

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

In the Matter of)
Implementation of Section 224 of the Act;) WC Docket No. 07-245
Amendment of the Commission's Rules and)
Policies Governing Pole Attachments) RM-11293
)
) RM-11303

NOTICE OF PROPOSED RULEMAKING

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By the Commission: Chairman Martin and Commissioners Copps, Adelstein, Tate, and McDowell
issuing separate statements.

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I. INTRODUCTION

1. In this Notice of Proposed Rulemaking (Notice), we seek comment with regard to our implementation of section 224 of the Communications Act of 1934, as amended (Act).¹ Section 224

¹ 47 U.S.C. § 224.

confers on cable television systems and telecommunications carriers the right to pole attachments at just and reasonable rates, terms and conditions. In the Telecommunications Act of 1996 (1996 Act),² Congress expanded the definition of a “pole attachment” for purposes of section 224 to include not only poles but also “any attachment” to a “duct, conduit, or right-of-way owned or controlled by a utility.”³ We seek to ensure that our regulatory framework remains current and faithful to the pro-competitive, market-opening provisions of the Act in light of our experience over the last decade, advances in technology, and developments in the markets for telecommunications and video services.

2. We initiate this rulemaking proceeding in order to consider comprehensively the appropriate changes, if any, to our implementation of section 224. Utilities and attachers have had nearly a decade of experience with the pole attachment rules that the Commission adopted to implement the 1996 Act, and we seek to draw on their experience and that of other interested parties as we consider adopting rules to facilitate pole and conduit access. We intend to promote the pro-competitive and deregulatory goals of the Act, as well as to reduce the need of parties to resort to the section 224 complaint process. We are further guided by the overarching concerns embodied in the statute and our precedent, including safety, certainty, administrability, and nondiscrimination.

3. In conducting this rulemaking proceeding, we ask commenters to assist us in compiling a record that will create, to the extent possible, a context into which we can place the experiences of utilities, attachers, state commissions, end users, and others in the decade since the Commission began to implement the 1996 Act. Specifically, we seek comment on a variety of issues relating to our implementation of section 224 including whether our existing rules governing pole attachment rates remain appropriate in light of increasing intermodal competition in the marketplace today; whether section 224 confers rights on incumbent local exchange carriers (LECs) to regulation of the rates they pay for pole attachments; and whether it would be appropriate to adopt specific rules regarding certain non-price terms and conditions associated with section 224 access rights. With regard to rates, we tentatively conclude that all attachments used for broadband Internet access service should be subject to a single rate, regardless of the platform over which those services are provided, and that that rate, for reasons discussed herein, should be greater than the current cable rate, yet no greater than the telecommunications rate.

II. BACKGROUND

4. *Rate Regulation.* Congress first directed the Commission to ensure that the rates, terms, and conditions for pole attachments by cable television systems were just and reasonable in 1978 when it added section 224 to the Act.⁴ Then, as now, the statute provided that the Commission will regulate pole attachments except where such matters are regulated by a state.⁵ Eighteen states and the District of Columbia have certified that they regulate pole attachments, and thus the Commission does not regulate pole attachments in those states.⁶ In a series of orders, the Commission implemented a formula that cable

² Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

³ 47 U.S.C. § 224(a)(4).

⁴ Pole Attachment Act of 1978, Pub. L. No. 95-234, 92 Stat. 33 (1978). Congress reacted to an apparent need in the cable television industry to resolve conflicts between such providers, then known as “CATV systems,” and utility pole, duct, and conduit owners over the charges for use of such facilities. *See generally* S. Rep. No. 95-580, 95th Cong., 1st Sess. (1977).

⁵ 47 U.S.C. § 224(c).

⁶ The following states have certified that they regulate pole attachments: Alaska, California, Connecticut, Delaware, District of Columbia, Idaho, Illinois, Kentucky, Louisiana, Maine, Massachusetts, Michigan, New Jersey, New York, Ohio, Oregon, Utah, Vermont, and Washington. *See States That Have Certified That They Regulate Pole Attachments*, Public Notice, 7 FCC Rcd 1498 (1992). Section 224 also withholds from the Commission jurisdiction (continued...)

television system attachers and utilities could use to determine a just and reasonable rate, and procedures for resolving rate complaints.⁷ In 1987, the U.S. Supreme Court found that the formula the Commission devised for pole attachments by cable television systems (the cable rate) did not result in an unconstitutional “taking.”⁸

5. Congress expanded the reach of section 224 in several notable ways in the 1996 Act.⁹ For one, Congress granted attachers an affirmative right to access utility poles.¹⁰ The 1996 Act also added ducts, conduits, and rights-of-way to the facilities covered by section 224.¹¹ Congress included a proviso, however, that utilities providing electric service may deny access, on a nondiscriminatory basis, where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.¹²

6. Further, Congress added “telecommunications carrier” as a category of attacher under section 224.¹³ Congress established two separate provisions governing the maximum rates for pole attachments – one for attachments used by “telecommunications carriers” to provide telecommunications services (the telecom rate), and another for attachments used “solely to provide cable service” (the cable rate).¹⁴ It also provided that the telecom rate, which applies also to cable television systems that offer telecommunications services, would be phased in over a five-year period.¹⁵ For purposes of section 224, Congress excluded incumbent LECs from the definition of “telecommunications carriers.”¹⁶

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to consider attachment complaints where the utility owning or controlling poles, ducts, conduits, or rights of way is a railroad, cooperatively organized, or owned by a government entity. 47 U.S.C. § 224(a)(1).

⁷ See, e.g., *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, CC Docket No. 78-144, First Report and Order, 68 FCC 2d 1585 (1978) (adopting complaint procedures); *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, CC Docket No. 78-144, Memorandum Opinion and Order, 77 FCC 2d 187 (1980) (defining, e.g., safety space, average usable space, attachment as occupying 12 inches of space, make-ready as non-recurring cost); *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, CC Docket No. 86-212, Report and Order, 2 FCC Rcd 4387 (1987) (*1987 Rate Order*), rev'd, *Florida Power Corp. v. FCC*, 772 F.2d 1537 (11th Cir. 1985) (*Florida Power Corp. v. FCC*), rev'd, *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987). The *1987 Rate Order* revised, for example, computation of carrying charges and certain complaint procedures. Carrying charges are an attacher's share of the utility's fully allocated costs of owning a pole, including administration, taxes, cost of capital, depreciation and maintenance utilized. See *1987 Rate Order*, 2 FCC Rcd at 4791, para. 25.

⁸ *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987).

⁹ See 47 U.S.C. § 224.

¹⁰ Previously, section 224 did not guarantee cable television systems the right to attach to utility poles but merely provided that where cable television systems were able to obtain such attachments, the rates, terms, and conditions must be just and reasonable.

¹¹ 47 U.S.C. § 224(f)(1).

¹² 47 U.S.C. § 224(f)(2).

¹³ 47 U.S.C. § 224(a)(4).

¹⁴ See 47 U.S.C. § 224(d) (describing the “cable rate”), (e) (describing the “telecom rate”).

¹⁵ 47 U.S.C. § 224(e)(4).

¹⁶ 47 U.S.C. § 224(a)(5).

7. In the *1998 Implementation Order*, the Commission adopted new pole attachment rates for telecommunications carriers.¹⁷ In addition to specifying the new telecom rate for pole attachments, the Commission addressed the issues of cable attachments used to offer commingled cable and Internet access services and attachments by wireless carriers. The Commission held that cable television systems that offer commingled cable and Internet access service should continue to pay the cable rate.¹⁸ Finally, the Commission also determined that the extension of section 224 to telecommunications carriers encompassed pole attachments by wireless carriers.¹⁹

8. In 2000, the Supreme Court upheld the *1998 Implementation Order*.²⁰ The Court held that section 224 gives the Commission broad authority to adopt just and reasonable rates.²¹ The Court thus rejected the view that “the straightforward language of [section 224’s] subsections (d) and (e) establish two specific just and reasonable rates [and] no other rates are authorized.”²² The Court also found no textual support for the proposition that section 224 conferred pole attachment rights on traditional wire-based service providers only, and deferred to the Commission’s conclusion that wireless carriers fit the definition of “telecommunications carrier” and were therefore entitled by section 224 to attach their equipment to poles.²³

9. *Access Regulation*. To implement the new section 224 access requirements of the 1996 Act, the Commission adopted five rules of general applicability and several broad policy guidelines in the *Local Competition Order*.²⁴ These rules and guidelines addressed issues such as capacity expansion, reservation of space by utilities for their own use, and the right of non-electric utilities to deny access for capacity or safety reasons.²⁵ The Commission declined at that time to mandate specific access

¹⁷ *Implementation of Section 703(e) of the Telecommunications Act, Amendment of the Commission’s Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, Report and Order, 13 FCC Rcd 6777 (1998) (*1998 Implementation Order*), *aff’d in part, rev’d in part, Gulf Power v. FCC*, 208 F.3d 1263 (11th Cir. 2000) (*Gulf Power v. FCC*), *rev’d, Nat’l Cable & Telecommunications Ass’n v. Gulf Power*, 534 U.S. 327 (2002) (*Gulf Power*).

¹⁸ See *1998 Implementation Order*, 13 FCC Rcd at 6796, para. 34.

¹⁹ See *1998 Implementation Order*, 13 FCC Rcd at 6797-99, paras. 36-42. Specifically, the Commission reasoned that, because the Act defines a “telecommunications carrier” as “any provider of telecommunications services,” 47 U.S.C. § 3(44); defines “telecommunications services” as the “offering of telecommunications for a fee directly to the public . . . regardless of the facilities used,” 47 U.S.C. § 3(46); and defines “telecommunications” as “the transmission, between or among points specified by the user, or information of the user’s choosing, without change in the form or content of the information as sent and received,” 47 U.S.C. § 3(43), section 224 therefore entitles wireless telecommunications carriers to attach equipment to utility poles at just and reasonable rates, terms, and conditions. *1998 Implementation Order*, 13 FCC Rcd at 6798, paras. 39-40.

²⁰ See generally *Gulf Power*, 534 U.S. 327.

²¹ See *Gulf Power*, 534 U.S. at 336, 338-89.

²² *Gulf Power*, 534 U.S. at 335 (citing *Gulf Power v. FCC*, 208 F.3d at 1276 n.29).

²³ See *Gulf Power*, 534 U.S. at 341.

²⁴ *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 (1996) (*Local Competition Order*) (subsequent history omitted).

²⁵ See *Local Competition Order*, 11 FCC Rcd at 16058-107, paras. 1119-240 (Part XI.B. “Access to Rights of Way”). The five specific rules are: (1) a utility may rely on industry codes, such as the National Electrical Safety Code (NESC), to prescribe standards with respect to capacity, safety, reliability and general engineering principles; (2) a utility will still be subject to any federal requirements, such as those imposed by Federal Energy Regulatory Commission (FERC) or Occupational Safety and Health Administration (OSHA), which might affect pole attachments; (3) state and local requirements will be given deference if not in direct conflict with Commission rules; (continued...)

requirements, concluding instead that the reasonableness of particular conditions of access imposed by a utility should be resolved on a case-specific basis.²⁶ The Commission stated that it would monitor the effect of the case-specific approach, and would propose specific rules at a later date if conditions warranted.²⁷

10. The Commission also concluded that section 224's principle of nondiscrimination required utilities to expand capacity for attachers as they would for themselves.²⁸ The Commission further determined that the lack of capacity on a particular facility did not mean that there is no capacity in the underlying right-of-way, and that requiring capacity expansion, including installation of a larger pole where necessary, was a fair reading of the statute because the cost of modification would be borne only by the attacher, and not by the utility or its ratepayers.²⁹

11. The U.S. Court of Appeals for the Eleventh Circuit rejected the Commission's requirement that utilities expand capacity for attachers.³⁰ In *Southern*, the Eleventh Circuit held that, under the plain language of section 224 of the Act, "[w]hen it is agreed that capacity is insufficient, there is no obligation to provide third parties with access" to poles.³¹ The Eleventh Circuit also held, however, that the term "insufficient capacity" is not defined by statute and is ambiguous, and that utilities do not "enjoy the unfettered discretion to determine when capacity is insufficient."³²

12. *Petitions for Rulemaking*. On December 7, 2005, Fibertech Networks, LLC (Fibertech) petitioned the Commission to conduct a rulemaking to adopt seven "standard practices" for pole and conduit access.³³ On October 11, 2005, United States Telecom Association (USTelecom) petitioned the Commission to conduct a rulemaking to consider whether, as providers of telecommunications services,

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(4) rates, terms and conditions of access must be uniformly applied to all attachers on a nondiscriminatory basis; and (5) a utility may not favor itself over other parties with respect to the provision of telecommunications or video services. See *Local Competition Order*, 11 FCC Rcd at 16071-74, paras. 1151-58; see also *id.* at 16074-85, paras. 1159-86 (adopting guidelines).

²⁶ See *Local Competition Order*, 11 FCC Rcd at 16067-68, para. 1143. See generally 47 C.F.R. §§ 1.1403-1.1418 (section 224 complaint rules).

²⁷ See *Local Competition Order*, 11 FCC Rcd at 16068, para. 1143; *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket Nos. 96-98, 95-185, Order on Reconsideration, 14 FCC Rcd 18049, 18051, paras. 4-5 (1999) (*Local Competition Reconsideration Order*) (allowing parties flexibility to reach agreements on access subject to dispute resolution mechanism if negotiations fail).

²⁸ See *Local Competition Order*, 11 FCC Rcd at 16075-76, para. 1162.

²⁹ See *Local Competition Order*, 11 FCC Rcd at 16075-76, para. 1162; see also *Local Competition Reconsideration Order*, 14 FCC Rcd at 18067, para. 53 (reiterating capacity-expansion rule, and grounding it in historical practice and industry expectations).

³⁰ *Southern Co. v. FCC*, 293 F.3d 1338, 1346-47 (11th Cir. 2002) (*Southern*) (holding Commission's approach contrary to the plain language of § 224(f)(2)).

³¹ *Southern*, 293 F.3d at 1346-47.

³² *Southern*, 293 F.3d at 1348.

³³ Fibertech Networks, LLC, Petition for Rulemaking, RM-11303 (filed Dec. 7, 2005) (Fibertech Petition). Comments on the Fibertech Petition were due by January 30, 2006, and replies were due by March 1, 2006. See *Pleading Cycle Established for Petition for Rulemaking of Fibertech Networks, LLC*, RM-11303, Public Notice, 20 FCC Rcd 19865 (2005); *Fibertech Networks, LLC, Petition for Rulemaking*, RM-11303, Order, 21 FCC Rcd 155 (WCB 2006). A list of commenters in this proceeding is included in Appendix A.

incumbent LECs are entitled to regulated pole attachment rates.³⁴ Among the numerous *ex parte* filings submitted in these dockets, Time Warner Telecom, Inc. (TWTC) filed a White Paper asking that we adopt a single pole attachment rate for both cable television systems and telecommunications carriers in order to remove regulatory bias from investment decisions regarding deployment of broadband and other services.³⁵ Other commenters raise many other issues and ask us to reconsider, modify, expand, or clarify pole attachment rights and obligations under section 224.³⁶

III. RATES

A. Market Forces and Change

13. *The State of the Market and the Goals of the Act.* We inquire about the current state of pole attachments, ducts, conduits, and rights-of-way,³⁷ and the relationship between these facilities and the competitive telecommunications market. In particular, we seek data on the nature and scope of pole attachments by the various types of providers. We inquire about the difference in pole attachment prices paid by cable systems, incumbent LECs, and competing telecommunications carriers that provide the same or similar services. For example, how many poles and how much conduit do the different types of providers or different network architectures access pursuant to section 224? In a typical metropolitan area, how many poles have three attachments or fewer, and how many support so many users that they are approaching full capacity? In addition to amassing price and usage data, we seek comment on how pole attachment price and usage by various different types of providers affect the larger goals of the Act. In what ways do pole attachments affect the expansion of broadband Internet access service? How do pole attachments by cable systems and providers of telecommunications services affect competition to deliver services? We seek comment on how the states that regulate pole attachments handle issues that arise concerning rates and access. We also seek information regarding how many pole attachments are used to offer, among other services, broadband Internet access service, and conversely, how many pole attachments are not used to offer such services.

14. *Cable Television Systems and Telecommunications Carriers.* Over the last few years, the Commission has recognized that the once-clear distinction between “cable television systems” and “telecommunications carriers” has blurred as each type of company enters markets for the delivery of services historically associated with the other.³⁸ The Commission has identified cable operators as market

³⁴ United States Telecom Association Petition for Rulemaking, RM-11293 (filed Oct. 11, 2005) (USTelecom Petition). Oppositions and comments on the USTelecom Petition were due by November 10, 2005. *See Petitions for Rulemaking Filed*, Report No. 2737 (CGB rel. Nov. 2, 2005). A list of commenters in this proceeding is included in Appendix B. To distinguish these pleadings from pleadings by the same parties in the Fibertech docket, we identify all pleadings by docket number.

³⁵ See Letter from Thomas Jones, Counsel for Time Warner Telecom Inc., to Marlene H. Dortch, Secretary, FCC, RM-11293, RM-11303, Attach. at 11-12 (filed Jan. 16, 2007) (TWTC White Paper).

³⁶ We hereby incorporate the records of the Fibertech Petition, RM-11303, and USTelecom Petition, RM-11293, proceedings into WC Docket No. 07-245. Commenters need not resubmit material previously filed in these proceedings.

³⁷ References to “pole attachments,” “attachment,” and “attacher” do not exclude use of duct, conduit, and right-of-way.

³⁸ See, e.g., *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, 5103, para. 2 (2007) (*Competitive Franchise Order*); *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, (and Subsidiaries, Debtors-In-Possession), Assignors, to Time Warner Cable Inc.* (continued...)

participants in both the enterprise and mass market for telecommunications services.³⁹ The Wireline Competition Bureau has recently clarified that wholesale telecommunications carriers that provide services to other service providers, including cable operators providing voice over Internet Protocol (VoIP) services, are indeed “telecommunications carriers” for the purposes of section 251 of the Act, and are thus entitled to interconnect with incumbent LECs.⁴⁰ The Commission has likewise acted to remove barriers to the provision of video services by telecommunications carriers,⁴¹ and further took action to ensure competitive video access to multiple dwelling units (MDUs) and other real estate developments.⁴²

15. *Incumbent LECs.* In addition, we seek comment regarding possible changes in bargaining power between electric utilities and incumbent LECs, and whether pole attachment rates paid by incumbent LECs could affect the vitality of competition to deliver telecommunications, video services, and broadband Internet access service. USTelecom maintains that the percentage of poles owned by electric utilities has increased significantly since 1996, and that electric utilities leverage the growing imbalance in pole ownership to engage in unjust and unreasonable practices.⁴³ AT&T reports that electric utilities refuse to renegotiate outdated joint-use arrangements, and that electric utilities now use more pole space, and incumbent LECs less pole space, than has historically been the case.⁴⁴ Incumbent LECs

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(Subsidiaries), Assignees, Adelphia Communications Corporation, (and Subsidiaries, Debtors-In-Possession), Assignors and Transferors, to Comcast Corporation (Subsidiaries), Assignees and Transferees, Comcast Corporation, Transferor, to Time Warner Inc., Transferee, Time Warner Inc., Transferor, to Comcast Corporation, Transferee, MB Docket No. 05-192, Memorandum Opinion and Order, 21 FCC Rcd 8203, 8209-12, paras. 8, 12 (2006) (Adelphia/Time Warner Merger) (explaining that, in 2006, Comcast provided facilities-based residential local telephone service to approximately 1.225 million customers and VoIP service to approximately 19 million households, and that Time Warner [Cable] provided high-speed Internet service to approximately 4.1 million residential subscribers, and VoIP to approximately 500,000 subscribers); Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 05-255, Twelfth Annual Report, 21 FCC Rcd 2503, 2508, para. 15 (2006) (finding that larger incumbent LECs have accelerated plans to roll out video services using digital subscriber line (DSL) and fiber-based distribution platforms).

³⁹ See *Verizon Communications Inc. and MCI, Inc. Application for Approval of Transfer of Control*, WC Docket No. 05-75, Memorandum Opinion and Order, 20 FCC Rcd 18433, 18467, 18473-74, paras. 64, 74 (2005) (*Verizon/MCI Order*) (finding that cable companies compete to provide telecommunications services to enterprise customers), *id.* at 18479-80, para. 88 n.256 (finding growing mass-market subscription to cable-based VoIP); *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, Memorandum Opinion and Order, 20 FCC Rcd 18290, 18395, 18331, paras. 64, 73 (2005) (*SBC/AT&T Order*).

⁴⁰ See *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, WC Docket No. 06-55, Memorandum Opinion and Order, 22 FCC Rcd 3513 (WCB 2007).

⁴¹ See *Competitive Franchise Order*, 22 FCC Rcd 5101; *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Second Report and Order, FCC 07-190 (rel. Nov. 6, 2007) (extending a number of the rules promulgated in a previous Report and Order to incumbents as well as new entrants).

⁴² See *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, MB Docket No. 07-51, Notice of Proposed Rulemaking, 22 FCC Rcd 5935 (2007); *FCC Adopts Rules to Increase Choice and Competition Among Video Providers for Consumers Residing in Multiple Dwelling Units*, MB Docket No. 07-51, Report and Order and Further Notice of Proposed Rulemaking, FCC 07-189 (rel. Nov. 13, 2007) (adopting regulations banning the use of exclusivity clauses for the provision of video services to multiple dwelling units or other real estate developments).

⁴³ See USTelecom Reply, RM-11293, at 8-10, 12-13.

⁴⁴ See AT&T Reply, RM-11293, at 2-5.

maintain that the competitive market for services could be distorted if they alone pay unregulated rates for pole attachments.⁴⁵ AEPSC counters that incumbent LECs and power companies have often used each others' poles for a nominal per-pole fee, and that attachment rates justifiably spike when power companies begin to charge incumbent LECs real allocated costs.⁴⁶ We seek comment on developments related to rates, costs, and bargaining power between electric utilities and incumbent LECs. We also seek data that may shed light on how many poles incumbent LECs own or control compared with the number of poles owned or controlled by electric utilities. We seek comment regarding "joint use agreements," including the number and percentage of poles that are owned or managed jointly, and how to evaluate when ownership and control of poles is truly "joint."⁴⁷ For example, Exelon maintains that power companies pay a disproportionate share of the cost of maintaining jointly held poles, such as restoring poles after storms.⁴⁸ When poles are owned jointly, do utilities require attachers to obtain licenses from both owners? Do joint owners coordinate survey and make-ready work? What other indicia establish joint ownership and control? AEPSC also comments that most state commissions already regulate the sale or lease of facilities between public utilities, and we seek discussion of state regulation of joint use arrangements or joint ownership of utility poles.⁴⁹

16. We also seek comment on claims that small and rural incumbent LECs are particularly at a disadvantage.⁵⁰ When incumbent LECs do not themselves own or control poles, do they have a stronger claim for a regulated rate? Particularly with regard to incumbent LECs, can rates and terms be effectively regulated absent a right of access?⁵¹

B. Statutory Framework

17. *Authority to Regulate Pole Attachments.* We seek general comment regarding the contours of our flexibility to interpret section 224.⁵² Section 224(b)(1) states that "the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable"⁵³ and section 224(a)(4) states that "[t]he term 'pole attachment' means any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-

⁴⁵ See USTelecom Petition, RM-11293, at 3; Alltel Comments, RM-11293, at 2-4.

⁴⁶ See AEPSC Joint Opposition, RM-11293, at 17-18.

⁴⁷ Compare USTelecom Petition, RM-11293, at 9-12 (discussing effect on competition on joint use agreements), with AEPSC Joint Opposition, RM-11293, at 17-18; FirstEnergy Opposition, RM-11293, at 4-6 (describing joint use agreements as useful and mutually beneficial).

⁴⁸ Compare FirstEnergy Opposition, RM-11293, at 3, 13-15, with USTelecom Reply, RM-11293, at 12-13 (arguing that power companies have often install poles in first instance and have operational advantage).

⁴⁹ See AEPSC Joint Opposition, RM-11293, at 19.

⁵⁰ Compare, e.g., BellSouth Comments, RM-11293, at 3-4, 11 (arguing that BellSouth experiences unjust and unreasonable pole attachment practices), with, e.g., NTCA Comments, RM-11293, at 3 (arguing that small and rural carriers are disproportionately harmed).

⁵¹ See Exelon Comments, RM-11293, at 5 (arguing that regulated rate, terms and conditions are not enforceable without right of attachment).

⁵² Ameren Opposition, RM-11293, at 13-14 (stating that Commission has no authority to provide relief sought, that opportunity to raise issue of incumbent LEC section 224 rights has passed, and that USTelecom may seek recourse before Congress).

⁵³ 47 U.S.C. § 224(b)(1).

way owned or controlled by a utility.”⁵⁴ In addition to this broad mandate, and as noted above, section 224 also provides two separate and explicit rate formulas. One rate – the cable rate – applies to cable television systems’ attachments used solely to provide cable service; the other – the telecom rate – applies to both cable systems and telecommunications carriers’ attachments used to provide telecommunications services.⁵⁵

18. The statute does not specify which of these rates, if either, should apply to transmission of information access services. When the Commission first addressed this question in 1998, it applied the cable rate to cable television systems that offered Internet access services with cable services.⁵⁶ The Supreme Court upheld this conclusion in *Gulf Power*, and rejected the view that section 224 authorizes only two specific just and reasonable rates. The Court also held, however, that “the specific controls but only within the self-described scope.”⁵⁷

19. We seek comment on the extent to which the current cable rate formula, whose space factor does not include unusable space, results in a subsidized rate, and, if so, whether cable operators should continue to receive such subsidized pole attachment rate at the expense of electric consumers. More importantly, we seek comment on whether cable operators should continue to qualify for the cable rate where they offer multiple services in addition to cable service.

20. Likewise, we ask whether all telecommunications carriers must pay the telecom rate, regardless of what other services they may provide over their attachments. If not, under what circumstances may the Commission adopt another rate? What is the extent of the Commission’s ability to modify how the cable and telecom rates are applied? For example, are wireless carriers entitled to attach equipment at the subsection (e) telecom rate, or do their attachments differ to such an extent that another rate would be more reasonable? We further seek comment on the reach of the Commission’s general authority to regulate pole attachments pursuant to section 224(b). Does the Commission have authority under section 224 to regulate pole attachment rates for all providers of telecommunications services, including incumbent LECs?

21. *A Unified Pole Attachment Rate and the Existing Cable and Telecom Rates.* We seek comment on the statutory limits, if any, to unifying the pole attachment rate paid by both cable systems and telecommunications carriers when their pole attachments are used to provide broadband Internet access service. TWTC proposes that we should eliminate the telecom rate and apply the cable rate to all pole attachments.⁵⁸ TWTC also argues that the Commission’s rules provide for the prescription or substitution of just and reasonable rates, and the termination of unjust or unreasonable rates, and argues that the Commission should use its broad authority to apply the cable rate to all pole attachments.⁵⁹ TWTC points out that the Commission has stated that “where access is mandated, the rates, terms and conditions of access must be uniformly applied to all telecommunications and cable operators that have or seek access.”⁶⁰ TWTC further argues that section 224(e)(1) mandates that rates must be

⁵⁴ 47 U.S.C. § 224(a)(4).

⁵⁵ See 47 U.S.C. § 224(d), (e).

⁵⁶ See *1998 Implementation Order*, 13 FCC Rcd at 6790, para. 34.

⁵⁷ *Gulf Power*, 534 U.S. at 336.

⁵⁸ See TWTC White Paper, RM-11293, at 13-17.

⁵⁹ See TWTC White Paper, RM-11293, at 17 (citing 47 C.F.R. § 1.1410).

⁶⁰ See TWTC White Paper, RM-11293, at 14 (citing *Local Competition Order*, 11 FCC Rcd at 16073, para. 1156).

nondiscriminatory, and that where cost allocation guidelines yield discriminatory rates, that the nondiscrimination mandate trumps the cost allocation guidelines.⁶¹

22. We question TWTC's assertion that the cable rate should apply to all pole attachments, particularly because, as discussed above, the cable rate does not include an allocation of the cost of unusable space. We also seek comment on the advantages and disadvantages of a unitary rate for all providers of broadband Internet access service, and, as discussed below, the appropriate level of such rate.

23. *The Rights of Incumbent LECs Under Section 224.* We also seek comment on the extent of our authority to regulate pole attachment rates for incumbent LECs. In the *Local Competition Order* and succeeding orders, and in the rules implementing section 224, the Commission interpreted the exclusion of incumbent LECs from the term "telecommunications carrier" (and from the corresponding right to attach to utility poles) to mean that section 224 does not apply to attachment rates paid by incumbent LECs.⁶² USTelecom asks us to revisit that interpretation.⁶³ USTelecom acknowledges that incumbent LECs are excluded from the section 224 definition of "telecommunications carrier."⁶⁴ USTelecom argues, however, that sections 224(b)(1) and 224(a)(4) provide an independent right to reasonable rates, terms, and conditions for any pole attachment by a *provider of telecommunications service*, and that the statute thus mandates the Commission to apply the "just and reasonable" standard to pole attachments for all such providers, including incumbent LECs.⁶⁵ USTelecom asks the Commission to revise any pole attachment rule that conflates "right of access" with "just and reasonable rates, terms, and conditions."⁶⁶

⁶¹ See TWTC White Paper, RM-11293, at 14.

⁶² See, e.g., *Local Competition Order*, 11 FCC Rcd at 16103-04, para. 16103; *1998 Implementation Order*, 13 FCC Rcd at 6781, para. 5 ("Because, for purposes of Section 224, an ILEC is a utility but is not a telecommunications carrier, an ILEC must grant other telecommunications carriers and cable television systems access to its poles, even though the ILEC has no rights under Section 224 with respect to the poles of other utilities."); *Amendment of Commission's Rules and Policies Governing Pole Attachments; Implementation of Section 703(e) of the Communications Act, Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket Nos. 97-97, 97-151, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12106, para. 2 (2001) (*2001 Order on Reconsideration*); 47 U.S.C. § 224(f)(1) (stating that "a utility shall provide . . . any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it"); 47 U.S.C. § 224(a)(5) (stating that "[f]or purposes of this section, the term 'telecommunications carrier' does not include any incumbent local exchange carrier."); 47 C.F.R. § 1.1401 ("Purpose: The rules and regulations contained in . . . this part provide complaint and enforcement procedures to ensure that telecommunications carriers and cable system television systems have nondiscriminatory access to utility poles, ducts, conduits, and rights-of-way on rates, terms, and conditions that are just and reasonable.").

⁶³ See USTelecom Petition, RM-11293, at 1-3.

⁶⁴ See 47 U.S.C. § 224(a)(5) ("For purposes of this section, the term 'telecommunications carrier' (as defined in section 153 of this title) does not include any incumbent local exchange carrier as defined in section 251(h) of this title."); USTelecom Petition at 7.

⁶⁵ See USTelecom Petition, RM-11293, at 6-10 (citing 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."); 47 U.S.C. § 224(b)(1) ("[T]he Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions.").

⁶⁶ Specifically, USTelecom asks us to (1) amend our section 224 rules to distinguish between access rights and regulation of rates, terms, and conditions; (2) amend our complaint procedures to permit incumbent LECs to use them when negotiations over rates, terms, and conditions fail; and (3) adopt the telecom rate as the default "just and reasonable" rate for incumbent LEC attachment to utility poles. See USTelecom Petition, RM-11293, at 18-21 (continued...)

24. USTelecom argues that Congress could have required just and reasonable rates only for “a cable television system or any telecommunications carrier” – the phrase used to specify the right of access⁶⁷ – but Congress chose instead to afford such protection to “any attachment by a cable television system or provider of telecommunications service.”⁶⁸ Therefore, according to USTelecom, because our current rules ignore this distinction, they only partially implement section 224.⁶⁹ Under USTelecom’s proposal, although only cable television systems and “telecommunications carriers” would be assured of access to poles, all attaching “providers of telecommunications service,” including incumbent LECs, would be assured of just and reasonable rates.⁷⁰ We seek comment on the view that, under section 224, “access” and “rates, terms, and conditions” are severable rights that should be implemented separately.

25. First, we ask whether the language and structure of section 224 are clear with regard to this question. Do the terms “telecommunications carrier” and “provider of telecommunications service,” as used in section 224, unambiguously refer to different groups with separate rights with regard to pole attachments?⁷¹ Conversely, is it plain from the text and structure of section 224 that incumbent LECs are excluded from all of its protections?⁷² We ask commenters to address the relationship between section 224 and the statutory definition in section 3, which states that a “telecommunications carrier” is a “provider of telecommunications services.”⁷³ We also ask commenters to address what provisions of section 224, if any, would govern rates paid by incumbent LECs, noting that section 224(e) refers to charges paid by “telecommunications carriers,” which section 224(a)(5) defines to exclude incumbent LECs.⁷⁴ Second, to the extent the language of section 224 is ambiguous, we seek analysis of Congress’s intent.⁷⁵ The Commission has relied on the legislative history of section 224 in prior orders,⁷⁶ and various (Continued from previous page) _____ (suggesting specific revisions to 47 C.F.R. § 1.1401 (“Purpose”), § 1.1404 (“Complaint”), and § 1.1409 (“Commission consideration of the complaint”)).

⁶⁷ 47 U.S.C. § 224(f)(1) (“A utility shall provide a *cable television system or any telecommunications carrier* with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.”) (emphasis added).

⁶⁸ See USTelecom Petition, RM-11293, at 8-10.

⁶⁹ See USTelecom Petition, RM-11293, at 8-9 (“Where Congress chooses to use different phrases in the same section of the Telecommunications Act, the Commission must read those phrases as having different meanings.”).

⁷⁰ See USTelecom Petition, RM-11293, at 9-10.

⁷¹ Compare USTelecom Reply, RM-11293, at 3-4 (arguing that Congress saw no need to guarantee incumbent LEC access, but afforded all attachers just and reasonable rates, terms, and conditions of attachment, backed by complaint process), with AEPSC Joint Opposition, RM-11293, at 3, 6 (countering that USTelecom’s argument premised on “flawed assumption” that section 224(a)(4) has broader meaning than the section 224(f)(1) right of access, and would nonsensically exempt incumbent LECs from the section 224(f)(2) statutory exceptions to that right).

⁷² Compare FirstEnergy Opposition, RM-11293, at 7-11 (calling statutory language clear and unequivocal); Ameren Opposition, RM-11293, at 5-9; UTC-EEI Comments, RM-11293, at 4-5; Exelon Comments, RM-11293, at 3-4, with BellSouth Comments, RM-11293, at 8 (arguing that statute is ambiguous).

⁷³ 47 U.S.C. § 153(44).

⁷⁴ 47 U.S.C. § 224(a)(5), (e)(1).

⁷⁵ See, e.g., Ameren Opposition, RM-11293, at 9-13; UTC-EEI Comments at 5-9 (arguing that legislative history and structure of statute reveal intention to exclude incumbent LECs).

⁷⁶ See, e.g., *1998 Implementation Order*, 13 FCC Rcd at 6780, para. 2 n.10; see also S. Rep. No. 580, 95th Congress., 1st Sess. at 19-20 (1977) (*1977 Senate Report*), reprinted in 1978 U.S.C.C.A.N. 109 (“The purpose of Section 224 of the Communications Act is to ensure that the deployment of communications networks and the development of competition are not impeded by private ownership and control of the scarce infrastructure and rights-of-way that many communications providers must use in order to reach customers.”); *2001 Order on Reconsideration*, 16 FCC Rcd at 12209, para.7 n.35 (citing *1977 Senate Report* at 19-20 to support proposition that (continued...))

parties urge us to rely on that legislative history further.⁷⁷ In particular, in light of previous construction of statutory intent by the Commission or the courts, what does the history of the Act show regarding Congress's concerns? Should section 224 be read in conjunction with other sections of the Act, such as Congress's intention in section 706 to promote the rollout of advanced services?⁷⁸

C. Rate Level

26. As discussed below, we seek comment on whether we should move toward a single rate for pole attachments used for the same or similar services. Does having different rates for different classes of providers providing the same services distort investment decisions or tilt the competitive playing field? Are there differences in the historical relationships between these classes of providers, or in the nature of certain attachments that warrant different rates when the same or similar services are involved? How should we determine a rate that is not only just and reasonable but also equitable, competitively neutral, and otherwise consistent with the goals of the Act? As discussed more fully below, we tentatively conclude that all attachers should pay the same pole attachment rate for all attachments used to provide broadband Internet access service, and we seek comment on that tentative conclusion.

27. We seek comment on whether adopting a single pole attachment rate would promote the goals of the Act with regard to competition, deregulation, and the deployment of advanced telecommunications capability. TWTC argues that we should "regulate like services in a similar manner"⁷⁹ and maintains that adopting a single attachment rate for both cable television systems and telecommunication carriers would remove regulatory bias from investment decisions regarding deployment of broadband and other services.⁸⁰ TWTC also notes that both cable television systems and telecommunications carriers pay a single rate for using conduit, which suggests that having two different rates for pole attachments is inherently baseless and discriminatory.⁸¹ TWTC further claims having two rates discourages investment in broadband networks,⁸² and for these reasons proposes that we eliminate the telecom rate and apply the cable rate to all wire and cable pole attachments.⁸³ Although we question TWTC's argument that we should adopt the cable rate as the single rate, we seek comment on whether having a single pole attachment rate better achieves the goals of the Act than having two separate rates. Specifically, we ask whether the current pole attachment rate structure unreasonably discriminates between similarly situated entities or otherwise distorts the market.

(Continued from previous page) _____

"Congress enacted this legislation as a solution to a perceived danger of anticompetitive practices by utilities in connection with cable television service.").

⁷⁷ See, e.g., USTelecom Petition, RM-11293, at 4 (citing *1977 Senate Report* at 122 to support proposition that "Congress believed the [1978 Pole Attachment Act] would 'serve two specific, interrelated purposes.'").

⁷⁸ Pub. L. 104-104, Title VII, § 706, Feb. 8, 1996, 110 Stat. 153, codified at 47 U.S.C. § 157 nt.

⁷⁹ See TWTC White Paper, RM-11293, at 12 (citing *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14877-78, para. 45 (2005) (quoting statement by the Commission regarding an intention to "regulate like services in a similar manner so that all potential investors in broadband network platforms, and not just a particular group of investors, are able to make market-based, rather than regulatory-driven, investment and deployment decisions"))).

⁸⁰ See TWTC White Paper, RM-11293, at 11-12.

⁸¹ See TWTC White Paper, RM-11293, at 11 (citing 47 C.F.R. § 1.1409(e)(3) (conduit rate formula)).

⁸² See TWTC White Paper, RM-11293, at 12.

⁸³ TWTC also argues that, at a minimum, we should reformulate our rules to make the rates as similar as possible. See TWTC White Paper, RM-11293, at 17-20. We discuss this possibility separately below.

28. We also seek comment regarding whether having two rates leads to recurring disputes over which rate to apply. TWTC illustrates this potential for controversy by asking us to consider what rate a cable operator that does not itself provide telecommunications services must pay if it leases capacity to a provider of telecommunications services.⁸⁴ Does having two rates needlessly lead to this and similar disputes, thereby adding to the transaction and administration costs of both attachers and utilities? We solicit general comment on whether the current system is clear, certain, and enforceable, and to what extent there is a perceived uncertainty about which rate to apply. If so, would the use of the same rate for similar services address this concern?

29. Sections 224(d) and (e) set forth two specific standards for just and reasonable rates for pole attachments – one applies to pole attachments by cable television systems used solely to provide cable services (the “cable rate”), and the other applies to pole attachments by any telecommunications carrier providing a telecommunications service (the “telecom rate”).⁸⁵ The Commission adopted specific formulas implementing the cable rate and telecom rate,⁸⁶ which differ only in the manner in which the costs associated with the unusable portion of the pole are allocated.⁸⁷ Both of these formulas include a component for the net costs of a bare pole and the carrying charge rate.⁸⁸ Carrying charges are the costs incurred by the utility in owning and maintaining poles regardless of the presence of pole attachments.⁸⁹

30. TWTC argues that the similarities in the Commission’s cable rate and telecom rate formulas are inappropriate, in light of textual differences between section 224(d) and section 224(e) regarding costs.⁹⁰ In particular, TWTC contends that the telecom rate includes elements not mentioned in section 224(e),⁹¹ citing (1) the “carrying charges” and (2) the “rate of return” element.⁹² TWTC alleges that such costs “bear no relation” to the cost of providing space for attachment and should be eliminated from the

⁸⁴ See TWTC White Paper, RM-11293, at 20-23 (arguing that, under the current dual-rate system, services provided by third-party lessee should be irrelevant in determining rate).

⁸⁵ 47 U.S.C. § 224(d), (e).

⁸⁶ 47 C.F.R. § 1.1409(e)(1), (2). Beginning in 1978, the Commission developed a methodology to determine the maximum allowable pole attachment rate under section 224(d)(1) of the Pole Attachment Act, which is referred to as the “Cable Rate Formula.” See, e.g., *1987 Rate Order*, 2 FCC Rcd 4387 (amending and clarifying the methodology). Section 703 of the 1996 Act added new subsections 224(e)(1-4), which set forth a separate methodology to govern charges for pole attachments used to provide telecommunications services beginning Feb. 8, 2001. 47 U.S.C. § 224(e)(1-4). The Commission adopted a separate methodology to implement this section, which is referred to as the “Telecom Rate Formula.” *1998 Implementation Order*, 13 FCC Rcd 6777. Both formulas were codified in the *1998 Implementation Order*. See *1998 Implementation Order*, 13 FCC Rcd at 6853-54 (App. A).

⁸⁷ See *2001 Order on Reconsideration*, 16 FCC Rcd at 12131. Explained another way, the “space factor” is calculated differently in each of the formulas. Compare 47 C.F.R. § 1.1409(e)(1); *2001 Order on Reconsideration*, 16 FCC Rcd at 12131, para. 53, with 47 C.F.R. § 1.1409(e)(2); *2001 Order on Reconsideration*, 16 FCC Rcd at 12131-32, para. 55 (citing *1988 Implementation Order*, 13 FCC Rcd at 6799-800, paras. 43-44).

⁸⁸ 47 C.F.R. § 1.1409(e)(1), (2).

⁸⁹ See, e.g., *1987 Rate Order*, 2 FCC Rcd at 4391, para. 25; *2001 Order on Reconsideration*, 16 FCC Rcd at 12121, para. 28. These charges include the utility’s administrative, maintenance, and depreciation expenses, a return on investment, and associated income taxes. *Id.*

⁹⁰ See TWTC White Paper, RM-11293, at 19.

⁹¹ See TWTC White Paper, RM-11293, at 18.

⁹² See TWTC White Paper, RM-11293, at 19 (citing *Amendment of Rules and Policies Governing Pole Attachments*, CS Docket No. 97-98, Report and Order, 15 FCC Rcd 6453, 6477-91, paras. 44-76 (2000) (revising formula for determining cable rate) (*2000 Cable Rate Formula Order*)).

telecom rate.⁹³ Under TWTC's proposal to calculate the telecom rate, utilities would determine "how much extra a utility must incur to provide non-usable and usable space on poles for pole attachments (in both construction and maintenance costs) and then fully allocate those costs based on the cost-apportionment formulas under Section 224(e)(2) and (3)."⁹⁴ TWTC suggests that, because neither of section 224's rate provisions explains how the utilities must calculate the cost of providing space, the Commission has the authority to adopt a different manner of calculation.⁹⁵

31. TWTC argues that we should move to a single rate, and that we should achieve such rate by revising our formula for computing the telecommunications rate so as to "eliminate or dramatically reduce the differential in pole attachment rates."⁹⁶ We seek comment first on the desirability of moving to a single pole attachment rate. We also seek comment on the appropriate level of such a single rate. We further seek comment regarding whether TWTC's arguments concerning nondiscrimination and regulatory distortion necessarily suggest that we should adjust the cable rate "up" to resemble the telecom rate. We also invite comment on the possible effect on small entities from adopting a single rate.

32. We seek comment on USTelecom's suggestion that the default "just and reasonable" attachment rate for incumbent LECs should be the telecom rate.⁹⁷ If we adopt rules or guidelines that concern jointly owned poles, how should we consider variables such as the proportion of poles owned, the division of maintenance costs and responsibilities, the income each party receives from other attachers, and similar variables?⁹⁸ If incumbent LECs generally control significantly more space on poles than entities that attach pursuant to section 224, how should that affect their rate?⁹⁹ We also seek comment regarding whether, given the historical and continuing relationship regarding pole ownership between electric utilities and incumbent LECs, a "just and reasonable" rate for incumbent LECs should be determined by a method other than by applying a rate formula.¹⁰⁰ For example, FirstEnergy advocates adopting a system modeled on that used in Maine, which pro-rates costs based on estimates of what each entity would pay if it had to install its own poles. We seek comment on that and other alternative approaches.¹⁰¹

33. In addition, we seek comment on whether the historical relationship between incumbent LECs and power companies suggests that the Commission should adopt a purely procedural solution

⁹³ See TWTC White Paper, RM-11293, at 19-20.

⁹⁴ See TWTC White Paper, RM-11293, at 20 (emphasis in original).

⁹⁵ See TWTC White Paper, RM-11293, at 18.

⁹⁶ See TWTC White Paper, RM-11293, at 3, 20.

⁹⁷ See USTelecom Petition at 18, 21.

⁹⁸ See, e.g., FirstEnergy Opposition, RM-11293, at 3, 13-15; USTelecom Reply, RM-11293, at 11-13.

⁹⁹ See FirstEnergy Opposition, RM-11293, at 6 (arguing that, unlike other attachers, incumbent LECs receive between two and three feet on pole and may rent out extra space).

¹⁰⁰ See 47 U.S.C. § 224(d), (e); 47 C.F.R. § 1.1409(e)(1)-(3).

¹⁰¹ Compare FirstEnergy Opposition, RM-11293, at 18-19, nn.26-27 (discussing Maine pole attachment regulations, in which Maine determined that telephone companies' requirements are greater than those of cable companies but less than those of electric utilities, and divides costs on a 24:20:15 ratio), with USTelecom Petition, RM-11293, at 18; BellSouth Comments, RM-11293, at 11-12 (advocating application of telecom rate to incumbent LECs). See Letter from Jack Richards and Thomas B. Magee, Keller and Heckman LLP, to Marlene H. Dortch, Secretary, FCC, RM-11293, RM-11303, at 3-4 (filed Jun. 1, 2007) (arguing that Maine's system distributes costs equitably).

instead of applying a rate formula.¹⁰² For example, if an electric utility and incumbent LEC are unable to arrive privately at a satisfactory pole attachment license or joint use agreement, should we require the parties to engage in mediated negotiation or arbitration subject to Commission review? We seek comment on these and any other issues as they relate to incumbent LECs.¹⁰³

34. Wireless telecommunications carriers urge the Commission to adopt rules explicitly stating that the Commission's telecommunications rate formula applies to the attachment of wireless devices.¹⁰⁴ In the *1998 Implementation Order*, the Commission found no clear indication that the rules could not accommodate wireless attachers' use of poles, and that when attachments required more than the presumptive one foot of usable space on the pole, or otherwise imposed unusual costs on a pole owner, the one-foot presumption could be rebutted.¹⁰⁵ We seek comment on whether, when they are "telecommunications carriers," wireless providers are entitled to the telecom rate as a matter of law, or whether we should adopt a rate specifically for wireless pole attachments. For example, if a wireless facility uses more than the presumptive one foot of space, could the per-foot rate simply be doubled, trebled, or otherwise multiplied as required?¹⁰⁶ If wireless providers are permitted to attach facilities to pole tops, should pole owners receive a higher rate of compensation, because unlike lateral space, each pole has only one top?¹⁰⁷

35. We seek comment on the extent to which municipalities lease pole attachments for municipal broadband purposes or other services such as telecommunications services. We also seek comment on the impact that the tentative conclusion herein might have on municipalities seeking to provide their residents municipal broadband or other services like telecommunications services.

D. Tentative Conclusion for Broadband Internet Access Service

36. Due to the importance of promoting broadband deployment and the importance of technological neutrality, we tentatively conclude that all categories of providers should pay the same pole attachment rate for all attachments used for broadband Internet access service, and we seek comment on that tentative conclusion. Section 706 of the 1996 Act directs us to promote the deployment of broadband infrastructure, and this directive leads us to separate out those pole attachments that are used to offer broadband Internet access service from those used for other services. As a policy matter, we tentatively conclude that the critical need to create even-handed treatment and incentives for broadband deployment would warrant the adoption of a uniform rate for all pole attachments used for broadband Internet access service.¹⁰⁸ Additionally, we conclude that the rate should be higher than the current cable rate, yet no greater than the telecommunications rate. We seek comment on these tentative conclusions. We also seek comment on the possible economic effect on small entities of adopting this tentative conclusion.

¹⁰² See BellSouth Comments, RM-11293, at 10 (arguing that private negotiation is preferable, but existence of a procedure for resolving disputes facilitate negotiation and deters unjust practices.)

¹⁰³ See FirstEnergy Opposition, RM-11293, at 15-18.

¹⁰⁴ See NextG Comments, RM-11293, at 8-10; Clearlinx Reply, RM-11293, at 12; Virtual Hipster, RM-11293, Comments at 1, 11; T-Mobile Reply, RM-11293, at 2, 9; Tropos Networks Comments, RM-11293, at 5-8.

¹⁰⁵ See *1998 Implementation Order*, 13 FCC Rcd at 6799, para. 42.

¹⁰⁶ See Virtual Hipster, RM-11293, at 9 (stating that if the telecom formula produces a rate of \$10 per foot per year, and Virtual Hipster occupies five feet of space, its rate should be \$50 per year).

¹⁰⁷ See, e.g., NextG Comments, RM-11293, at 10-12.

¹⁰⁸ Attachments used for broadband Internet access service includes attachments used to provide broadband Internet access service as a part of a bundled package of services.

IV. TERMS AND CONDITIONS OF ACCESS

37. When the Commission adopted general rules governing requests for access pursuant to the 1996 Act,¹⁰⁹ it declined to regulate specific techniques for pole and conduit modification. Rather, the Commission concluded that the reasonableness of particular conditions of access imposed by a utility should be resolved on a case-specific basis.¹¹⁰ In the record developed in response to the Fibertech Petition, a number of concerns have been expressed regarding terms and conditions of access to pole attachments, and we seek comment on these concerns.¹¹¹ For example, commenters raised concerns regarding searches and surveys of both poles and conduit, including related information management practices.¹¹² Parties also expressed concerns regarding performance of make-ready work, including timeliness,¹¹³ safety, capacity, and the use of boxing and extension arms.¹¹⁴ Sunesys supports Fibertech's position, but also submits its own plan to limit survey and make-ready work to six months, proposing that

¹⁰⁹ *Local Competition Order*, 11 FCC Rcd at 16058-107, paras. 1119-240 (Part XI.B. "Access to Rights of Way").

¹¹⁰ *Local Competition Order*, 11 FCC Rcd at 16067-68, para. 1143; *see generally* 47 C.F.R §§ 1.1403-1.1418 (section 224 complaint rules). We note that, since the enactment of the 1996 Act, the Commission has encouraged disputing parties to participate in staff-supervised, pre-complaint mediation. *See, e.g., Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to be Followed when Formal Complaints are Filed Against Common Carriers*, CC Docket No. 96-238, Report and Order, 12 FCC Rcd 22497, 22507-08, 22540, paras. 20-24, 100-01 (1997), *aff'd on recon.*, Order on Reconsideration, 16 FCC Rcd 5681, 5689, 5697, paras. 17, 36-37 (2001) (*Order on Reconsideration*). Such mediation has proven to be very successful, including in pole attachment disputes. *Order on Reconsideration*, 16 FCC Rcd at 5697, para. 36. Certain rules regarding pole attachment complaints, however, may have had the unintended consequence of discouraging pre-complaint mediation. *See* 47 C.F.R. §§ 1.1410(c) (the amount of a refund or payment awarded as a remedy for an unlawful rate, term, or condition will "normally" be measured from the date the complaint is filed), 1.1404(m) (potential attachers who are denied access to a pole, duct, or conduit must file a complaint within 30 days of the denial). Thus, we seek comment on whether those rules should be amended or eliminated to facilitate mediation of disputes. In addition, under current Commission rules, an attacher may execute a pole attachment agreement with a utility, and then later file a complaint challenging the lawfulness of a provision of that agreement. *See, e.g., Southern Company Services, Inc. v. FCC*, 313 F.3d 574, 582-84 (D.C. Cir. 2002). We seek comment on whether we should adopt some contours to the rule, such as time-frames for raising written concerns about a provision of a pole attachment agreement.

¹¹¹ *See generally* Fibertech Petition, RM-11303.

¹¹² Certain concerns relate to pole surveys. *Compare, e.g.,* Fibertech Petition, RM-11303, at 16-18, 30; segTEL Comments, RM-11303, at 11; Sigecom Comments, RM-11303, at 4; Indiana Fiber Works Comments, RM-11303, at 4; McLeod Comments at 4, RM-11303, *with, e.g.,* Verizon Reply, RM-11303, at 6-7; AEPSC Comments, RM-11303, at 19; Qwest Comments, RM-11303, at 5-6; AEPSC Joint Opposition, RM-11303, at 18; Verizon Opposition, RM-11303, at 3-4; Verizon Opposition, RM-11303, Attach B. (Harrington Declaration) at 3, 10, paras. 6-7, 27-28. Others relate to conduit surveys. *Compare, e.g.,* Fibertech Petition, RM-11303, at 29-30, *with, e.g.,* segTEL Comments, RM-11303, at 11; Verizon Opposition, RM-11303, at 8-10; AEPSC Joint Opposition, RM-11303, at 24; AEPSC Joint Opposition, RM-11303, at 22. We also ask commenters whether we should clarify the general record-keeping and information-sharing responsibilities of utilities and attachers.

¹¹³ *Compare, e.g.,* Fibertech Petition, RM-11303, at 16-17; Sigecom Comments, RM-11303, at 5, *with, e.g.,* AEPSC Joint Opposition, RM-11303, at 19; NSTAR Reply, RM-11303, at 2; AEPSC Joint Opposition, RM-11303, at 9, 18-19; Qwest Comments, RM-11303, at 5-6; Verizon Opposition, RM-11303, at 4.

¹¹⁴ *Compare, e.g.,* Fibertech Petition, RM-11303, at 13-18; segTEL Comments, RM-11303, at 3-5; Virtual Hipster, RM-11303, at 5-6, *with, e.g.,* UTC-EEI Comments, RM-11303, at 10-11; Verizon Opposition, RM-11303, at 2, 5; AEPSC Joint Opposition, RM-11303, at 5, 11-18; WMECO Comments, RM-11303, at 2; Ameren Opposition, RM-11303, at 15-16. Commenters also raise the specific issue of the propriety of the application of the NESC or other standards. *See, e.g.,* AEPSC Joint Opposition, RM-11303, at 3-4, 7, 12; Ameren Opposition, RM-11303, at 6-8, 10-11, 13; UTC-EEI Comments, RM-11303, at 9-10.

utility-approved contractors could perform the work if they were required to meet the deadline.¹¹⁵ Other commenters also recommended the use of qualified third-party contract workers.¹¹⁶ Certain commenters raised additional issues regarding access to in-building ducts, conduit, and rights-of-way, including access to incumbent LEC central offices.¹¹⁷ Parties also express concern regarding practices relating to drop lines and poles.¹¹⁸ These are illustrative categories of access concerns. We seek comment on these and any other pole attachment access concerns, such as concerns about the process for obtaining access.

38. Finally, we seek comment on practices of attachers that have the potential to adversely impact the safety and reliability of an integral component of our nation's critical infrastructure, our electric power system. The record contains allegations or concerns regarding unauthorized attachments, or attachments that have been installed without a lawful attachment agreement.¹¹⁹ We seek comment on the prevalence of this practice. We also seek comment on whether the Commission's existing enforcement mechanisms are sufficient to address any unlawful practices by attachers and ensure the safety and reliability of critical electric infrastructure. We ask commenters to address whether, in addition to the right, under section 224(f)(2) of the Act, of a utility to deny access to poles on a nondiscriminatory basis for reasons of safety, reliability and generally applicable engineering purposes, specific enforceable safety requirements should be adopted. For example, we ask commenters to address to what extent safety codes, such as the NESC, should apply to all attachers, and whether our enforcement authority can or should be used to address alleged violations of such codes. Finally, we seek comment on the general usefulness of rules, presumptions, or guidelines, as opposed to case-specific adjudication, and we particularly seek comment on how these alternative approaches to resolving access issues affect small entities.¹²⁰

¹¹⁵ See Sunesys Comments and Reply Comments, RM-11293 (supporting Fibertech); *see also, e.g.*, Supplemental *Ex Parte* Filing of Sunesys, Inc. in RM-11303 (filed June 23, 2006) (Sunesys June 23, 2006 Supplemental Filing); Letter from Alan G. Fischel and Jeffrey E. Rummel, Counsel for Sunesys, LLC, to Marlene H. Dortch, Secretary, FCC, in RM-11303 at 2 (Aug. 28, 2007) (proposing to permit utilities six months to complete survey and make-ready work; require utilities to use utility-approved contractors to perform the work if necessary to meet the six-month deadline; and permit utilities to charge only for "compliance neutral" make ready, *i.e.*, work that is necessary to bring the pole to the same level of compliance with NESC standards as the state of the pole before make ready).

¹¹⁶ Compare, *e.g.*, Fibertech Petition, RM-11303, at 18-19; Fibertech Petition, RM-11303, Exh. 3; Sigecom Comments, RM-11303, at 4-5; Sunesys Comments, RM-11303, at 4-5; McLeod Comments, RM-11303, at 4-6; segTel Comments, RM-11303, at 7, *with, e.g.*, Ameren Opposition, RM-11303, at 6-8; AEPSC Joint Opposition, RM-11303, at 19-21; UTC-EEI Comments, RM-11303, at 12-13; Verizon Opposition, RM-11303, at 6; NSTAR Reply, RM-11303, at 3.

¹¹⁷ See generally Letter from Andrew D. Lipman, Counsel for American Fiber Systems, Inc. and Cavalier Telephone, LLC to Marlene H. Dortch, Secretary, FCC, RM-11293, RM-11303 (filed Mar. 8, 2007) (attaching Petition for Declaratory Ruling of Coalition of Competitive Fiber Providers, CC Docket No. 01-77 (filed Mar. 15, 2001) (Fiber Coalition Petition)); Fibertech Petition, RM-303, at 35.

¹¹⁸ Compare, *e.g.*, Fibertech Petition, RM-11303, at 22; Fibertech Comments, RM-11303, at 22-23, *with, e.g.*, AEPSC Joint Opposition, RM-11303, at 21; Qwest Comments, RM-11303, at 7; Verizon Opposition, RM-11303, at 7-8; UTC-EEI Comments, RM-11303, at 13.

¹¹⁹ See, *e.g.*, Letter from Thomas Jones, Counsel for Time Warner Telecom, to Marlene H. Dortch, Secretary, FCC, RM-11303, RM-11293 (filed May 10, 2007) (expressing concerns about make-ready, survey and inspection costs, delays in obtaining access, proposed improvements to the contracting process, and other concerns regarding pole attachment access); AEPSC Joint Opposition, RM-11303, at 14 (expressing concern regarding unauthorized attachments).

¹²⁰ Compare, *e.g.*, Fibertech Petition, RM-11303, at 5, 10; McLeodUSA Comments, RM-11303, at 1; CompTel Comments, RM-11303, at 5-6; segTel Comments, RM-11303, at 2; T-Mobile Reply at 7-9, *with, e.g.*, Ameren Opposition, RM-11303, at 4-5; UTC-EEI Comments, RM-11303, at 7-8. See generally *Local Competition Order*, (continued...)

V. PROCEDURAL MATTERS

A. *Ex Parte* Presentations

39. The rulemaking this Notice initiates shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.¹²¹ Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented generally is required.¹²² Other requirements pertaining to oral and written presentations are set forth in section 1.1206(b) of the Commission’s rules.¹²³

B. Comment Filing Procedures

40. Pursuant to sections 1.415 and 1.419 of the Commission’s rules,¹²⁴ interested parties may file comments and reply comments regarding the Notice on or before the dates indicated on the first page of this document. **All filings related to this Notice of Proposed Rulemaking should refer to WC Docket No. 07-245.** Comments may be filed using: (1) the Commission’s Electronic Comment Filing System (ECFS), (2) the Federal Government’s eRulemaking Portal, or (3) by filing paper copies. *See* Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://www.fcc.gov/cgb/ecfs/> or the Federal eRulemaking Portal: <http://www.regulations.gov>. Filers should follow the instructions provided on the website for submitting comments.
- ECFS filers must transmit one electronic copy of the comments for WC Docket No. 07-245. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to ecfs@fcc.gov, and include the following words in the body of the message, “get form.” A sample form and directions will be sent in response.
- Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission’s Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554.
- The Commission’s contractor will receive hand-delivered or messenger-delivered paper filings for the Commission’s Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All

(Continued from previous page) _____

11 FCC Rcd at 16068, para. 1143 (stating that the Commission would monitor the effect of the case-specific approach).

¹²¹ 47 C.F.R. §§ 1.200 *et seq.*

¹²² *See* 47 C.F.R. § 1.1206(b)(2).

¹²³ 47 C.F.R. § 1.1206(b).

¹²⁴ 47 C.F.R. §§ 1.415, 1.419.

hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, S.W., Washington D.C. 20554.

41. Parties should send a copy of their filings to the Competition Policy Division, Wireline Competition Bureau, Federal Communications Commission, Room 5-C140, 445 12th Street, S.W., Washington, D.C. 20554, or by e-mail to cpdcopies@fcc.gov. Parties shall also serve one copy with the Commission's copy contractor, Best Copy and Printing, Inc. (BCPI), Portals II, 445 12th Street, S.W., Room CY-B402, Washington, D.C. 20554, (202) 488-5300, or via e-mail to fcc@bcpiweb.com.

42. Documents in WC Docket No. 07-245, RM-11293 and RM-11303 will be available for public inspection and copying during business hours at the FCC Reference Information Center, Portals II, 445 12th Street S.W., Room CY-A257, Washington, D.C. 20554. The documents may also be purchased from BCPI, telephone (202) 488-5300, facsimile (202) 488-5563, TTY (202) 488-5562, e-mail fcc@bcpiweb.com.

C. Initial Regulatory Flexibility Analysis

43. As required by the Regulatory Flexibility Act of 1980,¹²⁵ the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the policies and rules addressed in this document. The IRFA is set forth in Appendix C. 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 Notice provided on or before the dates indicated on the first page of this Notice.

D. Paperwork Reduction Act

44. This document contains proposed new or modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198,¹²⁶ we seek specific comment on how we might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

E. Accessible Formats

45. 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) or 202-418-0432 (TTY). Contact the FCC to request reasonable accommodations for filing comments (accessible format documents, sign language interpreters, CART, etc.) by e-mail: FCC504@fcc.gov; phone: 202-418-0530 or TTY: 202-418-0432.

¹²⁵ See 5 U.S.C. § 603.

¹²⁶ See 44 U.S.C. § 3506(c)(4).

VI. ORDERING CLAUSES

46. Accordingly, IT IS ORDERED that pursuant to sections 1, 4(i), 4(j), 224, 303 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i)-(j), 224, 303, 403, this Notice of Proposed Rulemaking in WC Docket No. 07-245 IS ADOPTED.

47. IT IS FURTHER ORDERED that the Fibertech Networks, LLC, Petition for Rulemaking, RM-11303, and the United States Telecom Association Petition for Rulemaking, RM-11293, ARE GRANTED to the extent indicated herein and otherwise ARE DENIED.

48. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Notice, 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

List of Commenters in RM-11303

Fibertech Petition for Rulemaking

Commenters

1. Ameren Corporation, Florida Power & Light Company, Pacificorp, Public Service Electric and Gas Company, Southern California Edison Company, Tampa Electric Company and Virginia Electric and Power Company (Ameren)
2. American Electric Power Service Corporation, Duke Energy Corporation, Wisconsin Electric Power Company WPS Resources Corporation and Xcel Energy Inc. (AEPSC)
3. AT&T Inc. (AT&T)
4. CompTel
5. Indiana Fiber Works, LLC (IFW)
6. McLeodUSA Telecommunications Services, Inc. (McLeodUSA)
7. NextG Networks, Inc. (NextG)
8. Qwest Communications (Qwest)
9. segTEL, Inc. (segTEL)
10. Sigecom, LLC (Sigecom)
11. Sunesys, Inc. (Sunesys)
12. The Real Access Alliance (RRA)
13. Tropos Networks (Tropos)
14. United Telecom Council and Electric Institute (UTC-EEI)
15. United States Telecom Association (USTelecom)
16. Verizon telephone companies (Verizon)
17. Virtual Hipster Corporation (Virtual Hipster)
18. Western Massachusetts Electric Company (WMECO)

Reply Commenters

1. AT&T Inc. (AT&T)
2. Clearlinx Network Corporation, LLC (Clearlinx)
3. Fibertech Networks, LLC (Fibertech)
4. Massachusetts Department of Telecommunications and Energy (MDTE)
5. NSTAR Electric & Gas Corporation (NSTAR)
6. Sunesys, Inc. (Sunesys)
7. T-Mobile USA, Inc. (T-Mobile)
8. Time Warner Telecom Inc. (TWTC)
9. United States Telecom Association (USTelecom)
10. United Telecom Council and the Edison Electric Institute (UTC-EEI)
11. Verizon telephone companies (Verizon)

APPENDIX B**List of Commenters in RM-11293**

USTelecom Petition for Rulemaking

Commenters

1. AEP Service Corp., Duke Energy Corp, WPS Resources Corp., Xcel Energy Inc. (AEPSC)
2. Alltel Corp (Alltel)
3. Ameren, Entergy, Florida Power & Light, Southern Co., Virginia Electric & Power Co. (Ameren)
4. BellSouth Corporation (BellSouth)
5. CenturyTel, Inc.
6. Edison Electric Institute
7. Exelon Corporation (Exelon)
8. FirstEnergy Corporation (FirstEnergy)
9. Level 3 Communications, Inc. (Level 3)
10. National Telecommunications Cooperative Association (NTCA)
11. United Telecom Council and Edison Electric Institute (UTC-EEI)

Reply Commenters

1. AT&T Inc. (AT&T)
2. Level 3 Communications, Inc. (Level 3)
3. T-Mobile USA, Inc. (T-Mobile)
4. Tropos Networks (Tropos)
5. United States Telecom Association (USTelecom)

APPENDIX C

INITIAL REGULATORY FLEXIBILITY ANALYSIS

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),¹ the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this Notice of Proposed Rulemaking (Notice). 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 Notice provided on the first page of the Notice. The Commission will send a copy of the Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).² In addition, the Notice and IRFA (or summaries thereof) will be published in the Federal Register.³

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

2. The Notice seeks comment on a variety of issues relating to implementation of section 224 pole attachment rules in light of increasing intermodal competition in the decade since the Commission began to implement the 1996 Act. Specifically, the Notice asks whether existing rules governing pole attachment rates remain appropriate in light of competition in the marketplace today; whether section 224 confers rights on incumbent local exchange carriers (LECs), including regulation of the rates they pay for pole attachments; and whether it would be appropriate to adopt specific rules regarding certain non-price terms and conditions associated with section 224 access rights. With regard to rates, the Notice tentatively concludes that all attachments used for broadband Internet access service should be subject to a single rate, regardless of the platform over which those services are provided.

B. Legal Basis

3. The legal basis for any action that may be taken pursuant to the Notice is contained in sections 1, 4(i), 4(j), 224, 303 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i)-(j), 224, 303, 403.

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

4. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules.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)

¹ See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§601-12, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

² See 5 U.S.C. § 603(a).

³ See 5 U.S.C. § 603(a).

⁴ 5 U.S.C. §§ 603(b)(3), 604(a)(3).

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 (continued...)”

is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).⁷

5. *Small Businesses*. Nationwide, there are a total of approximately 22.4 million small businesses, according to SBA data.⁸

6. *Small Organizations*. Nationwide, there are approximately 1.6 million small organizations.⁹

7. *Small Governmental Jurisdictions*. The term “small governmental jurisdiction” is defined generally as “governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.”¹⁰ Census Bureau data for 2002 indicate that there were 87,525 local governmental jurisdictions in the United States.¹¹ We estimate that, of this total, 84,377 entities were “small governmental jurisdictions.”¹² Thus, we estimate that most governmental jurisdictions are small.

1. Telecommunications Service Entities

a. Wireline Carriers and Service Providers

8. 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.”¹³ 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.¹⁴ 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.

9. *Incumbent LECs*. Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent LECs. The appropriate size standard under SBA rules is for the

(Continued from previous page) _____

for public comment, establishes one or more definitions of such terms which are appropriate to the activities of the agency and publishes such definitions(s) in the Federal Register.”

⁷ 15 U.S.C. § 632.

⁸ See SBA, Programs and Services, SBA Pamphlet No. CO-0028, at page 40 (July 2002).

⁹ Independent Sector, *The New Nonprofit Almanac & Desk Reference* (2002).

¹⁰ 5 U.S.C. § 601(5).

¹¹ U.S. Census Bureau, *Statistical Abstract of the United States: 2006*, Section 8, page 272, Table 415.

¹² We assume that the villages, school districts, and special districts are small, and total 48,558. See U.S. Census Bureau, *Statistical Abstract of the United States: 2006*, section 8, page 273, Table 417. For 2002, Census Bureau data indicate that the total number of county, municipal, and township governments nationwide was 38,967, of which 35,819 were small. *Id.*

¹³ 15 U.S.C. § 632.

¹⁴ Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of “small-business concern,” which the RFA incorporates into its own definition of “small business.” See 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret “small business concern” to include the concept of dominance on a national basis. See 13 C.F.R. § 121.102(b).

category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.¹⁵ According to Commission data,¹⁶ 1,303 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,303 carriers, an estimated 1,020 have 1,500 or fewer employees and 283 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our action.

10. *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 size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.¹⁷ According to Commission data,¹⁸ 859 carriers have reported that they are engaged in the provision of either competitive access provider services or competitive LEC services. Of these 859 carriers, an estimated 741 have 1,500 or fewer employees and 118 have more than 1,500 employees. In addition, 16 carriers have reported that they are “Shared-Tenant Service Providers,” and all 16 are estimated to have 1,500 or fewer employees. In addition, 44 carriers have reported that they are “Other Local Service Providers.” Of the 44, an estimated 43 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, “Shared-Tenant Service Providers,” and “Other Local Service Providers” are small entities.

11. *Interexchange Carriers (IXCs).* Neither the Commission nor the SBA has developed a small business size standard specifically for providers of interexchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.¹⁹ According to Commission data,²⁰ 330 carriers have reported that they are engaged in the provision of interexchange service. Of these, an estimated 309 have 1,500 or fewer employees and 21 have more than 1,500 employees. Consequently, the Commission estimates that the majority of IXCs are small entities that may be affected by our action.

b. Wireless Telecommunications Service Providers

12. Below, for those services subject to auctions, we note that, as a general matter, the number of winning bidders that 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 unless, in the context of assignments or transfers, unjust enrichment issues are implicated.

13. *Wireless Service Providers.* The SBA has developed a small business size standard for wireless firms within the two broad economic census categories of “Paging”²¹ and “Cellular and Other

¹⁵ 13 C.F.R. § 121.201, NAICS code 517110.

¹⁶ FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, *Trends in Telephone Service* at Table 5.3, page 5-5 (Feb. 2007) (*Trends in Telephone Service*). This source uses data that are current as of October 20, 2005.

¹⁷ 13 C.F.R. § 121.201, NAICS code 517110.

¹⁸ *Trends in Telephone Service* at Table 5.3.

¹⁹ 13 C.F.R. § 121.201, NAICS code 517110.

²⁰ *Trends in Telephone Service* at Table 5.3.

²¹ 13 C.F.R. § 121.201, NAICS code 517211 (changed from 513321 in Oct. 2002).

Wireless Telecommunications.”²² Under both SBA categories, a wireless business is small if it has 1,500 or fewer employees. For the census category of Paging, Census Bureau data for 2002 show that there were 807 firms in this category that operated for the entire year.²³ Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more.²⁴ Thus, under this category and associated small business size standard, the majority of firms can be considered small. For the census category of Cellular and Other Wireless Telecommunications, Census Bureau data for 2002 show that there were 1,397 firms in this category that operated for the entire year.²⁵ Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more.²⁶ Thus, under this second category and size standard, the majority of firms can, again, be considered small.

14. *Cellular Licensees*. The SBA has developed a small business size standard for wireless firms within the broad economic census category “Cellular and Other Wireless Telecommunications.”²⁷ Under this SBA category, a wireless business is small if it has 1,500 or fewer employees. For the census category of Cellular and Other Wireless Telecommunications, Census Bureau data for 2002 show that there were 1,397 firms in this category that operated for the entire year.²⁸ Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more.²⁹ Thus, under this category and size standard, the majority of firms can be considered small. Also, according to Commission data, 437 carriers reported that they were engaged in the provision of cellular service, Personal Communications Service (PCS), or Specialized Mobile Radio (SMR) Telephony services, which are placed together in the data.³⁰ We have estimated that 260 of these are small under the SBA small business size standard.³¹

15. *Paging*. The SBA has developed a small business size standard for the broad economic census category of “Paging.”³² Under this category, the SBA deems a wireless business to be small if it has 1,500 or fewer employees. Census Bureau data for 2002 show that there were 807 firms in this category

²² 13 C.F.R. § 121.201, NAICS code 517212 (changed from 513322 in Oct. 2002).

²³ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization),” Table 5, NAICS code 517211 (issued Nov. 2005).

²⁴ *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is firms with “1000 employees or more.”

²⁵ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization),” Table 5, NAICS code 517212 (issued Nov. 2005).

²⁶ *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is firms with “1000 employees or more.”

²⁷ 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in Oct. 2002).

²⁸ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization),” Table 5, NAICS code 517212 (issued Nov. 2005).

²⁹ *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is firms with “1000 employees or more.”

³⁰ *Trends in Telephone Service* at Table 5.3.

³¹ *Id.*

³² 13 C.F.R. § 121.201, NAICS code 517211.

that operated for the entire year.³³ Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more.³⁴ In addition, according to Commission data,³⁵ 365 carriers have reported that they are engaged in the provision of “Paging and Messaging Service.” Of this total, we estimate that 360 have 1,500 or fewer employees, and five have more than 1,500 employees. Thus, in this category the majority of firms can be considered small.

16. We also note that, in the Paging Second Report and Order, the Commission adopted a size standard for “small businesses” for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.³⁶ In this context, a small business is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years.³⁷ The SBA has approved this definition.³⁸ An auction of Metropolitan Economic Area (MEA) licenses commenced on February 24, 2000, and closed on March 2, 2000. Of the 2,499 licenses auctioned, 985 were sold.³⁹ Fifty-seven companies claiming small business status won 440 licenses.⁴⁰ An auction of MEA and Economic Area (EA) licenses commenced on October 30, 2001, and closed on December 5, 2001. Of the 15,514 licenses auctioned, 5,323 were sold.⁴¹ One hundred thirty-two companies claiming small business status purchased 3,724 licenses. A third auction, consisting of 8,874 licenses in each of 175 EAs and 1,328 licenses in all but three of the 51 MEAs commenced on May 13, 2003, and closed on May 28, 2003. Seventy-seven bidders claiming small or very small business status won 2,093 licenses.⁴² We also note that, currently, there are approximately 74,000 Common Carrier Paging licenses.

17. *Wireless Telephony.* Wireless telephony includes cellular, personal communications services (PCS), and specialized mobile radio (SMR) telephony carriers. As noted earlier, the SBA has developed a small business size standard for “Cellular and Other Wireless Telecommunications” services.⁴³ Under that SBA small business size standard, a business is small if it has 1,500 or fewer employees.⁴⁴

³³ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization),” Table 5, NAICS code 517211 (issued Nov. 2005).

³⁴ *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with “1000 employees or more.”

³⁵ *Trends in Telephone Service*, Table 5.3.

³⁶ *Revision of Part 22 and Part 90 of the Commission’s Rules to Facilitate Future Development of Paging Systems*, WT Docket No. 96-18, PP Docket No. 93-235, Second Report and Order, 12 FCC Rcd 2732, 2811-2812, paras. 178-181 (*Paging Second Report and Order*); see also *Revision of Part 22 and Part 90 of the Commission’s Rules to Facilitate Future Development of Paging Systems*, WT Docket No. 96-18, PP Docket No. 93-235, Memorandum Opinion and Order on Reconsideration, 14 FCC Rcd 10030, 10085-10088, paras. 98-107 (1999).

³⁷ *Paging Second Report and Order*, 12 FCC Rcd at 2811, para. 179.

³⁸ See Letter from Aida Alvarez, Administrator, Small Business Administration, to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau (dated Dec. 2, 1998) (SBA Dec. 2, 1998 Letter).

³⁹ See “929 and 931 MHz Paging Auction Closes,” Public Notice, 15 FCC Rcd 4858 (WTB 2000).

⁴⁰ *Id.*

⁴¹ See *Lower and Upper Paging Band Auction Closes*, Public Notice, 16 FCC Rcd 21821 (WTB 2002).

⁴² See *Lower and Upper Paging Bands Auction Closes*, Public Notice, 18 FCC Rcd 11154 (WTB 2003).

⁴³ 13 C.F.R. § 121.201, NAICS code 517212.

⁴⁴ *Id.*

According to Commission data, 432 carriers reported that they were engaged in the provision of wireless telephony.⁴⁵ We have estimated that 221 of these are small under the SBA small business size standard.

18. *Broadband Personal Communications Service.* The broadband Personal Communications Service (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission defined “small entity” for Blocks C and F as an entity that has average gross revenues of \$40 million or less in the three previous calendar years.⁴⁶ For Block F, an additional classification for “very small business” was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.⁴⁷ These standards defining “small entity” in the context of broadband PCS auctions have been approved by the SBA.⁴⁸ No small businesses, within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 small and very small business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F.⁴⁹ On March 23, 1999, the Commission re-auctioned 347 C, D, E, and F Block licenses. There were 48 small business winning bidders. On January 26, 2001, the Commission completed the auction of 422 C and F Broadband PCS licenses in Auction No. 35. Of the 35 winning bidders in this auction, 29 qualified as “small” or “very small” businesses. Subsequent events, concerning Auction 35, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant.

19. *Narrowband Personal Communications Services.* To date, two auctions of narrowband personal communications services (PCS) licenses have been conducted. For purposes of the two auctions that have already been held, “small businesses” were entities with average gross revenues for the prior three calendar years of \$40 million or less. Through these auctions, the Commission has awarded a total of 41 licenses, out of which 11 were obtained by small businesses. To ensure meaningful participation of small business entities in future auctions, the Commission has adopted a two-tiered small business size standard in the Narrowband PCS Second Report and Order.⁵⁰ A “small business” is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$40 million. A “very small business” is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$15 million. The SBA has approved these small business size standards.⁵¹ In the future, the Commission will auction 459 licenses to serve Metropolitan Trading Areas (MTAs) and 408 response channel licenses.

⁴⁵ *Trends in Telephone Service* at Table 5.3.

⁴⁶ *See Amendment of Parts 20 and 24 of the Commission’s Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, WT Docket No. 96-59, Report and Order, 11 FCC Rcd 7824, 61 FR 33859 (July 1, 1996) (*PCS Order*); *see also* 47 C.F.R. § 24.720(b).

⁴⁷ *See PCS Order*, 11 FCC Rcd 7824.

⁴⁸ *See, e.g., Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, PP Docket No. 93-253, Fifth Report and Order, 9 FCC Rcd 5332, 59 FR 37566 (Jul. 22, 1994).

⁴⁹ FCC News, *Broadband PCS, D, E and F Block Auction Closes*, No. 71744 (rel. Jan. 14, 1997); *see also Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses*, WT Docket No. 97-82, Second Report and Order, 12 FCC Rcd 16436, 62 FR 55348 (Oct. 24, 1997).

⁵⁰ *Amendment of the Commission’s Rules to Establish New Personal Communications Services, Narrowband PCS*, ET Docket No. 92-100, PP Docket No. 93-253, Second Report and Order and Second Further Notice of Proposed Rulemaking, 15 FCC Rcd 10456, 65 FR 35875 (June 6, 2000).

⁵¹ *See* SBA Dec. 2, 1998 Letter.

There is also one megahertz of narrowband PCS spectrum that has been held in reserve and that the Commission has not yet decided to release for licensing. The Commission cannot predict accurately the number of licenses that will be awarded to small entities in future auctions. However, four of the 16 winning bidders in the two previous narrowband PCS auctions were small businesses, as that term was defined. The Commission assumes, for purposes of this analysis that a large portion of the remaining narrowband PCS licenses will be awarded to small entities. The Commission also assumes that at least some small businesses will acquire narrowband PCS licenses by means of the Commission's partitioning and disaggregation rules.

20. *Rural Radiotelephone Service.* The Commission has not adopted a size standard for small businesses specific to the Rural Radiotelephone Service.⁵² A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio System (BETRS).⁵³ The Commission uses the SBA's small business size standard applicable to "Cellular and Other Wireless Telecommunications," *i.e.*, an entity employing no more than 1,500 persons.⁵⁴ There are approximately 1,000 licensees in the Rural Radiotelephone Service, and the Commission estimates that there are 1,000 or fewer small entity licensees in the Rural Radiotelephone Service that may be affected by the rules and policies adopted herein.

21. *Air-Ground Radiotelephone Service.* The Commission has not adopted a small business size standard specific to the Air-Ground Radiotelephone Service.⁵⁵ We will use SBA's small business size standard applicable to "Cellular and Other Wireless Telecommunications," *i.e.*, an entity employing no more than 1,500 persons.⁵⁶ There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and we estimate that almost all of them qualify as small under the SBA small business size standard.

22. *Offshore Radiotelephone Service.* This service operates on several UHF television broadcast channels that are not used for television broadcasting in the coastal areas of states bordering the Gulf of Mexico.⁵⁷ There are presently approximately 55 licensees in this service. We are unable to estimate at this time the number of licensees that would qualify as small under the SBA's small business size standard for "Cellular and Other Wireless Telecommunications" services.⁵⁸ Under that SBA small business size standard, a business is small if it has 1,500 or fewer employees.⁵⁹

2. Cable and OVS Operators

23. *Cable Television Distribution Services.* Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data,

⁵² See 47 C.F.R. § 22.99 (defining Rural Radiotelephone Service).

⁵³ See 47 C.F.R. §§ 22.757, 22.759 (defining BETRS).

⁵⁴ 13 C.F.R. § 121.201, NAICS code 517212.

⁵⁵ See 47 C.F.R. § 22.99 (defining Air-Ground Radiotelephone Service).

⁵⁶ 13 C.F.R. § 121.201, NAICS code 517212 (changed from 513322 in Oct. 2002).

⁵⁷ This service is governed by Subpart I of Part 22 of the Commission's rules. See 47 C.F.R. §§ 22.1001-22.1037.

⁵⁸ 13 C.F.R. § 121.201, NAICS code 517212.

⁵⁹ *Id.*

text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies.”⁶⁰ The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. To gauge small business prevalence for these cable services we must, however, use current census data that are based on the previous category of Cable and Other Program Distribution and its associated size standard; that size standard was: all such firms having \$13.5 million or less in annual receipts.⁶¹ According to Census Bureau data for 2002, there were a total of 1,191 firms in this previous category that operated for the entire year.⁶² Of this total, 1,087 firms had annual receipts of under \$10 million, and 43 firms had receipts of \$10 million or more but less than \$25 million.⁶³ Thus, the majority of these firms can be considered small.

24. *Cable Companies and Systems.* The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission’s rules, a “small cable company” is one serving 400,000 or fewer subscribers, nationwide.⁶⁴ Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard.⁶⁵ In addition, under the Commission’s rules, a “small system” is a cable system serving 15,000 or fewer subscribers.⁶⁶ Industry data indicate that, of 7,208 systems nationwide, 6,139 systems have under 10,000 subscribers, and an additional 379 systems have 10,000-19,999 subscribers.⁶⁷ Thus, under this second size standard, most cable systems are small.

25. *Cable System Operators.* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is “a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000.”⁶⁸ The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates,

⁶⁰ U.S. Census Bureau, 2007 NAICS Definitions, “517110 Wired Telecommunications Carriers” (partial definition); <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

⁶¹ 13 C.F.R. § 121.201, NAICS code 517110.

⁶² U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005).

⁶³ *Id.* An additional 61 firms had annual receipts of \$25 million or more.

⁶⁴ 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of \$100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, MM Docket Nos. 92-266, 93-215, 10 FCC Rcd 7393, 7408 (1995).

⁶⁵ These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, “Top 25 Cable/Satellite Operators,” pages A-8 & C-2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006*, “Ownership of Cable Systems in the United States,” pages D-1805 to D-1857.

⁶⁶ 47 C.F.R. § 76.901(c).

⁶⁷ Warren Communications News, *Television & Cable Factbook 2006*, “U.S. Cable Systems by Subscriber Size,” page F-2 (data current as of Oct. 2005). The data do not include 718 systems for which classifying data were not available.

⁶⁸ 47 U.S.C. § 543(m)(2); *see* 47 C.F.R. § 76.901(f) & nn. 1-3.

do not exceed \$250 million in the aggregate.⁶⁹ Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard.⁷⁰ 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,⁷¹ and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

26. *Open Video Systems (OVS)*. In 1996, Congress established the open video system (OVS) framework, one of four statutorily recognized options for the provision of video programming services by local exchange carriers (LECs).⁷² The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,⁷³ OVS falls within the SBA small business size standard of Cable and Other Program Distribution Services, which consists of such entities having \$13.5 million or less in annual receipts.⁷⁴ The Commission has certified 25 OVS operators, with some now providing service. Broadband service providers (BSPs) are currently the only significant holders of OVS certifications or local OVS franchises.⁷⁵ As of June, 2005, BSPs served approximately 1.4 million subscribers, representing 1.5 percent of all MVPD households.⁷⁶ Affiliates of Residential Communications Network, Inc. (RCN), which serves about 371,000 subscribers as of June, 2005, is currently the largest BSP and 14th largest MVPD.⁷⁷ RCN received approval to operate OVS systems in New York City, Boston, Washington, D.C. and other areas. The Commission does not have financial information regarding the entities authorized to provide OVS, some of which may not yet be operational. We thus believe that at least some of the OVS operators may qualify as small entities.

3. Internet Service Providers

27. *Internet Service Providers*. The SBA has developed a small business size standard for Internet Service Providers (ISPs). ISPs “provide clients access to the Internet and generally provide related services such as web hosting, web page designing, and hardware or software consulting related to Internet

⁶⁹ 47 C.F.R. § 76.901(f); see *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, Public Notice, DA 01-158, 16 FCC Rcd 2225 (Cable Services Bureau, Jan. 24, 2001).

⁷⁰ These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, “Top 25 Cable/Satellite Operators,” pages A-8 & C-2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006*, “Ownership of Cable Systems in the United States,” pages D-1805 to D-1857.

⁷¹ The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority’s finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission’s rules. See 47 C.F.R. § 76.909(b).

⁷² 47 U.S.C. § 571(a)(3)-(4). See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Eleventh Annual Report*, 20 FCC Rcd 2507, 2549, para. 88 (2006) (*2006 Cable Competition Report*).

⁷³ See 47 U.S.C. § 573.

⁷⁴ 13 C.F.R. § 121.201, NAICS code 517510.

⁷⁵ See *2006 Cable Competition Report*, 20 FCC Rcd at 2549, para. 88. BSPs are newer firms that are building state-of-the-art, facilities-based networks to provide video, voice, and data services over a single network.

⁷⁶ See *id.* at 2507, para. 14.

⁷⁷ See *2006 Cable Competition Report*, 20 FCC Rcd at 2549, para. 89. WideOpenWest is the second largest BSP and 16th largest MVPD, with cable systems serving about 292,000 subscribers as of June, 2005. The third largest BSP is Knology, serving approximately 170,800 subscribers as of June 2005. *Id.*

connectivity.”⁷⁸ Under the SBA size standard, such a business is small if it has average annual receipts of \$23 million or less.⁷⁹ According to Census Bureau data for 2002, there were 2,529 firms in this category that operated for the entire year.⁸⁰ Of these, 2,437 firms had annual receipts of under \$10 million, and an additional 47 firms had receipts of between \$10 million and \$24,999,999. Consequently, we estimate that the majority of these firms are small entities that may be affected by our action.

28. *All Other Information Services.* “This industry comprises establishments primarily engaged in providing other information services (except new syndicates and libraries and archives).”⁸¹ The SBA has developed a small business size standard for this category; that size standard is \$6.5 million or less in average annual receipts.⁸² According to Census Bureau data for 2002, there were 155 firms in this category that operated for the entire year.⁸³ Of these, 138 had annual receipts of under \$5 million, and an additional four firms had receipts of between \$5 million and \$9,999,999. Consequently, we estimate that the majority of these firms are small entities that may be affected by our action.

4. Public Utilities

29. *Electric Power Generation, Transmission and Distribution.* The Census Bureau defines this category as follows: “This industry group comprises establishments primarily engaged in generating, transmitting, and/or distributing electric power. Establishments in this industry group may perform one or more of the following activities: (1) operate generation facilities that produce electric energy; (2) operate transmission systems that convey the electricity from the generation facility to the distribution system; and (3) operate distribution systems that convey electric power received from the generation facility or the transmission system to the final consumer.”⁸⁴ This category includes Electric Power Distribution, Hydroelectric Power Generation, Fossil Fuel Power Generation, Nuclear Electric Power Generation, and Other Electric Power Generation. The SBA has developed a small business size standard for firms in this category: “A firm is small if, including its affiliates, it is primarily engaged in the generation, transmission, and/or distribution of electric energy for sale and its total electric output for the preceding fiscal year did not exceed 4 million megawatt hours.”⁸⁵ According to Census Bureau data for 2002, there

⁷⁸ U.S. Census Bureau, “2002 NAICS Definitions: 518111 Internet Service Providers,” *available at* <http://www.census.gov/epcd/naics02/def/ND518111.HTM> (visited Oct. 16, 2007).

⁷⁹ 13 C.F.R. § 121.201, NAICS code 518111 (changed from 514191, “On-Line Information Services,” in Oct. 2002).

⁸⁰ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization),” Table 4, NAICS code 518111 (issued Nov. 2005).

⁸¹ U.S. Census Bureau, “2002 NAICS Definitions: 519190 All Other Information Services,” *available at* <http://www.census.gov/epcd/naics02/def/ND519190.HTM> (visited Oct. 16, 2007).

⁸² 13 C.F.R. § 121.201, NAICS code 519190.

⁸³ U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization),” Table 4, NAICS code 514199 (issued Oct. 2000). This category was created for the 2002 Economic Census by taking a portion of the superseded 1997 category, “All Other Information Services,” NAICS code 514199. The data cited in the text above are derived from the superseded category.

⁸⁴ U.S. Census Bureau, 2002 NAICS Definitions, “2211 Electric Power Generation, Transmission and Distribution”; <http://www.census.gov/epcd/naics02/def/NDEF221.HTM>.

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

were 1,644 firms in this category that operated for the entire year.⁸⁶ Census data do not track electric output and we have not determined how many of these firms fit the SBA size standard for small, with no more than 4 million megawatt hours of electric output. Consequently, we estimate that 1,644 or fewer firms may be considered small under the SBA small business size standard.

30. *Natural Gas Distribution.* This economic census category comprises: “(1) establishments primarily engaged in operating gas distribution systems (e.g., mains, meters); (2) establishments known as gas marketers that buy gas from the well and sell it to a distribution system; (3) establishments known as gas brokers or agents that arrange the sale of gas over gas distribution systems operated by others; and (4) establishments primarily engaged in transmitting and distributing gas to final consumers.”⁸⁷ The SBA has developed a small business size standard for this industry, which is: all such firms having 500 or fewer employees.⁸⁸ According to Census Bureau data for 2002, there were 468 firms in this category that operated for the entire year.⁸⁹ Of this total, 424 firms had employment of fewer than 500 employees, and 18 firms had employment of 500 to 999 employees.⁹⁰ Thus, the majority of firms in this category can be considered small.

31. *Water Supply and Irrigation Systems.* This economic census category “comprises establishments primarily engaged in operating water treatment plants and/or operating water supply systems.”⁹¹ The SBA has developed a small business size standard for this industry, which is: all such firms having \$6.5 million or less in annual receipts.⁹² According to Census Bureau data for 2002, there were 3,830 firms in this category that operated for the entire year.⁹³ Of this total, 3,757 firms had annual sales of less than \$5 million, and 37 firms had sales of \$5 million or more but less than \$10 million.⁹⁴ Thus, the majority of firms in this category can be considered small.

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

32. Should the Commission alter the pole attachment rate structure, such action could result in increased, reduced, or otherwise altered reporting, recordkeeping or other compliance requirements for pole owners and attaching entities. For example, if the Commission were to adopt a uniform rate for all

⁸⁶ U.S. Census Bureau, 2002 Economic Census, Subject Series: Utilities, “Establishment and Firm Size (Including Legal Form of Organization),” Table 4, NAICS codes 221111, 221112, 221113, 221119, 221121, 221122 (issued Nov. 2005).

⁸⁷ U.S. Census Bureau, 2007 NAICS Definitions, “221210 Natural Gas Distribution”; <http://www.census.gov/epcd/naics02/def/ND221210.HTM>.

⁸⁸ 13 C.F.R. § 121.201, NAICS code 221210.

⁸⁹ U.S. Census Bureau, 2002 Economic Census, Subject Series: Utilities, “Establishment and Firm Size: 2002 (Including Legal Form of Organization),” Table 5, NAICS code 221210 (issued November 2005).

⁹⁰ *Id.* An additional 26 firms had employment of over 1,000 employees.

⁹¹ U.S. Census Bureau, 2007 NAICS Definitions, “221310 Water Supply and Irrigation Systems” (partial definition); <http://www.census.gov/naics/2007/def/ND221310.HTM>.

⁹² 13 C.F.R. § 121.201, NAICS code 221310.

⁹³ U.S. Census Bureau, 2002 Economic Census, Subject Series: Utilities, “Establishment and Firm Size: 2002 (Including Legal Form of Organization),” Table 4, NAICS code 221310 (issued November 2005).

⁹⁴ *Id.* An additional 36 firms had annual sales of \$10 million or more.

pole attachments used for broadband Internet access service, providers of such services might be required to record and report where such service is offered.⁹⁵ If the Commission were to adopt a uniform rate for all pole attachments, such action could eliminate the need for cable television systems to record and report to utilities where they or their lessees offer telecommunications services.⁹⁶ Changes to reporting, recordkeeping or other compliance requirements could either be new (*e.g.*, if telecommunications carriers begins to record or report where they offer broadband Internet access service) or could reconfigure existing requirements (*e.g.*, if cable television systems begin to record and report where they or their lessees offer broadband Internet access service, but cease to record and report where they or their lessees offer telecommunications services). If the Commission initiates regulation of the rates, terms, and conditions of pole attachment by incumbent LECs, such regulation could increase reporting, recordkeeping or other compliance requirements for pole owners and incumbent LECs where incumbent LECs attach to poles owned by other utilities.⁹⁷

33. Should the Commission adopt regulations concerning access to poles, ducts, conduits, and rights-of-way, such action could result in increased, reduced, or otherwise altered reporting, recordkeeping or other compliance requirements for pole owners, attaching entities, and users of ducts, conduits, and rights-of-way. In particular, if the Commission adopts rules governing specific techniques for pole and conduit modification, as opposed to resolution on a case-specific complaint basis, reporting, recordkeeping or other compliance requirements could change.⁹⁸ Examples of specific topics where recordkeeping, reporting, or compliance requirements could change by virtue of Commission action include: (1) searches and surveys of both poles and conduit, including information management; (2) performance of make-ready work, including timeliness, safety, capacity, and the use of boxing and extension arms; (3) the use of qualified third-party contract workers; (4) access to in-building ducts, conduit, and rights-of-way, including access to incumbent LEC central offices; or (5) practices relating to drop lines and poles.⁹⁹

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

34. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include (among others) the following four alternatives: (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.¹⁰⁰

35. The Commission's tentatively concludes that it will promote broadband deployment and technological neutrality by requiring all categories of companies to pay the same pole attachment rate for all pole attachments used for broadband Internet access service, and the Notice seeks comment on the

⁹⁵ See Notice at para. 36.

⁹⁶ See Notice at para. 28.

⁹⁷ See Notice at paras. 32-33.

⁹⁸ See Notice at para. 38.

⁹⁹ See Notice at para. 37.

¹⁰⁰ 5 U.S.C. § 603(c).

possible economic effect on small entities of adopting this requirement.¹⁰¹ In coming to this tentative conclusion, we first assessed the alternative of continuing a system of two rates.¹⁰² Another objective is to implement overarching policies concerning safety, certainty, administrability, and nondiscrimination.¹⁰³ When alternatives are discussed, such as whether it would be better to choose an existing rate as the broadband Internet access services rate (and, if so, which rate) or to modify existing rates, the Notice invites small entities to discuss the economic ramifications of such action.¹⁰⁴ The Notice seeks comment on whether regulation of pole attachment rates is particularly necessary for small incumbent LECs, and asks how incumbent LECs could be affected if rates and terms were regulated absent a right of access.¹⁰⁵ The Notice also seeks comment on the general usefulness of rules, presumptions, or guidelines, as opposed to case-specific adjudication, and how these alternative approaches to resolving access issues may affect small entities.¹⁰⁶

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

36. None. We note that, since the enactment of the 1996 Act, the Commission has encouraged disputing parties to participate in staff-supervised, pre-complaint mediation.¹⁰⁷ Such mediation has proven to be very successful, including in pole attachment disputes.¹⁰⁸ Certain rules regarding pole attachment complaints, however, may have had the unintended consequence of discouraging pre-complaint mediation.¹⁰⁹ Thus, we seek comment on whether those rules should be amended or eliminated to facilitate mediation of disputes. In addition, under current Commission rules, an attacher may execute a pole attachment agreement with a utility, and then later file a complaint challenging the lawfulness of a provision of that agreement.¹¹⁰ We seek comment on whether we should adopt some contours to the rule, such as time-frames for raising written concerns about a provision of a pole attachment agreement.

¹⁰¹ See Notice at para. 36.

¹⁰² See Notice at paras. 26-32.

¹⁰³ See, e.g., Notice at paras. 2, 27.

¹⁰⁴ See Notice at para. 30.

¹⁰⁵ See Notice at para. 16; see also paras. 31-36.

¹⁰⁶ See Notice at para. 37.

¹⁰⁷ See, e.g., *Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to be Followed when Formal Complaints are Filed Against Common Carriers*, Report and Order, 12 FCC Rcd 22497, 22507-08, 22537, 22541 (1997), *aff'd on recon.*, *Order on Reconsideration*, 16 FCC Rcd 5681, 5689, 5697 (2001) (*Order on Reconsideration*).

¹⁰⁸ *Order on Reconsideration*, 16 FCC Rcd at 5697.

¹⁰⁹ See 47 C.F.R. §§ 1.1410(c) (the amount of a refund or payment awarded as a remedy for an unlawful rate, term, or condition will “normally” be measured from the date the complaint is filed), 1.1404(m) (potential attachers who are denied access to a pole, duct, or conduit must file a complaint within 30 days of the denial).

¹¹⁰ See, e.g., *Southern Company Services, Inc. v. FCC*, 313 F.3d 574, 582-84 (D.C. Cir. 2002).

**STATEMENT OF
CHAIRMAN KEVIN J. MARTIN**

Re: Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments WC Docket No. 07-245, RM-11293, RM-11303

I am pleased that the Commission has adopted this Notice of Proposed Rulemaking tentatively concluding to adopt a single rate for all pole attachments used to provide broadband services, providing a level playing field for all providers of broadband. Establishing parity between all providers of broadband services will help to promote competition between providers of broadband services. The Commission will continue to look for ways to remove barriers to competition across all platforms and with respect to all services that we regulate. The public interest demands that all Americans reap the benefits of competition.

It is also important that pole owners be properly compensated for the use of their infrastructure by others. I do not think electric consumers should be subsidizing any broadband companies. Establishing parity should not come at the expense of pole owners or electric consumers.

Pole attachments provide an important means for the deployment of broadband and other services to Americans. However, the safety and reliability of critical electric infrastructure is a paramount concern. Our work on telecommunications reliability should not come at the expense of other public safety systems. I look forward to developing a full record in response to this Notice.

**SEPARATE STATEMENT OF
COMMISSIONER MICHAEL J. COPPS, APPROVING**

Re: *In the Matter of Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, RM-11293, RM-11303, Notice of Proposed Rulemaking (Oct. 31, 2007)

While implementing pole attachment policy is one of the drier and more technical issues the Commission faces, it is also essential to ensuring that we have a competitive broadband market. I have said for some time that I believe we need to act in an expeditious fashion to resolve petitions before the agency that would clarify the rules that apply to the rates, terms and conditions for broadband providers' access to poles. I am pleased that the Commission heads down this road today with an expansive Notice of Proposed Rulemaking that tees up the many pole-related issues sitting before us. It may be hard to imagine, but relatively simple tweaks to our current rules could greatly assist in unleashing the deployment of competitive broadband throughout the country. Goodness knows how badly we need that! I look forward to quickly completing a record upon which the Commission can act, and I am pleased to support this item.

**SEPARATE STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN**

Re: Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments; WC Docket No. 07-245, RM-11293, RM-11303, Notice of Proposed Rulemaking (Oct. 31, 2007).

The utility pole may have hit its iconic high point in the fall of 1947, when Norman Rockwell painted a New England Telephone Company employee perched atop a telephone pole, giving us his historic depiction of this venerable lineman. I have a copy in my office to remind me of the important work men and women on the lines do every day to make our networks run. While it's hard to top attention from Norman Rockwell, I'm pleased that the Commission today devotes some of its time to the critical issue of access to utility poles for telecommunications and broadband providers.

Through this Notice, we seek comment on two petitions that ask the Commission to explore changes to its pole attachment rules in order to reduce competitive distortions among broadband providers. These parties have asked the Commission to consider, among other things, changes to its rules for pole attachment rates, complaint processes, and procedures for providing access to poles, ducts, and conduits. Even this Commission, with its preference for facilities-based competition, has recognized that it is impractical and undesirable to have multiple sets of utility poles in our neighborhoods, so I am pleased that this Order recognizes that timely access to poles, ducts, and conduits is critical for facilities-based providers of broadband services. It is important that the Commission move forward with these petitions as expeditiously as possible. I look forward to working with my colleagues and the many segments of industry as we make progress on these issues. We should do so keeping in mind the need to level the competitive playing field for facilities-based providers of broadband services.

**STATEMENT OF
COMMISSIONER DEBORAH TAYLOR TATE**

Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments, WC Docket No. 07-245, RM-11293, RM-11303, Notice of Proposed Rulemaking

Nearly 10 years ago the FCC implemented section 224 of the Telecommunications Act which conferred on cable and telecommunications providers the right to pole attachments at “just and reasonable rates, terms and conditions”. Since that time the competitive landscape has changed dramatically with providers of voice, broadband, and video services increasingly competing cross-platform. As convergence has become a reality in the United States, I have sought to limit the regulatory hindrances to competition, in part by seeking to ensure a level regulatory playing field. To the extent possible all providers of the same service must be treated in the same manner regardless of the technology they employ. To that end I have worked to help ensure technological and competitive neutrality in communications markets to minimize marketplace distortions arising from regulatory advantage. For example, we have adopted the same regulatory approach for broadband Internet access service provided over cable systems, telephone wires, power lines, and wireless platforms; helping to promote competition and which will in turn propel broadband deployment—one of my principal priorities.

Through section 706 of the Act Congress charges the FCC with promoting the deployment of broadband infrastructure. In initiating this inquiry we properly seek input on whether our rules governing pole attachment rates remain appropriate in light of the increasing intermodal competition in the marketplace today. Significantly, due to the import of promoting broadband deployment and the importance of technological neutrality, we tentatively conclude that all categories of companies should pay the same pole attachment rate for all attachments used for broadband Internet access service.

Through this inquiry we will seek to ensure that our regulatory framework responds to the dynamic changes in technology and the markets for telecommunications and video services and remains faithful to the pro-competitive, market-provisions of the Act.

**STATEMENT
COMMISSIONER ROBERT M. McDOWELL**

Re: Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments, Notice of Proposed Rulemaking, WC Docket No. 07-245, RM-11293, RM-11303

While increased competition and technological convergence empower consumers, such progress often exposes outdated regulations for the anachronisms they are. In this notice of proposed rulemaking, we are seeking comment on the requirements for pole attachments, ducts, conduits and rights-of-way by both cable television systems and telecommunications service providers that are contained in Section 224 of the Communications Act. That provision embodies terms that, as interpreted by the Commission in the past, have resulted in different treatment for cable systems and telecommunications service providers in rates, terms and conditions.

We now are faced with the reality that different providers using pole attachments are offering substantially similar services. As the stovepipe regulations of yesteryear become increasingly burdensome, we should strive to modernize our regulations so that similar offerings are regulated similarly. While I favor parity of regulation for similar providers of services, at the same time, we must meet our statutory obligations. In this situation, Section 224 contains standards for determining both the cable rate and the telecom rate; yet, the *Notice* tentatively concludes that there should be a single rate for all attachments used to provide broadband Internet access service. As always, I look forward to carefully analyzing the legal arguments that support and oppose development of a uniform rate for all pole attachments.