocated to the new and/or existing attachers to ensure that utilities are compensated for the costs of attachments to their poles?[94] What, if any, impact would the standard proposed by NCTA have on pole attachment rates, costs borne by existing attachers other than the utilities, and utility ratepayers?[95] Is there a different standard of cost allocation that would better balance the incentives of the parties, be administratively simple to apply, and be more amenable to utilities? Have states that regulate pole attachments adopted rules specifying how to allocate the upfront cost to replace a pole between utilities and attachers that the Commission should consider adopting or modifying for its own use?

[92] *See* Electric Utilities Comments at 19; Coalition of Concerned Utilities Comments at 17; Xcel Energy Comments at 15; Edison Electric Institute/NRECA Dec. 17, 2020 *Ex Parte* Letter at 4; Georgia Power et al. Jan. 29, 2021 *Ex Parte* Letter at 2 (arguing that "NCTA's proposal would require electric utilities to reconsider their historical willingness to replace poles to expand capacity for attachers (based on the fact that they are reimbursed their actual costs) rather than exercising their right to deny access for insufficient capacity under Section 224(f)(2)").

[93] NCTA Petition at 11, 23; *see also* Charter Comments at 11 (arguing that "the primary cost that attachers should be responsible for is the unrecovered net book value of the retired pole, which would perhaps otherwise become a 'stranded cost'"); Crown Castle Reply at 16 (agreeing with NCTA that "attachers should, at most, only be responsible for the costs associated with changing the timing of inevitable pole replacements, plus any documented and verifiable additional costs actually caused by the attacher"); ACA Connects Comments at 17-18 (arguing that for poles that have remaining useful life but "insufficient capacity," a utility that puts in a pole to accommodate a new attachment request may charge the new attacher a make-ready fee only to recover (1) the remaining net book value, if any, of the existing (to be replaced) pole less salvage value (2) the incremental costs of installing a pole larger than the existing pole to accommodate the new attachment; and (3) a proportion of the costs to transfer existing electrical attachments to the new pole that is equal to the percentage of the original net book value that remains in the pole); ExteNet Comments at 6 ("The total pole replacement cost should be the remaining book value of the pole being replaced, allocated between the pole owner and the attacher pursuant to the FCC's pole attachment formula."); Altice USA Comments at 3 (arguing that "attachers should be responsible, at most, for a proportionate share of the cost of replacing a pole that reflects the depreciated value of the pole").

[94] *See* POWER Coalition Comments at 20 ("At a minimum, a direct beneficiary of pole replacement must incur a portion of the substantial costs of labor, facility transfers, and the new pole itself."); Coalition of Concerned Utilities Comments at 14-15 (arguing for "the entire material cost of the new pole, along with the entire labor cost to install the new pole, the entire labor cost to replace the old pole, and the entire labor cost to transfer existing attachments to the new pole").

[95] *See* Xcel Energy Comments at 16 (stating that a utility would have to divert capital from its own business and operational needs if required to bear all but the incremental bare pole cost of a pole replacement, or "[a]lternatively, the recovery of the associated costs of the pole replacement would have to be allocated to the utility's rate base and would therefore be borne by the utility's own electric service customers, rather than by the entity that is causing these costs to be incurred"). The Electric Utilities argue that shifting some of the cost of pole replacements to utilities "would actually discriminate against existing attachers that have already paid the actual cost of make-ready necessary to accommodate their attachments." Electric Utilities Comments at 14; *see also* Edison Electric Institute et al. Reply at 11. According to the Electric Utilities "[i]f electric utilities are bearing the vast majority of make-ready pole replacement costs, then those costs will be booked to the appropriate capital and O&M accounts (principally FERC Accounts 364 and 593), which will, in turn, lead to an increase in pole attachment rates paid by all attaching entities subject to the FCC's formulas." Electric Utilities Comments at 14 ("This would have the effect of increasing the pole attachment rates paid by existing telecom carriers and cable television providers (many of whom will receive no 'benefit' from the pole replacement and some of whom may already have paid for a make-ready pole replacement).").

31. We also seek comment on the relationship between the upfront costs incurred to replace a pole versus the recovery of pole replacement costs through recurring pole attachment rates. Specifically, would it be more efficient and effective to require all costs incurred to replace a pole (except where a pole replacement is solely necessitated by a new attachment) to be recovered over time through the allowance for depreciation reflected in recurring rates calculated pursuant to the Commission's pole attachment rate formulas, rather than upfront through make-ready fees? Would the utility be made whole for early replacement of a structurally sound pole through the allowance for depreciation expense reflected in recurring pole rental rates, given the use of accurate depreciation rates?[96] Do utilities use group depreciation for poles? Do utilities' pole depreciation rates equally reflect the probability of late pole replacement, relative to average expected useful life, and the probability of early replacement, whether caused by the addition of an attachment or by some other reason? Under this approach, would the allowance reflected in recurring pole attachment rates through the application of the rate of return component of the carrying charge rate to the net cost of a bare pole, as in the Commission's rate formula,[97] fully compensate the utility for the cost of capital used to finance the remaining undepreciated cost of a replacement pole? Pole replacement costs (other than for pole replacements solely necessitated by a new attachment) under this approach would be allocated in the same way that capital, maintenance, and administrative costs are allocated under the Commission's recurring pole attachment rate formulas.[98] Would this approach reduce barriers to entry and at the same time send efficient pricing signals for pole investment and broadband deployment? Would this approach reduce cost allocation and rate disputes related to pole replacement? Could such an approach be used for recovery of all upfront pole replacement costs, regardless of the reason for replacement? What are the advantages and disadvantages of such an approach?

32. If we were to adopt a standard for allocating the costs of a pole replacement precipitated by a new attachment between utility and attachers, should utilities be able to contest that the allocation is sufficiently compensatory during negotiations with attachers and, if necessary, in complaint proceedings at the Commission, and what showing would be required for them to do so?[99]

33. To help us understand the scale of the pole replacement costs at issue, we seek data from attachers for a broad sample of recent, large broadband network buildouts showing the total number of poles to which they attached and, of those poles, the number for which they paid the full cost to replace an existing pole. For each project identified, we ask that attachers specify the total non-recurring costs of the project (i.e., costs for the physical material of the poles and any and all other assets, such as fiber and

[96] *See, e.g.,* Altice USA Comments at 4 ("The FCC's cable attachment rate formula is a relatively simple and efficient way to assign costs to attaching entities. It relies primarily upon publicly available pole owner actual cost data to derive the average net investment per pole. This average reflects the cost of brand new, undepreciated poles as well as older, depreciated poles, and therefore more likely than not actually produces a cost (born by the attacher) that is greater than the cost of the typically older poles being replaced."); NTCA Reply at 5; *but see* Xcel Energy Comments at 9 (arguing that "the purpose of depreciation is to determine when the investment on an asset has been returned, not the actual useful service life of the asset. NCTA therefore improperly correlates the economic depreciation of a pole to the pole's actual useful service life. In fact, the actual service life of a pole is based entirely on the pole's *condition* – regardless of its age or its depreciated value – and recent surveys and studies have found that actual pole service lives generally exceed their depreciation service lives by a significant margin." (emphasis in original)).

[97] *See* 47 CFR § 1.1406(d).

[98] *See id.*

[99] *See* Free State Foundation Comments at 4 ("[T]he Commission ought to adopt a formula for apportioning pole attachment replacement costs . . . [and] could supplement such formula with a process by which pole owners have opportunity to demonstrate, upon clear and convincing evidence, that providers seeking attachments have caused or will cause specific and unique financial costs that they should be obligated to cover."); Altice USA Comments at 4 ("A pole owner's ability to . . . demonstrate that a pole is actually newer and more valuable than the average pole (as proposed in the [NCTA] Petition) adequately protects pole owners against under recovery.").

electronic equipment, and labor costs for design, engineering, and construction of the network) and the total non-recurring cost specifically for replacement poles. We ask that attachers and utilities provide information concerning the condition of the poles that were replaced and their status within the utility's pole inspection and replacement program, including any available information concerning the term of the pole's useful life.[100] We also request that utilities provide data from their year-end 2021 accounts showing: (1) gross pole investment; (2) accumulated pole depreciation expense; (3) accumulated deferred income taxes attributable to poles; (4) net pole investment (i.e., gross pole investment minus accumulated depreciation expense minus accumulated deferred income taxes, a result that is equivalent to the net cost of a bare pole under the Commission's pole attachment formulas); and (5) pole investment excluded from gross pole investment (to avoid double recovery of the same pole costs through the collection of both non-recurring make-ready and recurring rental fees).

34. We seek comment on whether revising our cost sharing rules to recognize that utilities directly benefit from pole replacements needed to create capacity for new attachments and should pay a proportional share of those costs would have a positive or negative impact on the negotiation of pole attachment agreements and broadband deployment. As the Commission has previously recognized, section 224 of the Act does not authorize us to mandate that utilities replace poles to create capacity for new attachments.[101] We ask that commenters supporting or recommending specific cost allocation methodologies address why their favored solution will expedite pole attachment approvals without increasing denials, benefit consumers by connecting more people to broadband, and otherwise be in the public interest.

C. Avoiding and Resolving Pole Replacement Disputes

35. In addition to the questions above, we seek comment on additional measures that the Commission could adopt that would enable attachers and utilities to avoid pole replacement disputes and/or quickly resolve them when they occur. For instance, ExteNet argues that the Commission should require utilities to provide potential attachers with information concerning the condition of, and replacement plans for, their poles.[102] Would disputes concerning the need for pole replacements and associated costs be avoided if attachers had access to such information when planning their deployments? What specific data points would utilities need to provide potential attachers for such disputes to be avoided? What mechanism could utilities use to provide such information to attachers if required to do so (e.g., an internal utility database) and what costs would be associated with establishing the mechanism(s)? Does the Commission have jurisdiction to require utilities to provide potential attachers with information concerning the status of their poles? Are there any other revisions or additions that the Commission can make to its rules that would enable parties to avoid disputes concerning pole replacements or facilitate the private resolution of those disputes?

36. When pole replacement disputes cannot be avoided or resolved privately by the parties, are there additional procedures the Commission should adopt to expedite the resolution of pole attachment complaints? In November 2017, the Commission established a 180-day shot clock for the Enforcement Bureau to resolve pole access complaints.[103] NCTA argues that the Commission should take the additional step of announcing policies favoring the placement of pole attachment complaints arising in

[100] *See, e.g.,* ACA Connects Comments at 19 (requesting that "the Commission should require a utility to disclose sufficient information about the condition of such poles and the attachments thereto to enable the attacher to verify that the charges it is being assessed are just and reasonable and consistent with the other rules proposes herein").

[101] *2011 Pole Attachment Order*, 26 FCC Rcd at 5284, para. 95; *see also* Xcel Energy Comments at 15 ("[U]tilities are not required to undertake pole replacements in order to accommodate new attachments . . . limit[ing] attachers' responsibility for pole replacements to the incremental cost of a bare pole would result in such voluntary pole replacements being no longer economically viable for a regulated utility.").

[102] ExteNet Comments at 6-7.

[103] 47 CFR § 1.1414; *2017 Wireline Infrastructure Order*, 32 FCC Rcd at 11132-34, paras. 9-13.

unserved areas on the Accelerated Docket,[104] which requires that proceedings on a complaint be concluded within 60 days.[105] We seek comment on whether such a step is necessary given the 180-day shot clock for pole access complaints and the discretion already afforded to Commission staff to place a complaint on the Accelerated Docket if they deem it suitable.[106] We seek comment on the specific criteria the Commission would include in a policy that would guide Commission staff on when pole attachment complaints should be placed on the Accelerated Docket. For example, should the Commission's policy take into account the number and complexity of the claims, need for discovery, need for expert affidavits, and ability of the parties to stipulate to facts? We also seek comment on any other procedural mechanisms that would expedite the resolution of complaints before the Commission concerning pole replacements. We also seek comment on whether there is additional clarity the Commission can provide on the scope of refunds available under the Commission's existing rules governing pole attachment complaints.[107]

37. The Commission, as part of its continuing effort to advance digital equity for all,[108] including people of color, persons with disabilities, persons who live in rural or Tribal areas, and others who are or have been historically underserved, marginalized, or adversely affected by persistent poverty or inequality, invites comment on any equity-related considerations[109] and benefits (if any) that may be associated with the proposals and issues discussed herein. Specifically, we seek comment on how our proposals may promote or inhibit advances in diversity, equity, inclusion, and accessibility, as well the scope of the Commission's relevant legal authority.

IV. PROCEDURAL MATTERS

38. *Ex Parte Rules.* This proceeding shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.[110] Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda, or other filings in the proceeding, then the presenter may provide citations to such data or arguments in his or her prior comments, memoranda,

[104] 47 CFR § 1.736.

[105] NCTA Petition at 27-29; 47 CFR § 1.736(a).

[106] 47 CFR § 1.736(d).

[107] *See* EEI Petition.

[108] Section 1 of the Communications Act of 1934 as amended provides that the FCC "regulat[es] interstate and foreign commerce in communication by wire and radio so as to make [such service] available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex." 47 U.S.C. § 151.

[109] The term "equity" is used here consistent with Executive Order 13985 as the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality. *See* Exec. Order No. 13985, 86 Fed. Reg. 7009, Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government (January 20, 2021).

[110] 47 CFR. §§ 1.1200 *et seq.*

or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with 47 CFR § 1.1206(b). In proceedings governed by 47 CFR § 1.49(f), or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

39. *Initial Regulatory Flexibility Analysis*. Pursuant to the Regulatory Flexibility Act,[111] the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the policies and actions considered in the Second Further Notice. The text of the IRFA is set forth in Appendix A. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the Second Further Notice. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, will send a copy of the Second Further Notice, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.[112]

40. *Filing of Comments and Reply Comments*. Interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by paper.[113]

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: https://www.fcc.gov/ecfs/.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

  Paper filings can be sent by first-class or overnight commercial or U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

  - Filings by commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.
  - Filings by U.S. Postal Service first-class, Express, and Priority mail must be addressed to 45 L Street, NE, Washington, DC 20554.
- People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

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[111] 5 U.S.C. § 603.

[112] *See* 5 U.S.C. § 603(a).

[113] In response to the COVID-19 pandemic, the Commission has closed its current hand-delivery filing location at FCC Headquarters. We encourage outside parties to take full advantage of the Commission's electronic filing system. Any party that is unable to meet the filing deadline due to the building closure may request a waiver of the comment or reply comment deadline, to the extent permitted by law. *FCC Announces Closure of FCC Headquarters Open Window and Change in Hand-Delivery Filing*, Public Notice, DA 20-304 (rel. Mar. 19, 2020), https://www.fcc.gov/document/fcc-closes-headquarters-open-window-and-changes-hand-delivery-policy.

41. *Contact Person*. For further information about this proceeding, contact Michael Ray, FCC Wireline Competition Bureau, Competition Policy Division, 45 L Street, NE, Washington, DC 20554, (202) 418-0357, Michael.Ray@fcc.gov.

V. ORDERING CLAUSES

42. Accordingly, IT IS ORDERED that, pursuant to sections 1-4, 201, and 224 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 201, and 224, this Second Notice of Proposed Rulemaking IS ADOPTED.

43. IT IS FURTHER ORDERED that the Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Second Further Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A
Initial Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[1] the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities from the policies and rule changes proposed in this Second Further Notice. The Commission requests written public comment on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the Second Further Notice. The Commission will send a copy of the Second Further Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).[2] In addition, the Second Further Notice and IRFA (or summaries thereof) will be published in the Federal Register.[3]

A. Need for, and Objectives of, the Proposed Rule Changes

2. The Second Further Notice seeks comment on ways to eliminate or expedite the resolution of pole replacement disputes by establishing clear standards for when and how the cost causation and cost sharing requirements in section 1.1408(b) of the Commission's rules apply to pole replacements. The Second Further Notice specifically seeks comment on situations in which a pole replacement is not "necessitated solely" by a new attachment request, whether and to what extent utilities directly benefit from various types of pole replacements, and if the Commission should establish standards for when utilities should be required to pay a proportional share of pole replacement costs. Additionally, the Second Further Notice seeks comment on whether the Commission should adopt an express presumption with regard to whether utilities directly benefit when they use pole replacements precipitated by attachment requests to upgrade or enhance their poles, as well as whether the Commission has previously embraced or rejected such a presumption. Comments are also sought regarding the circumstances in which such a presumption would apply, how relevant costs would be allocated, and whether this presumption would positively or negatively impact pole attachment negotiations and, relatedly, broadband deployment.

3. The Second Further Notice also seeks comment on the costs and benefits of early pole retirements. Specifically, when retiring a pole early to accommodate a new attachment, the Second Further Notice seeks comment on whether a revision of the Commission's pole attachment rules to require utilities to pay a portion of the costs of the pole replacement would help to align parties' economic incentives. The Second Further Notice seeks comment on whether it would be more efficient and effective to require all costs incurred to replace a structurally sound pole for reasons other than insufficient capacity to be recovered over time through the allowance for depreciation reflected in recurring rates calculated pursuant to the Commission's pole attachment rate formulas, rather than upfront through make-ready fees. It also seeks comment on whether a revision of the Commission's cost sharing rules to recognize that utilities directly benefit from pole replacements that create capacity for new attachments and should thus pay a proportional share of the costs would positively or negatively affect negotiations of pole attachment agreements and broadband deployment. The Second Further Notice seeks comment on whether the Commission should explicitly define certain key terms related to pole replacements and the rules governing them, including "necessitated solely" and "red-tagged." Finally, the Second Further Notice seeks comment on measures the Commission could adopt to avoid disputes concerning pole replacements and expedite the resolution of complaints concerning pole replacements and provide more clarity with respect to the scope of refunds and payments that may be ordered if the Commission determines that a pole attachment rate, term, or condition is unjust and unreasonable.

[1] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[2] *See* 5 U.S.C. § 603(a).

[3] *Id.*

B. Legal Basis

4. The proposed action is authorized under sections 1-4, 201, 202, 214, 224, 251, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-54, 201, 202, 214, 224, 251, and 303(r).

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

5. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the rules adopted herein.[4] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[5] In addition, the term "small business" has the same meaning as the term "small-business concern" under the Small Business Act."[6] A "small-business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[7]

6. *Small Businesses, Small Organizations, Small Governmental Jurisdictions*. Our actions, over time, may affect small entities that are not easily categorized at present. We therefore describe here, at the outset, three broad groups of small entities that could be directly affected herein.[8] First, while there are industry specific size standards for small businesses that are used in the regulatory flexibility analysis, according to data from the Small Business Administration's (SBA) Office of Advocacy, in general a small business is an independent business having fewer than 500 employees.[9] These types of small businesses represent 99.9% of all businesses in the United States, which translates to 30.7 million businesses.[10]

7. Next, the type of small entity described as a "small organization" is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."[11] The Internal Revenue Service (IRS) uses a revenue benchmark of $50,000 or less to delineate its annual electronic filing requirements for small exempt organizations.[12] Nationwide, for tax year 2018, there

[4] 5 U.S.C. § 604(a)(4).

[5] 5 U.S.C. § 601(6).

[6] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[7] 15 U.S.C. § 632.

[8] *See* 5 U.S.C. §§ 601(3)-(6).

[9] *See* SBA, Office of Advocacy, "What's New With Small Business?", https://cdn.advocacy.sba.gov/wp-content/uploads/2019/09/23172859/Whats-New-With-Small-Business-2019.pdf (Sept 2019).

[10] *Id*.

[11] 5 U.S.C. § 601(4).

[12] The IRS benchmark is similar to the population of less than 50,000 benchmark in 5 U.S.C § 601(5) that is used to define a small governmental jurisdiction. Therefore, the IRS benchmark has been used to estimate the number small organizations in this small entity description. *See* Annual Electronic Filing Requirement for Small Exempt Organizations — Form 990-N (e-Postcard), "Who must file," https://www.irs.gov/charities-non-profits/annual-electronic-filing-requirement-for-small-exempt-organizations-form-990-n-e-postcard. We note that the IRS data does not provide information on whether a small exempt organization is independently owned and operated or dominant in its field.

were approximately 571,709 small exempt organizations in the U.S. reporting revenues of $50,000 or less according to the registration and tax data for exempt organizations available from the IRS.[13]

8. Finally, the small entity described as a "small governmental jurisdiction" is defined generally as "governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand."[14] U.S. Census Bureau data from the 2017 Census of Governments[15] indicate that there were 90,075 local governmental jurisdictions consisting of general purpose governments and special purpose governments in the United States.[16] Of this number there were 36,931 general purpose governments (county[17], municipal, and town or township[18]) with populations of less than 50,000 and 12,040 special purpose governments - independent school districts[19] with enrollment populations of less than 50,000.[20] Accordingly, based on the 2017 U.S. Census of Governments data, we estimate that at least 48,971 entities fall into the category of "small governmental jurisdictions."[21]

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[13] *See* Exempt Organizations Business Master File Extract (EO BMF), "CSV Files by Region," https://www.irs.gov/charities-non-profits/exempt-organizations-business-master-file-extract-eo-bmf. The IRS Exempt Organization Business Master File (EO BMF) Extract provides information on all registered tax-exempt/non-profit organizations. The data utilized for purposes of this description was extracted from the IRS EO BMF data for Region 1-Northeast Area (76,886), Region 2-Mid-Atlantic and Great Lakes Areas (221,121), and Region 3-Gulf Coast and Pacific Coast Areas (273,702) which includes the continental U.S., Alaska, and Hawaii. This data does not include information for Puerto Rico.

[14] 5 U.S.C. § 601(5).

[15] *See* 13 U.S.C. § 161. The Census of Governments survey is conducted every five years compiling data for years ending with "2" and "7". *See also* Census of Governments, https://www.census.gov/programs-surveys/cog/about.html.

[16] *See* U.S. Census Bureau, 2017 Census of Governments – Organization Table 2. Local Governments by Type and State: 2017 [CG1700ORG02], https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html. Local governmental jurisdictions are made up of general purpose governments (county, municipal, and town or township) and special purpose governments (special districts and independent school districts). *See also* Table 2. CG1700ORG02 Table Notes_Local Governments by Type and State_2017.

[17] *See id.* at Table 5. County Governments by Population-Size Group and State: 2017 [CG1700ORG05], https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html. There were 2,105 county governments with populations less than 50,000. This category does not include subcounty (municipal and township) governments.

[18] *See id. at* Table 6. Subcounty General-Purpose Governments by Population-Size Group and State: 2017 [CG1700ORG06], https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html. There were 18,729 municipal and 16,097 town and township governments with populations less than 50,000.

[19] *See id.* at Table 10. Elementary and Secondary School Systems by Enrollment-Size Group and State: 2017 [CG1700ORG10], https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html. There were 12,040 independent school districts with enrollment populations less than 50,000. *See also* Table 4. Special-Purpose Local Governments by State Census Years 1942 to 2017 [CG1700ORG04], CG1700ORG04 Table Notes_Special Purpose Local Governments by State_Census Years 1942 to 2017.

[20] While the special purpose governments category also includes local special district governments, the 2017 Census of Governments data does not provide data aggregated based on population size for the special purpose governments category. Therefore, only data from independent school districts is included in the special purpose governments category.

[21] This total is derived from the sum of the number of general purpose governments (county, municipal, and town or township) with populations of less than 50,000 (36,931) and the number of special purpose governments - independent school districts with enrollment populations of less than 50,000 (12,040) from the 2017 Census of Governments - Organizations Tables 5, 6, and 10.

1. Broadband Internet Access Service Providers

9. The broadband Internet access service provider industry has changed since the definition was introduced in 2007. The data cited below may therefore include entities that no longer provide broadband Internet access service and may exclude entities that now provide such service. To ensure that this FRFA describes the universe of small entities that our action might affect, we discuss in turn several different types of entities that might be providing broadband Internet access service. We note that, although we have no specific information on the number of small entities that provide broadband Internet access service over unlicensed spectrum, we included these entities in our Initial Regulatory Flexibility Analysis.

10. *Internet Service Providers (Broadband).* Broadband Internet service providers include wired (e.g., cable, DSL) and VoIP service providers using their own operated wired telecommunications infrastructure and fall in the category of Wired Telecommunication Carriers.[22] Wired Telecommunications Carriers are comprised of establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies.[23] The SBA size standard for this category classifies a business as small if it has 1,500 or fewer employees.[24] U.S. Census Bureau data for 2012 show that there were 3,117 firms that operated that year.[25] Of this total, 3,083 operated with fewer than 1,000 employees.[26] Consequently, under this size standard the majority of firms in this industry can be considered small.

11. *Internet Service Providers (Non-Broadband).* Internet access service providers such as Dial-up Internet service providers, VoIP service providers using client-supplied telecommunications connections, and Internet service providers using client-supplied telecommunications connections (e.g., dial-up ISPs) fall in the category of All Other Telecommunications.[27] The SBA has developed a small business size standard for All Other Telecommunications, which consists of all such firms with gross annual receipts of $35 million or less.[28] For this category, U.S. Census Bureau data for 2012 show that there were 1,442 firms that operated for the entire year.[29] Of these firms, a total of 1,400 had gross

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[22] *See*, U.S. Census Bureau, *2017 NAICS Definition*, *"517311 Wired Telecommunications Carriers"*, https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517311&search=2017.

[23] *Id*.

[24] *See* 13 CFR § 121.201, NAICS Code 517311 (previously 517110).

[25] *See* U.S. Census Bureau, *2012 Economic Census of the United States,* Table ID: EC1251SSSZ5, *Information: Subject Series - Estab & Firm Size: Employment Size of Firms for the U.S.*: *2012*, NAICS Code 517110, https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517110&tid=ECNSIZE2012.EC1251SSSZ5&hidePreview=false.

[26] *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

[27] *See* U.S. Census Bureau, *2017 NAICS Definition, "517919 All Other Telecommunications",* https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=517919&search=2017+NAICS+Search&search=2017.

[28] *See* 13 CFR § 121.201, NAICS Code 517919.

[29] *See* U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1251SSSZ4, *Information: Subject Series - Estab and Firm Size: Receipts Size of Firms for the U.S.: 2012*, NAICS Code 517919, https://data.census.gov/cedsci/table?text=EC1251SSSZ4&n=517919&tid=ECNSIZE2012.EC1251SSSZ4&hidePreview=false.

annual receipts of less than $25 million.[30] Consequently, under this size standard a majority of firms in this industry can be considered small.

2. Wireline Providers

12. *Wired Telecommunications Carriers.* The U.S. Census Bureau defines this industry as "establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired communications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services, wired (cable) audio and video programming distribution, and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry."[31] The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees.[32] U.S. Census Bureau data for 2012 show that there were 3,117 firms that operated that year.[33] Of this total, 3,083 operated with fewer than 1,000 employees.[34] Thus, under this size standard, the majority of firms in this industry can be considered small.

13. *Local Exchange Carriers (LECs).* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to local exchange services. The closest applicable NAICS Code category is Wired Telecommunications Carriers.[35] Under the applicable SBA size standard, such a business is small if it has 1,500 or fewer employees.[36] According to Commission data, U.S. Census Bureau data for 2012 show that there were 3,117 firms that operated that year.[37] Of this total, 3,083 operated with fewer than 1,000 employees.[38] Thus under this category and the associated size standard, the Commission estimates that the majority of local exchange carriers are small entities.

14. *Incumbent Local Exchange Carriers* (*Incumbent LECs*). Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services.

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[30] *Id*. The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

[31] *See* U.S. Census Bureau, *2017 NAICS Definition*, *"517311 Wired Telecommunications Carriers"*, https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517311&search=2017.

[32] *See* 13 CFR § 121.201, NAICS Code 517311 (previously 517110).

[33] *See* U.S. Census Bureau, *2012 Economic Census of the United States,* Table ID: EC1251SSSZ5, *Information: Subject Series - Estab & Firm Size: Employment Size of Firms for the U.S.: 2012,* NAICS Code 517110, https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517110&tid=ECNSIZE2012.EC1251SSSZ5&hidePreview=false.

[34] *Id*. The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

[35] *See*, U.S. Census Bureau, *2017 NAICS Definition, "517311 Wired Telecommunications Carriers"*, https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517311&search=2017.

[36] *Id*.

[37] *See* U.S. Census Bureau, *2012 Economic Census of the United States,* Table ID: EC1251SSSZ5, *Information: Subject Series - Estab & Firm Size: Employment Size of Firms for the U.S.: 2012,* NAICS Code 517110, https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517110&tid=ECNSIZE2012.EC1251SSSZ5&hidePreview=false.

[38] *Id*. The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

The closest applicable NAICS Code category is Wired Telecommunications Carriers.[39] Under the applicable SBA size standard, such a business is small if it has 1,500 or fewer employees.[40] According to U.S. Census Bureau data for 2012, 3,117 firms operated in that year.[41] Of this total, 3,083 operated with fewer than 1,000 employees.[42] Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our actions. According to Commission data, 1,307 Incumbent LECs reported that they were incumbent local exchange service providers.[43] Of this total, an estimated 1,006 have 1,500 or fewer employees.[44] Thus, using the SBA's size standard, the majority of Incumbent LECs can be considered small entities.

15. Competitive Local Exchange Carriers (Competitive LECs), Competitive Access Providers (CAPs), Shared-Tenant Service Providers, and Other Local Service Providers. Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate NAICS Code category is Wired Telecommunications Carriers[45] and under that size standard, such a business is small if it has 1,500 or fewer employees.[46] U.S. Census Bureau data for 2012 indicate that 3,117 firms operated during that year.[47] Of that number, 3,083 operated with fewer than 1,000 employees.[48] Based on these data, the Commission concludes that the majority of Competitive LECs, CAPs, Shared-Tenant Service Providers, and Other Local Service Providers, are small entities. According to Commission data, 1,442 carriers reported that they were engaged in the provision of either competitive local exchange services or competitive access provider services.[49] Of these 1,442 carriers, an estimated 1,256 have 1,500 or fewer employees.[50] In addition, 17 carriers have reported that they are Shared-Tenant Service Providers, and all 17 are estimated to have 1,500 or fewer employees.[51] Also, 72

[39] *See* U.S. Census Bureau, *2017 NAICS Definition, "517311 Wired Telecommunications Carriers"*, https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517311&search=2017.

[40] *See* 13 CFR § 121.201, NAICS Code 517311 (previously 517110).

[41] *See* U.S. Census Bureau, *2012 Economic Census of the United States,* Table ID: EC1251SSSZ5, *Information: Subject Series - Estab & Firm Size: Employment Size of Firms for the U.S.: 2012*, NAICS Code 517110, https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517110&tid=ECNSIZE2012.EC1251SSSZ5&hidePreview=false.

[42] *Id*. The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

[43] *See* Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, Trends in Telephone Service, at Table 5.3 (Sept. 2010) (*Trends in Telephone Service*).

[44] *Id*.

[45] *See* U.S. Census Bureau, *2017 NAICS Definition, "517311 Wired Telecommunications Carriers"*, https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517311&search=2017.

[46] *See* 13 CFR § 121.201, NAICS Code 517311 (previously 517110).

[47] *See* U.S. Census Bureau, *2012 Economic Census of the United States,* Table ID: EC1251SSSZ5, *Information: Subject Series - Estab & Firm Size: Employment Size of Firms for the U.S.: 2012*, NAICS Code 517110,https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517110&tid=ECNSIZE2012.EC1251SSSZ5&hidePreview=false.

[48] *Id*. The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

[49] *See Trends in Telephone Service*, at tbl. 5.3.

[50] *Id.*

[51] *Id*.

carriers have reported that they are Other Local Service Providers.[52] Of this total, 70 have 1,500 or fewer employees.[53] Consequently, based on internally researched data, the Commission estimates that most providers of competitive local exchange service, competitive access providers, Shared-Tenant Service Providers, and Other Local Service Providers are small entities.[54]

16. *Interexchange Carriers (IXCs).* Neither the Commission nor the SBA has developed a small business size standard specifically for Interexchange Carriers. The closest NAICS Code category is Wired Telecommunications Carriers.[55] The applicable size standard under SBA rules consists of all such companies having 1,500 or fewer employees.[56] U.S. Census Bureau data for 2012 indicate that 3,117 firms operated during that year.[57] Of that number, 3,083 operated with fewer than 1,000 employees.[58] According to internally developed Commission data, 359 companies reported that their primary telecommunications service activity was the provision of interexchange services.[59] Of this total, an estimated 317 have 1,500 or fewer employees.[60] Consequently, the Commission estimates that the majority of interexchange service providers are small entities.

17. *Operator Service Providers* (*OSPs*). Neither the Commission nor the SBA has developed a small business size standard specifically for operator service providers. The closest applicable size standard under SBA rules is the category of Wired Telecommunications Carriers.[61] Under that size standard such a business is small if it has 1,500 or fewer employees.[62] U.S. Census Bureau data for 2012 show that there were 3,117 firms that operated that year.[63] Of this total, 3,083 operated with fewer than

[52] *Id.*

[53] *Id*.

[54] We have included small incumbent LECs in this present RFA analysis. As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees) and "is not dominant in its field of operation." The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not "national" in scope. We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

[55] *See* U.S. Census Bureau, *2017 NAICS Definition*, *"517311 Wired Telecommunications Carriers"*, https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517311&search=2017.

[56] *See* 13 CFR § 121.201, NAICS Code 517311 (previously 517110).

[57] *See* U.S. Census Bureau, *2012 Economic Census of the United States,* Table ID:. EC1251SSSZ5, *Information: Subject Series - Estab & Firm Size: Employment Size of Firms for the U.S.: 2012,* NAICS Code 517110, https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517110&tid=ECNSIZE2012.EC1251SSSZ5&hidePreview=false.

[58] *Id*. The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

[59] *See Trends in Telephone Service*, at tbl. 5.3.

[60] *Id*.

[61] *See* U.S. Census Bureau, *2017 NAICS Definition*, *"517311 Wired Telecommunications Carriers"*, https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517311&search=2017.

[62] *See* 13 CFR § 121.201, NAICS Code 517311 (previously 517110).

[63] *See* U.S. Census Bureau, *2012 Economic Census of the United States,* Table ID: EC1251SSSZ5, *Information: Subject Series - Estab & Firm Size: Employment Size of Firms for the U.S.: 2012,* NAICS Code 517110, https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517110&tid=ECNSIZE2012.EC1251SSSZ5&hidePreview=false.

1,000 employees.[64] Thus under this size standard, the Commission estimates that the majority of firms in this industry can be considered small. According to Commission data, 33 carriers have reported that they are engaged in the provision of operator services.[65] Of these, an estimated 31 have 1,500 or fewer employees and 2 have more than 1,500 employees.[66] Consequently, the Commission estimates that the majority of OSPs are small entities.

18. *Other Toll Carriers*. Neither the Commission nor the SBA has developed a definition for small businesses specifically applicable to Other Toll Carriers. This category includes toll carriers that do not fall within the categories of interexchange carriers, operator service providers, prepaid calling card providers, satellite service carriers, or toll resellers. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers.[67] The applicable SBA size standard consists of all such companies having 1,500 or fewer employees.[68] U.S. Census Bureau data for 2012 indicate that 3,117 firms operated during that year.[69] Of that number, 3,083 operated with fewer than 1,000 employees.[70] Thus, under this category and the associated small business size standard, the majority of Other Toll Carriers can be considered small. According to internally developed Commission data, 284 companies reported that their primary telecommunications service activity was the provision of other toll carriage.[71] Of these, an estimated 279 have 1,500 or fewer employees.[72] Consequently, the Commission estimates that most Other Toll Carriers are small entities.

3. Wireless Providers—Fixed and Mobile

19. The broadband Internet access service provider category covered by these new rules may cover multiple wireless firms and categories of regulated wireless services.[73] Thus, to the extent the wireless services listed below are used by wireless firms for broadband Internet access service, the actions may have an impact on those small businesses as set forth above and further below. In addition, for those services subject to auctions, we note that, as a general matter, the number of winning bidders that claim to qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Also, the Commission does not generally track subsequent business size

[64] *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

[65] *Trends in Telephone Service*, tbl. 5.3.

[66] *Id.*

[67] *See* U.S. Census Bureau, *2017 NAICS Definition*, *"517311 Wired Telecommunications Carriers"*, https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517311&search=2017.

[68] *See* 13 CFR § 121.201, NAICS Code 517311 (previously 517110).

[69] *See* U.S. Census Bureau, *2012 Economic Census of the United States,* Table ID: EC1251SSSZ5, *Information: Subject Series - Estab & Firm Size: Employment Size of Firms for the U.S.: 2012,* NAICS Code 517110, https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517110&tid=ECNSIZE2012.EC1251SSSZ5&hidePreview=false.

[70] *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

[71] *Trends in Telephone Service*, at tbl. 5.3.

[72] *Id*.

[73] This includes, among others, the approximately 800 members of WISPA, including those entities who provide fixed wireless broadband service using unlicensed spectrum. *See* WISPA, *About WISPA,* https://www.wispa.org/About-Us/Mission-and-Goals (last visited June 27, 2019). We also consider the impact to these entities today for the purposes of this FRFA, by including them under the "Wireless Providers – Fixed and Mobile" category.

unless, in the context of assignments and transfers or reportable eligibility events, unjust enrichment issues are implicated.

20. *Wireless Telecommunications Carriers (except Satellite*). This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular services, paging services, wireless Internet access, and wireless video services.[74] The appropriate size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees.[75] For this industry, U.S. Census Bureau data for 2012 show that there were 967 firms that operated for the entire year.[76] Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more.[77] Thus, under this category and the associated size standard, the Commission estimates that the majority of Wireless Telecommunications Carriers (except Satellite) are small entities.

21. The Commission's own data—available in its Universal Licensing System—indicate that, as of August 31, 2018, there are 265 Cellular licensees that will be affected by our actions.[78] The Commission does not know how many of these licensees are small, as the Commission does not collect that information for these types of entities. Similarly, according to internally-developed Commission data, 413 carriers reported that they were engaged in the provision of wireless telephony, including cellular service, Personal Communications Service (PCS), and Specialized Mobile Radio (SMR) Telephony services.[79] Of this total, an estimated 261 have 1,500 or fewer employees, and 152 have more than 1,500 employees.[80] Thus, using available data, we estimate that the majority of wireless firms can be considered small.

22. *Wireless Communications Services*. This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission defined "small business" for the wireless communications services (WCS) auction as an entity with average gross revenues of $40 million for each of the three preceding years, and a "very small business" as an entity with average gross revenues of $15 million for each of the three preceding years.[81] The SBA has approved these small business size standards.[82] In the Commission's auction for geographic area licenses in the WCS, there

[74] *See* U.S. Census Bureau, *2017 NAICS Definition, "517312 Wireless Telecommunications Carriers (except Satellite)*, https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=517312&search=2017+NAICS+Search&search=2017.

[75] *See* 13 CFR § 121.201, NAICS Code 517312 (previously 517210).

[76] *See* U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1251SSSZ5, *Information: Subject Series: Estab and Firm Size: Employment Size of Firms for the U.S.: 2012*, NAICS Code 517210, https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517210&tid=ECNSIZE2012.EC1251SSSZ5&hidePreview=false&vintage=2012.

[77] *Id*. The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

[78] *See* http://wireless.fcc.gov/uls. For the purposes of this FRFA, consistent with Commission practice for wireless services, the Commission estimates the number of licensees based on the number of unique FCC Registration Numbers.

[79] *Trends in Telephone Service* at Table 5.3.

[80] *See id*.

[81] Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service (WCS), GN Docket No. 96-228, Report and Order, 12 FCC Rcd 10785, 10879, para. 194 (1997).

were seven winning bidders that qualified as "very small business" entities and one that qualified as a "small business" entity.[83]

23. *1670–1675 MHz Services*. This service can be used for fixed and mobile uses, except aeronautical mobile.[84] An auction for one license in the 1670–1675 MHz band was conducted in 2003. One license was awarded. The winning bidder was not a small entity.

24. *Wireless Telephony*. Wireless telephony includes cellular, personal communications services, and specialized mobile radio telephony carriers. The closest applicable SBA category is Wireless Telecommunications Carriers (except Satellite).[85] Under the SBA small business size standard, a business is small if it has 1,500 or fewer employees.[86] For this industry, U.S. Census Bureau data for 2012 show that there were 967 firms that operated for the entire year.[87] Of this total, 955 firms had fewer than 1,000 employees and 12 firms had 1000 employees or more.[88] Thus, under this category and the associated size standard, the Commission estimates that a majority of these entities can be considered small. According to Commission data, 413 carriers reported that they were engaged in wireless telephony.[89] Of these, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees.[90] Therefore, more than half of these entities can be considered small.

25. *Broadband Personal Communications Service.* The broadband personal communications services (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission initially defined a "small business" for C- and F-Block licenses as an entity that has average gross revenues of $40 million or less in the three previous calendar years.[91] For F-Block licenses, an additional small business size standard for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross

(Continued from previous page)

[82] See Public Notice, FCC, Comment Sought on Small Business Size Standards (Jan. 13, 1999), at Attach. A, Letter from Aida Alvarez, Administrator, SBA, to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC (filed Dec. 2, 1998) (Alvarez Letter 1998), https://ecfsapi.fcc.gov/file/6006142119.pdf.

[83] *WCS Auction Closes; Winning Bidders in the Auction of 128 Wireless Communications Licenses; FCC Form 600s Due May 12, 1997,* 12 FCC Rcd 21653, DA-97-886, Report No. AUC-997-14-E (Auction No.14) (April 28, 1997).

[84] 47 CFR § 2.106; *see generally* 47 CFR §§ 27.1-27.70.

[85] *See* U.S. Census Bureau, *2017 NAICS Definition, "517210 Wireless Telecommunications Carriers (except Satellite)*," https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=517312&search=2017+NAICS+Search&search=2017.

[86] *See* 13 CFR § 121.201, NAICS Code 517312 (previously 517210).

[87] *See* U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1251SSSZ5, *Information: Subject Series: Estab and Firm Size: Employment Size of Firms for the U.S.: 2012*, NAICS Code 517210, https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517210&tid=ECNSIZE2012.EC1251SSSZ5&hidePreview=false&vintage=2012.

[88] *Id*. The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

[89] Trends in Telephone Service, tbl. 5.3.

[90] *Id.*

[91] *See* Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap; Amendment of the Commission's Cellular/PCS Cross-Ownership Rule, Report and Order, 11 FCC Rcd 7824, 7850-52, paras. 57-60 (1996) (PCS Report and Order); see also 47 CFR § 24.720(b).

revenues of not more than $15 million for the preceding three calendar years.[92] These standards, defining "small entity" in the context of broadband PCS auctions, have been approved by the SBA.[93] No small businesses within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that claimed small business status in the first two C-Block auctions. A total of 93 bidders that claimed small business status won approximately 40% of the 1,479 licenses in the first auction for the D, E, and F Blocks.[94] On April 15, 1999, the Commission completed the reauction of 347 C-, D-, E-, and F-Block licenses in Auction No. 22.[95] Of the 57 winning bidders in that auction, 48 claimed small business status and won 277 licenses.

26. On January 26, 2001, the Commission completed the auction of 422 C and F Block Broadband PCS licenses in Auction No. 35. Of the 35 winning bidders in that auction, 29 claimed small business status.[96] Subsequent events concerning Auction 35, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant. On February 15, 2005, the Commission completed an auction of 242 C-, D-, E-, and F-Block licenses in Auction No. 58. Of the 24 winning bidders in that auction, 16 claimed small business status and won 156 licenses.[97] On May 21, 2007, the Commission completed an auction of 33 licenses in the A, C, and F Blocks in Auction No. 71.[98] Of the 12 winning bidders in that auction, five claimed small business status and won 18 licenses.[99] On August 20, 2008, the Commission completed the auction of 20 C-, D-, E-, and F-Block Broadband PCS licenses in Auction No. 78.[100] Of the eight winning bidders for Broadband PCS licenses in that auction, six claimed small business status and won 14 licenses.[101]

27. *Specialized Mobile Radio Licenses.* The Commission awards "small entity" bidding credits in auctions for Specialized Mobile Radio (SMR) geographic area licenses in the 800 MHz and 900 MHz bands to firms that had revenues of no more than $15 million in each of the three previous calendar years.[102] The Commission awards "very small entity" bidding credits to firms that had revenues of no more than $3 million in each of the three previous calendar years.[103] The SBA has approved these small

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

[93] *See Alvarez Letter 1998*.

[94] *See Broadband PCS, D, E and F Block Auction Closes*, Public Notice, Doc. No. 89838 (rel. Jan. 14, 1997).

[95] *See C, D, E, and F Block Broadband PCS Auction Closes*, Public Notice, 14 FCC Rcd 6688 (WTB 1999). Before Auction No. 22, the Commission established a very small standard for the C Block to match the standard used for F Block. *See Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, Fourth Report and Order, 13 FCC Rcd 15743, 15768, para. 46 (1998).

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

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

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

[99] *Id.*

[100] *See Auction of AWS-1 and Broadband PCS Licenses Closes; Winning Bidders Announced for Auction 78*, Public Notice, 23 FCC Rcd 12749 (WTB 2008).

[101] *Id.*

[102] 47 CFR § 90.814(b)(1).

[103] *Id*.

business size standards for the 900 MHz Service.[104] The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz bands. The 900 MHz SMR auction began on December 5, 1995, and closed on April 15, 1996. Sixty bidders claiming that they qualified as small businesses under the $15 million size standard won 263 geographic area licenses in the 900 MHz SMR band. The 800 MHz SMR auction for the upper 200 channels began on October 28, 1997, and was completed on December 8, 1997. Ten bidders claiming that they qualified as small businesses under the $15 million size standard won 38 geographic area licenses for the upper 200 channels in the 800 MHz SMR band.[105] A second auction for the 800 MHz band conducted in 2002 and included 23 BEA licenses. One bidder claiming small business status won five licenses.[106]

28. The auction of the 1,053 800 MHz SMR geographic area licenses for the General Category channels was conducted in 2000. Eleven bidders won 108 geographic area licenses for the General Category channels in the 800 MHz SMR band and qualified as small businesses under the $15 million size standard.[107] In an auction completed in 2000, a total of 2,800 Economic Area licenses in the lower 80 channels of the 800 MHz SMR service were awarded.[108] Of the 22 winning bidders, 19 claimed small business status and won 129 licenses. Thus, combining all four auctions, 41 winning bidders for geographic licenses in the 800 MHz SMR band claimed status as small businesses.

29. In addition, there are numerous incumbent site-by-site SMR licenses and licensees with extended implementation authorizations in the 800 and 900 MHz bands. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than $15 million. One firm has over $15 million in revenues. In addition, we do not know how many of these firms have 1,500 or fewer employees, which is the SBA-determined size standard.[109] We assume, for purposes of this analysis, that all of the remaining extended implementation authorizations are held by small entities, as defined by the SBA.

30. *Lower 700 MHz Band Licenses*. The Commission previously adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits.[110] The Commission defined a "small business" as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years.[111] A "very small business" is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years.[112] Additionally, the lower 700 MHz Service had a third category of small

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[104] *See* Letter from Aida Alvarez, Administrator, SBA, to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission (filed Aug. 10, 1999) (*Alvarez Letter 1999*).

[105] *See Correction to Public Notice DA 96-586, FCC Announces Winning Bidders in the Auction of 1020 Licenses to Provide 900 MHz SMR in Major Trading Areas*, Public Notice, 18 FCC Rcd 18367 (WTB 1996).

[106] *See Multi-Radio Service Auction Closes*, Public Notice, 17 FCC Rcd 1446 (WTB 2002).

[107] *See 800 MHz Specialized Mobile Radio (SMR) Service General Category (851–854 MHz) and Upper Band (861–865 MHz) Auction Closes; Winning Bidders Announced*, Public Notice, 15 FCC Rcd 17162 (2000).

[108] *See 800 MHz SMR Service Lower 80 Channels Auction Closes; Winning Bidders Announced*, Public Notice, 16 FCC Rcd 1736 (2000).

[109] *See generally* 13 CFR § 121.201, NAICS Code 517312.

[110] *See Reallocation and Service Rules for the 698–746 MHz Spectrum Band (Television Channels 52–59)*, Report and Order, 17 FCC Rcd 1022 (2002) (*Channels 52–59 Report and Order*).

[111] *See id*. at 1087-88, para. 172.

[112] *See id*.

business status for Metropolitan/Rural Service Area (MSA/RSA) licenses—"entrepreneur"—which is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years.[113] The SBA approved these small size standards.[114] An auction of 740 licenses (one license in each of the 734 MSAs/RSAs and one license in each of the six Economic Area Groupings (EAGs)) commenced on August 27, 2002, and closed on September 18, 2002. Of the 740 licenses available for auction, 484 licenses were won by 102 winning bidders. Seventy-two of the winning bidders claimed small business, very small business, or entrepreneur status and won a total of 329 licenses.[115] A second auction commenced on May 28, 2003, closed on June 13, 2003, and included 256 licenses: 5 EAG licenses and 476 Cellular Market Area licenses.[116] Seventeen winning bidders claimed small or very small business status and won 60 licenses, and nine winning bidders claimed entrepreneur status and won 154 licenses.[117] On July 26, 2005, the Commission completed an auction of 5 licenses in the Lower 700 MHz band (Auction No. 60). There were three winning bidders for five licenses. All three winning bidders claimed small business status.

31. In 2007, the Commission reexamined its rules governing the 700 MHz band in the *700 MHz Second Report and Order*.[118] An auction of 700 MHz licenses commenced January 24, 2008 and closed on March 18, 2008, which included, 176 Economic Area licenses in the A Block, 734 Cellular Market Area licenses in the B Block, and 176 EA licenses in the E Block.[119] Twenty winning bidders, claiming small business status (those with attributable average annual gross revenues that exceed $15 million and do not exceed $40 million for the preceding three years) won 49 licenses. Thirty-three winning bidders claiming very small business status (those with attributable average annual gross revenues that do not exceed $15 million for the preceding three years) won 325 licenses.

32. *Upper 700 MHz Band Licenses*. In the *700 MHz Second Report and Order*, the Commission revised its rules regarding Upper 700 MHz licenses.[120] On January 24, 2008, the Commission commenced Auction 73 in which several licenses in the Upper 700 MHz band were available for licensing: 12 Regional Economic Area Grouping licenses in the C Block and one nationwide license in the D Block.[121] The auction concluded on March 18, 2008, with three winning bidders claiming very small business status (those with attributable average annual gross revenues that do not exceed $15 million for the preceding three years) and winning five licenses.

33. *700 MHz Guard Band Licensees*. In 2000, in the *700 MHz Guard Band Order*, the Commission adopted size standards for "small businesses" and "very small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.[122] A small business in this service is an entity that, together with its affiliates and controlling principals, has

[113] *See id*., at 1088, para. 173.

[114] *See Alvarez Letter 1999*.

[115] *See Lower 700 MHz Band Auction Closes*, Public Notice, 17 FCC Rcd 17272 (WTB 2002).

[116] *See id*.

[117] *See id*.

[118] *Service Rules for the 698–746, 747–762 and 777–792 MHz Band; Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems et al.*, Second Report and Order, 22 FCC Rcd 15289, 15359 n. 434 (2007) (*700 MHz Second Report and Order*).

[119] *See Auction of 700 MHz Band Licenses Closes*, Public Notice, 23 FCC Rcd 4572 (WTB 2008).

[120] *700 MHz Second Report and Order*, 22 FCC Rcd 15289.

[121] *See Auction of 700 MHz Band Licenses Closes*, Public Notice, 23 FCC Rcd 4572 (WTB 2008).

[122] *See Service Rules for the 746–764 MHz Bands, and Revisions to Part 27 of the Commission's Rules*, Second Report and Order, 15 FCC Rcd 5299 (2000) (*746–764 MHz Band Second Report and Order*).

average gross revenues not exceeding $40 million for the preceding three years.[123] Additionally, a very small business is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years.[124] SBA approval of these definitions is not required.[125] An auction of 52 Major Economic Area licenses commenced on September 6, 2000, and closed on September 21, 2000.[126] Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses commenced on February 13, 2001, and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.[127]

34. *Air-Ground Radiotelephone Service*. The Commission has previously used the SBA's small business size standard applicable to Wireless Telecommunications Carriers (except Satellite).[128] The appropriate size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees.[129] For this industry, U.S. Census Bureau data for 2012 show that there were 967 firms that operated for the entire year.[130] Of this total, 955 firms had fewer than 1,000 employees and 12 had employment of 1,000 employees or more.[131] There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and we estimate that almost all of them qualify as small entities under the SBA definition.

35. For purposes of assigning Air-Ground Radiotelephone Service licenses through competitive bidding, the Commission has defined "small business" as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding $40 million.[132] A "very small business" is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding $15 million.[133] These definitions were approved by the SBA.[134] In May 2006, the Commission completed an

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[123] *See id*. at 5343, para. 108.

[124] *See id*.

[125] *See id*. at 5343, para. 108 n.246 (for the 746–764 MHz and 776–794 MHz bands, the Commission is exempt from 15 U.S.C. § 632, which requires Federal agencies to obtain SBA approval before adopting small business size standards).

[126] *See 700 MHz Guard Bands Auction Closes: Winning Bidders Announced*, Public Notice, 15 FCC Rcd 18026 (WTB 2000).

[127] *See 700 MHz Guard Bands Auction Closes: Winning Bidders Announced*, Public Notice, 16 FCC Rcd 4590 (WTB 2001).

[128] *See* U.S. Census Bureau, *2017 NAICS Definition,* "*517312 Wireless Telecommunications Carriers (except Satellite*)", https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517312&search=2017%20NAICS%20Search.

[129] *See* 13 CFR § 121.201, NAICS Code 517312 (previously 517210).

[130] *See* U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1251SSSZ5, *Information: Subject Series: Estab and Firm Size: Employment Size of Firms for the U.S.: 2012*, NAICS Code 517210. https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517210&tid=ECNSIZE2012.EC1251SSSZ5&hidePreview=false&vintage=2012.

[131] *Id*. The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

[132] *Amendment of Part 22 of the Commission's Rules to Benefit the Consumers of Air-Ground Telecommunications Services et al*, WT Docket No. 03-103 et al., Order on Reconsideration and Report and Order, 20 FCC Rcd 19663, paras. 28-42 (2005).

[133] *Id*.

auction of nationwide commercial Air-Ground Radiotelephone Service licenses in the 800 MHz band (Auction No. 65). On June 2, 2006, the auction closed with two winning bidders winning two Air-Ground Radiotelephone Services licenses. Neither of the winning bidders claimed small business status.

36. Advanced Wireless Services (AWS (1710–1755 MHz and 2110–2155 MHz bands (AWS-1); 1915–1920 MHz, 1995–2000 MHz, 2020–2025 MHz and 2175–2180 MHz bands (AWS-2); 2155–2175 MHz band (AWS-3)). For the AWS-1 bands,[135] the Commission has defined a "small business" as an entity with average annual gross revenues for the preceding three years not exceeding $40 million, and a "very small business" as an entity with average annual gross revenues for the preceding three years not exceeding $15 million. For AWS-2 and AWS-3, although we do not know for certain which entities are likely to apply for these frequencies, we note that the AWS-1 bands are comparable to those used for cellular service and personal communications service. The Commission has not yet adopted size standards for the AWS-2 or AWS-3 bands but proposes to treat both AWS-2 and AWS-3 similarly to broadband PCS service and AWS-1 service due to the comparable capital requirements and other factors, such as issues involved in relocating incumbents and developing markets, technologies, and services.[136]

37. *3650–3700 MHz Band*. In March 2005, the Commission released a *Report and Order and Memorandum Opinion and Order* that provides for nationwide, non-exclusive licensing of terrestrial operations, using contention-based technologies, in the 3650 MHz band (i.e., 3650–3700 MHz).[137] As of April 2010, more than 1,270 licenses have been granted and more than 7,433 sites have been registered. The Commission has not developed a definition of small entities applicable to 3650–3700 MHz band nationwide, non-exclusive licenses. However, we estimate that the majority of these licensees are Internet Access Service Providers (ISPs) and that most of those licensees are small businesses.

38. *Fixed Microwave Services.* Microwave services include common carrier,[138] private-operational fixed,[139] and broadcast auxiliary radio services.[140] They also include the Upper Microwave

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[134] *See* Letter from Hector V. Barreto, Administrator, SBA, to Gary D. Michaels, Deputy Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, Federal Communications Commission (filed Sept. 19, 2005).

[135] The service is defined in section 90.1301 *et seq*. of the Commission's Rules, 47 CFR § 90.1301 *et seq*.

[136] *See Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands*, Report and Order, 18 FCC Rcd 25162, Appx. B (2003), *modified by Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands*, Order on Reconsideration, 20 FCC Rcd 14058, Appx. C (2005); *Service Rules for Advanced Wireless Services in the 1915–1920 MHz*, *1995–2000 MHz*, *2020–2025 MHz and 2175–2180 MHz Bands; Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands*, Notice of Proposed Rulemaking, 19 FCC Rcd 19263, Appx. B (2005); *Service Rules for Advanced Wireless Services in the 2155–2175 MHz Band*, Notice of Proposed Rulemaking, 22 FCC Rcd 17035, Appx. (2007).

[137] *Wireless Operations in the 3650-3700 MHz Band Rules for Wireless Broadband*, ET Docket No. 04-151, Report and Order and Memorandum Opinion and Order, 20 FCC Rcd 6502, 6530, ¶ 75 (2005) (*3650-3700 MHz Band R&O*).

[138] *See* 47 CFR Part 101, Subparts C and I.

[139] *See* 47 CFR Part 101, Subparts C and H.

[140] Auxiliary Microwave Service is governed by Part 74 of Title 47 of the Commission's Rules. *See* 47 CFR Part 74. Available to licensees of broadcast stations and to broadcast and cable network entities, broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile TV pickups, which relay signals from a remote location back to the studio.

Flexible Use Service[141], Millimeter Wave Service[142], Local Multipoint Distribution Service (LMDS),[143] the Digital Electronic Message Service (DEMS),[144] and the 24 GHz Service,[145] where licensees can choose between common carrier and non-common carrier status.[146] There are approximately 66,680 common carrier fixed licensees and 69,360 private and public safety operational-fixed licensees, 20,150 broadcast auxiliary radio licensees, 411 LMDS licenses, 33 24 GHz DEMS licenses, 777 39 GHz licenses, and five 24 GHz licenses, and 467 Millimeter Wave licenses in the microwave services.[147] The Commission has not yet defined a small business with respect to microwave services. The closest applicable SBA category is Wireless Telecommunications Carriers (except Satellite)[148] and the appropriate size standard for this category under SBA rules is that such a business is small if it has 1,500 or fewer employees.[149] For this industry, U.S. Census Bureau data for 2012 show that there were 967 firms that operated for the entire year.[150] Of this total, 955 firms had fewer than 1,000 employees and 12 had employment of 1,000 employees or more.[151] Thus, under this SBA category and the associated size standard, the Commission estimates that a majority of fixed microwave service licensees can be considered small.

39. The Commission does not have data specifying the number of these licensees that have more than 1,500 employees, and thus is unable at this time to estimate with greater precision the number of fixed microwave service licensees that would qualify as small business concerns under the SBA's small business size standard. Consequently, the Commission estimates that there are up to 36,708 common carrier fixed licensees and up to 59,291 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services that may be small and may be affected by the rules and policies adopted herein. We note, however, that the common carrier microwave fixed licensee category includes some large entities.

40. *Broadband Radio Service and Educational Broadband Service.* Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS) systems and "wireless cable," transmit video programming to subscribers and provide two-way high-speed data operations using the microwave frequencies of the

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[141] *See* 47 CFR Part 30.

[142] *See* 47 CFR Part 101, Subpart Q.

[143] *See* 47 CFR Part 101, Subpart L.

[144] *See* 47 CFR Part 101, Subpart G.

[145] *See id*.

[146] *See* 47 CFR §§ 101.533, 101.1017.

[147] These statistics are based on a review of the Universal Licensing System on September 22, 2015.

[148] *See* U.S. Census Bureau, *2017 NAICS Definition, "517312 Wireless Telecommunications Carriers (except Satellite)"*, https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517312&search=2017%20NAICS%20Search.

[149] *See* 13 CFR § 121.201, NAICS Code 517312 (previously 517210).

[150] *See* U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1251SSSZ5, *Information: Subject Series, "Estab and Firm Size: Employment Size of Firms for the U.S.: 2012,* NAICS Code 517210,https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517210&tid=ECNSIZE2012.EC1251SSSZ5&hidePreview=false&vintage=2012.

[151] *Id*. The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

Broadband Radio Service (BRS) and Educational Broadband Service (EBS) (previously referred to as the Instructional Television Fixed Service (ITFS)).[152]

41. *BRS*— In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than $40 million in the previous three calendar years.[153] The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 86 incumbent BRS licensees that are considered small entities (18 incumbent BRS licensees do not meet the small business size standard).[154] After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 133 BRS licensees that are defined as small businesses under either the SBA or the Commission's rules.

42. In 2009, the Commission conducted Auction 86, the sale of 78 licenses in the BRS areas.[155] The Commission offered three levels of bidding credits: (1) a bidder with attributed average annual gross revenues that exceed $15 million and do not exceed $40 million for the preceding three years (small business) received a 15% discount on its winning bid; (2) a bidder with attributed average annual gross revenues that exceed $3 million and do not exceed $15 million for the preceding three years (very small business) received a 25% discount on its winning bid; and (3) a bidder with attributed average annual gross revenues that do not exceed $3 million for the preceding three years (entrepreneur) received a 35% discount on its winning bid.[156] Auction 86 concluded in 2009 with the sale of 61 licenses.[157] Of the ten winning bidders, two bidders that claimed small business status won four licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses.

43. *EBS*— Educational Broadband Service has been included within the broad economic census category and SBA size standard for Wired Telecommunications Carriers since 2007. Wired Telecommunications Carriers are comprised of establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies."[158] The

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[152] *Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, Report and Order, 10 FCC Rcd 9589, 9593, para. 7 (1995).

[153] 47 CFR § 21.961(b)(1).

[154] 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standard of 1,500 or fewer employees.

[155] *Auction of Broadband Radio Service (BRS) Licenses*, *Scheduled for October 27*, *2009*, *Notice and Filing Requirements*, *Minimum Opening Bids*, *Upfront Payments*, *and Other Procedures for Auction 86*, Public Notice, 24 FCC Rcd 8277 (2009).

[156] *Id*. at 8296, para. 73.

[157] *Auction of Broadband Radio Service Licenses Closes*, *Winning Bidders Announced for Auction 86*, *Down Payments Due November 23*, *2009*, *Final Payments Due December 8*, *2009*, *Ten-Day Petition to Deny Period*, Public Notice, 24 FCC Rcd 13572 (2009).

[158] *See* U.S. Census Bureau, *2017 NAICS Definition*, "*517311 Wired Telecommunications Carriers,"* http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517311&search=2017.

SBA's small business size standard for this category is all such firms having 1,500 or fewer employees.[159] U.S. Census Bureau data for 2012 show that there were 3,117 firms that operated that year.[160] Of this total, 3,083 operated with fewer than 1,000 employees.[161] Thus, under this size standard, the majority of firms in this industry can be considered small.

44. In addition to U.S. Census Bureau data, the Commission's Universal Licensing System indicates that as of March 2019 there were 1,300 licensees holding over 2,190 active EBS licenses. The Commission estimates that of these 2,190 licenses, the majority are held by non-profit educational institutions and school districts, which are by statute defined as small businesses.[162]

4. Satellite Service Providers

45. *Satellite Telecommunications.* This category comprises firms "primarily engaged in providing telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications."[163] Satellite telecommunications service providers include satellite and earth station operators. The category has a small business size standard of $35 million or less in average annual receipts, under SBA rules.[164] For this category, U.S. Census Bureau data for 2012 show that a total of 333 firms operated for the entire year.[165] Of this total, 299 firms had annual receipts of less than $25 million.[166] Consequently, we estimate that the majority of satellite telecommunications providers are small entities.

46. *All Other Telecommunications.* The **"**All Other Telecommunications" category is comprised of establishments that are primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation.[167] This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting

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[159] *See* 13 CFR § 121.201, NAICS Code 517311 (previously 517110).

[160] *See* U.S. Census Bureau, *2012 Economic Census of the United States,* Table ID: EC1251SSSZ5, *Information: Subject Series - Estab & Firm Size: Employment Size of Firms for the U.S.: 2012,* NAICS Code 517110, https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517110&tid=ECNSIZE2012.EC1251SSSZ5&hidePreview=false.

[161] *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

[162] The term "small entity" within SBREFA applies to small organizations (non-profits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6).

[163] *See* U.S. Census Bureau, *2017 NAICS Definition*, "*517410 Satellite Telecommunications*," https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=517410&search=2017+NAICS+Search&search=2017.

[164] *See* 13 CFR § 121.201, NAICS Code 517410.

[165] *See* U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1251SSSZ4, *Information: Subject Series - Estab and Firm Size: Receipts Size of Firms for the U.S.: 2012*, NAICS Code 517410, https://data.census.gov/cedsci/table?text=EC1251SSSZ4&n=517410&tid=ECNSIZE2012.EC1251SSSZ4&hidePreview=false&vintage=2012.

[166] *Id*. The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

[167] *See* U.S. Census Bureau, *2017 NAICS Definition, "517919 All Other Telecommunications"*, https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=517919&search=2017+NAICS+Search&search=2017.

telecommunications to, and receiving telecommunications from, satellite systems.[168] Establishments providing Internet services or voice over Internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry.[169] The SBA has developed a small business size standard for "All Other Telecommunications," which consists of all such firms with gross annual receipts of $35 million or less.[170] For this category, U.S. Census Bureau data for 2012 show that there were 1,442 firms that operated for the entire year.[171] Of these firms, a total of 1,400 had gross annual receipts of less than $25 million and 15 firms had annual receipts of $25 million to $49, 999,999.[172] Thus, the Commission estimates that the majority of "All Other Telecommunications" firms potentially affected by our action can be considered small.

5. Cable Service Providers

47. Because section 706 of the Act requires us to monitor the deployment of broadband using any technology, we anticipate that some broadband service providers may not provide telephone service. Accordingly, we describe below other types of firms that may provide broadband services, including cable companies, MDS providers, and utilities, among others.

48. *Cable and Other Subscription Programming.* The U.S. Census Bureau defines this industry as establishments primarily engaged in operating studios and facilities for the broadcasting of programs on a subscription or fee basis. The broadcast programming is typically narrowcast in nature (e.g. limited format, such as news, sports, education, or youth-oriented). These establishments produce programming in their own facilities or acquire programming from external sources. The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers.[173] The SBA size standard for this industry establishes as small, any company in this category that has annual receipts of $41.5 million or less.[174] According to 2012 U.S. Census Bureau data, 367 firms operated for the entire year.[175] Of that number, 319 operated with annual receipts of less than $25 million a year and 48 firms operated with annual receipts of $25 million or more.[176] Based on this data, the Commission estimates that the majority of firms in this industry are small.

49. *Cable Companies and Systems (Rate Regulation).* The Commission has developed its own small business size standards for the purpose of cable rate regulation. Under the Commission's rules,

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[168] *Id*.

[169] *Id*.

[170] *See* 13 CFR § 121.201, NAICS Code 517919.

[171] *See* U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1251SSSZ4, *Information: Subject Series - Estab and Firm Size: Receipts Size of Firms for the U.S.: 2012*, NAICS Code 517919, https://data.census.gov/cedsci/table?text=EC1251SSSZ4&n=517919&tid=ECNSIZE2012.EC1251SSSZ4&hidePreview=false.

[172] *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

[173] S*ee* U.S. Census Bureau, *2017 NAICS Definition, "515210 Cable and Other Subscription Programming"*, https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=515210&search=2017%20NAICS%20Search.

[174] *See* 13 CFR § 121.201, NAICS Code 515210.

[175] *See* U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1251SSSZ4, *Information: Subject Series - Estab & Firm Size: Receipts Size of Firms for the U.S.: 2012*, NAICS Code 515210, https://data.census.gov/cedsci/table?text=EC1251SSSZ4&n=515210&tid=ECNSIZE2012.EC1251SSSZ4&hidePreview=false.

[176] *Id*. The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

a "small cable company" is one serving 400,000 or fewer subscribers nationwide.[177] Industry data indicate that there are 4,600 active cable systems in the United States.[178] Of this total, all but five cable operators nationwide are small under the 400,000-subscriber size standard.[179] In addition, under the Commission's rate regulation rules, a "small system" is a cable system serving 15,000 or fewer subscribers.[180] Commission records show 4,600 cable systems nationwide.[181] Of this total, 3,900 cable systems have fewer than 15,000 subscribers, and 700 systems have 15,000 or more subscribers, based on the same records.[182] Thus, under this standard as well, we estimate that most cable systems are small entities.

50. *Cable System Operators (Telecom Act Standard).* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1% of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[183] As of 2019, there were approximately 48,646,056 basic cable video subscribers in the United States.[184] Accordingly, an operator serving fewer than 486,460 subscribers shall be deemed a small operator if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate.[185] Based on available data, we find that all but five incumbent cable operators are small entities under this size standard.[186] We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million.[187] Therefore, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

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[177] 47 CFR § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of $100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation,* Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

[178] The number of active, registered cable systems comes from the Commission's Cable Operations and Licensing System (COALS) database on August 15, 2015. *See* FCC, *Cable Operations and Licensing System* (COALS), https://apps.fcc.gov/coals/ (last visited Oct. 25, 2016).

[179] S&P Global Market Intelligence, *Top Cable MSOs as of 12/2019, https://platform.marketintelligence.spglobal.com/ (Dec 2019)*. The five cable operators all had more than 400,000 basic cable subscribers.

[180] *See* 47 CFR § 76.901(c).

[181] *See* FCC, *Cable Operations and Licensing System* (COALS), https://apps.fcc.gov/coals/ (last visited Oct. 25, 2016).

[182] *Id*.

[183] *See* 47 U.S.C. § 543(m)(2), *see also* 47 CFR § 76.901(e).

[184] S&P Global Market Intelligence, *U.S. Cable Subscriber Highlights, Basic Subscribers(actual) 2019*, *U.S. Cable MSO Industry Total, see also U.S. Multichannel Industry Benchmarks, U.S. Cable Industry Benchmarks, Basic Subscribers 2019Y, https://platform.marketintelligence.spglobal.com.*

[185] 47 CFR § 76.901(e).

[186] S&P Global Market Intelligence, *Top Cable MSOs as of 12/2019, https://platform.marketintelligence.spglobal.com.* The five cable operators all had more than 486,460 basic cable subscribers.

[187] The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to section 76.901(e) of the Commission's rules. *See* 47 CFR § 76.910(b).

6. All Other Telecommunications

51. *Electric Power Generators*, *Transmitters*, *and Distributors.* This U.S. industry is comprised of establishments that are primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Establishments providing Internet services or voice over Internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry.[188] The closest applicable SBA category is "All Other Telecommunications." The SBA's small business size standard for "All Other Telecommunications" consists of all such firms with gross annual receipts of $35 million or less.[189] For this category, U.S. Census Bureau data for 2012 show that there were 1,442 firms that operated for the entire year.[190] Of these firms, a total of 1,400 had gross annual receipts of less than $25 million and 15 firms had annual receipts of $25 million to $49, 999,999.[191] Consequently, we estimate that under this category and the associated size standard the majority of these firms can be considered small entities.

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

52. The Second Further Notice seeks comment on ways to effectively resolve pole replacement disputes through the establishment of standards for when and how utilities and attachers must share in the costs of a pole replacement necessitated by an attachment request. The Second Further Notice does not definitively propose any changes to the Commission's current pole attachment rules, but does request that commenters address the legal implications of any rule revisions they propose, which may include reporting, recordkeeping, and other compliance requirements. For example, the Second Further Notice seeks comment on whether the Commission has jurisdiction to require utilities to share information concerning the status of utility poles with attachers and, if so, the mechanism through which such information would be provided.

53. The Second Further Notice seeks comment on what situations exist in which a pole replacement is not "necessitated solely" by a new attachment request and whether codifying a definition of this phrase would be helpful for parties seeking to comply with section 1.1408(b) of the Commission's rules. With respect to utility benefits, the Second Further Notice seeks comment on how to identify and quantify the costs associated with a pole replacement that are proportional to the direct benefit obtained by a utility from a replacement not necessitated solely by a new attachment request. The Second Further Notice also seeks comment on whether the Commission should revise its pole attachment rules to recognize that utilities directly benefit from pole replacements caused by new attachment requests and establish clear standards for when utilities should be required to pay a proportional share of pole replacement costs. Further, the Second Further Notice seeks comment on whether the Commission

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[188] *See* U.S. Census Bureau, *2017 NAICS Definition*, "*517919 All Other Telecommunications*", https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=517919&search=2017+NAICS+Search&search=2017..

[189] *See* 13 CFR § 121.201, NAICS Code 517919.

[190] *See* U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1251SSSZ4, *Information: Subject Series - Estab & Firm Size: Receipts Size of Firms for the U.S., 2012*, NAICS Code 517919, https://data.census.gov/cedsci/table?text=EC1251SSSZ4&n=517919&tid=ECNSIZE2012.EC1251SSSZ4&hidePreview=false.

[191] *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

should adopt an express presumption that utilities directly benefit when they use pole replacements precipitated by an attachment request to upgrade or enhance their poles. The Commission then asks how costs should be allocated between utilities and attachers if such a presumption is adopted and whether the Commission should revise its cost sharing rules to require utilities to pay a portion of the costs of replacing a pole to create capacity for new attachments. The Commission also seeks comment on the scope of utility liability for pole attachment rate refunds when rates are found to be unjust and unreasonable. Should commenters provide compelling arguments, some or all of these proposals could be adopted. The guidance and clarity offered by these proposals would lessen the compliance impact on small utilities and attaching entities with regard to pole replacements and pole attachment rate refunds.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

54. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[192]

55. The Second Further Notice does not propose specific changes to the Commission's pole attachment rules, but seeks comment on whether the Commission should revise its rules to eliminate and expedite the resolution of pole replacement disputes between utilities and attachers and to establish a set time period for pole attachment rate refund liability for utilities. The Commission's objective in requesting this information is to determine whether it can and should establish clear standards for when and how attachers and utilities must share the costs of a pole replacement precipitated by a new attachment request. In considering the cost allocations, the Commission seeks comment on alternatives that might help smaller utilities and attaching entities. For example, it asks that when a pole needs to be replaced both to accommodate a new attachment and to correct a preexisting violation, whether the new attacher should be responsible for the difference in cost between the taller pole needed for its attachment and what it would cost to replace the existing pole with one of the same type and size. The Second Further Notice also seeks comment on what other methods of apportioning costs are available in this situation in an attempt to properly balance this burden on different types of entities. Additionally, the Second Further Notice seeks comment on the Commission recognizing an express presumption regarding whether utilities directly benefit when they use pole replacements precipitated by an attachment request to upgrade or enhance their poles. The Commission seeks comment on cost allocation alternatives related to the presumption, were it to be adopted, that could be helpful to smaller attachers and utilities. Specifically, the Second Further Notice asks whether the new attacher should be responsible for the difference in cost between a taller pole of the same type as the existing pole and the upgraded pole, along with other typical make-ready costs of a new attachment, or if another measure is more appropriate when specific parties are involved. Notably, at the conclusion of the Second Further Notice, the Commission also asks commenters recommending certain cost allocation methodologies to address why their favored solution will expedite pole attachment approvals, benefit consumers, and otherwise be in the public interest. With regard to refunds to attachers when pole attachment rates are found to be unjust and unreasonable, the Commission seeks comment on the extent of the timing of such liability for utilities. Information submitted in response to these requests for comment will enable the Commission to evaluate the impact that revising its cost sharing and rate refund rules would impact smaller entities.

[192] *See* 5 U.S.C. § 603(c).

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

56. None.