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
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51

ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: May 20, 2010 **Released: May 20, 2010**

Comment Date: [30 days after publication in the Federal Register]
Reply Comment Date: [60 days after publication in the Federal Register]

By the Commission: Chairman Genachowski and Commissioners Copps, McDowell, Clyburn and Baker issuing separate statements.

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I. INTRODUCTION

1. In this Order and Further Notice of Proposed Rulemaking, we begin the process of revising the Commission's pole attachment rules to lower the costs of telecommunications, cable, and broadband deployment and to promote competition, as recommended in the National Broadband Plan. In the Order, we clarify that communications providers have a statutory right to use space- and cost-saving techniques that are consistent with pole owners' use of those techniques. We also establish that providers have a statutory right to timely access to poles. In the Further Notice, we seek comment on additional reforms to promote deployment and competition. For example, we propose timelines to obtain pole attachments, which some evidence suggests could cut in half the time to prepare a pole for access in many cases. We also seek comment on ways to clarify rights and responsibilities in the pole attachment process, improve communications between attachers and pole owners, improve dispute resolution, and reduce the variation in pole access rates. These steps will reduce network providers' costs and speed access to utility poles. In turn, lower costs and faster access will benefit consumers by removing barriers to telecommunications and cable network deployment, increasing broadband availability, and increasing competition in the provision of broadband, voice, and video services.

II. BACKGROUND

2. In 1978, Congress first directed the Commission to ensure that the rates, terms, and conditions for pole attachments by cable television systems are just and reasonable when it added section 224 to the Act.[1] The Telecommunications Act of 1996 (1996 Act)[2] expanded the definition of pole attachments to include attachments by providers of telecommunications service,[3] and granted both cable systems and telecommunications carriers[4] an affirmative right of nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by a utility.[5] However, the 1996 Act permits utilities to deny access where there is insufficient capacity and for reasons of safety, reliability or generally applicable engineering purposes.[6] Besides establishing a right of access, the 1996 Act mandates a rate

[1] Pole Attachment Act of 1978, Pub. L. No. 95-234, 92 Stat. 33 (1978). Section 224 provides that the Commission will regulate pole attachments except where such matters are regulated by a state. 47 U.S.C. § 224(c). *See also States That Have Certified That They Regulate Pole Attachments*, WC Docket No. 10-101, Public Notice, DA 10-893 (rel. May 19, 2010). Section 224 also withholds from the Commission jurisdiction to consider attachment complaints where the utility is a railroad, cooperatively organized, or owned by a government entity. 47 U.S.C. § 224(a)(1).

[2] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of 47 U.S.C.).

[3] 47 U.S.C. § 224(a)(4).

[4] For purposes of section 224, Congress excluded incumbent LECs from the definition of "telecommunications carriers." 47 U.S.C. § 224(a)(5).

[5] 47 U.S.C. § 224(f)(1). As a general matter, all references to poles in this item refer to the infrastructure covered by the statutory definition of "pole attachments," including poles, ducts, conduit, and rights-of-way, unless otherwise indicated. 47 U.S.C. § 224(a)(4).

[6] 47 U.S.C. § 224(f)(2); *see also 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, 16080-81, paras. 1175-77 (1996) (*Local Competition Order*) (subsequent history omitted) (extending the provisions of section 224(f)(2) to other utilities).

formula for telecommunications carriers that differs from the rate formula for attachments used solely to provide cable service.[7]

3. The Commission implemented the new section 224 access requirements in the *Local Competition Order*.[8] At that time, the Commission concluded that it would determine the reasonableness of a particular condition of access on a case-by-case basis.[9] Finding that no single set of rules could take into account all attachment issues, the Commission specifically declined to adopt the National Electric Safety Code (NESC) in lieu of access rules.[10] The Commission also recognized that utilities typically develop individual standards and incorporate them into pole attachment agreements, and that, in some cases, federal, state, or local laws also impose relevant restrictions.[11] The *Local Competition Order* acknowledged concerns that utilities might deny access unreasonably, but rather than adopt a set of substantive engineering standards, the Commission decided that procedures for requiring utilities to justify the conditions they placed on access would best safeguard attachers' rights.[12] The Commission did adopt five rules of general applicability and several broad policy guidelines in the *Local Competition Order*.[13] The Commission also stated that it would monitor the effect of the case-specific approach, and would propose specific rules at a later date if conditions warranted.[14]

4. In the *1998 Implementation Order*, the Commission adopted rules implementing the 1996 Act's new pole attachment rate formula for telecommunications carriers.[15] The Commission also

[7] *See* 47 U.S.C. § 224(d) (describing the "cable rate formula"), (e) (describing the "telecom rate formula").

[8] *Local Competition Order*, 11 FCC Rcd at 15499.

[9] *Local Competition Order*, 11 FCC Rcd at 16067-68, para. 1143.

[10] *Local Competition Order*, 11 FCC Rcd at 16068-69, paras. 1145-46 (finding that the NESC's depth of detail—64 pages of rules dictating minimum clearances alone—and allowance for variables make it unworkable for setting access standards).

[11] *Local Competition Order*, 11 FCC Rcd at 16068-69, paras. 1147-48 (finding that applicable federal regulations include rules promulgated by the Federal Energy Regulatory Commission (FERC) and by the Occupational Safety and Health Administration (OSHA), and that utility internal operating standards reflect regional and local conditions as well individual needs and experiences of the utility).

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

[13] *Local Competition Order*, 11 FCC Rcd at 16071-74, paras. 1151-58. The five specific rules are: (1) a utility may rely on industry codes, such as the 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 FERC or OSHA, which might affect pole attachments; (3) state and local requirements will be given deference if not in direct conflict with Commission rules; (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 also 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, 22 FCC Rcd 20195, 20198-99, para. 9 (2007) (*Pole Attachment Notice*) (noting the Commission's establishment of access rules in the *Local Competition Order* and determination to revisit them if needed).

[14] *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).

[15] *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*

(continued….)

concluded that cable television systems offering both cable and Internet access service should continue to pay the cable rate.[16] The Commission further held that the statutory right of nondiscriminatory access includes attachments by wireless carriers.[17] The latter two determinations were challenged but ultimately upheld by the Supreme Court.[18] In particular, the Court held that section 224 gives the Commission broad authority to adopt just and reasonable rates.[19] The Court also deferred to the Commission's conclusion that wireless carriers are entitled by section 224 to attach facilities to poles.[20]

5. On November 20, 2007, the Commission issued the *Pole Attachment Notice*[21] in recognition of the importance of pole attachments to the deployment of communications networks, in part in response to petitions for rulemaking from USTelecom and Fibertech Networks.[22] USTelecom argued that incumbent LECs, as providers of telecommunications service, are entitled to just and reasonable pole attachment rates, terms, and conditions of attachment even though, under section 224, they do not count as "telecommunications carriers" and have no statutory right of access.[23] Fibertech petitioned the Commission to initiate a rulemaking to set access standards for pole attachments, including standards for timely performance of make-ready work, use of boxing and extension arms, and use of qualified third-party contract workers, among other concerns.[24] The *Pole Attachment Notice* focused on the effect of disparate pole-attachment rates on broadband competition and arrived at two tentative conclusions: first, that all attachers should pay the same pole attachment rate for all attachments used to provide broadband Internet access service[25] and second, that the rate should be higher than the current cable rate, yet no

(Continued from previous page)

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*).

[16] *See 1998 Implementation Order*, 13 FCC Rcd at 6796, para. 34.

[17] *See 1998 Implementation Order*, 13 FCC Rcd at 6797-99, paras. 36-42 (applying the definitions of "telecommunications carriers," "telecommunications services," and relevant provisions of section 224 to wireless carriers).

[18] *See Gulf Power v. FCC*, 208 F.3d at 1273-75 (wireless), 1275-78 (cable rate) (finding that the term "any telecommunications carrier" in section 224 excluded attachment of wireless carriers' equipment, and that the term "solely cable service" rendered provision of Internet access service by cable systems ineligible for cable rate); *Gulf Power*, 534 U.S. at 333-39 (cable rate), 339-342 (wireless) (finding that cable rate did not limit agency discretion to determine rates, and holding that any service provided "by" a cable system is, by definition, a "cable" service; also finding inclusion of wireless equipment within "any attachment" reasonable and entitled to deference).

[19] *See Gulf Power*, 534 U.S. at 336, 338-89. The Court 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." *Id*. at 335 (citing *Gulf Power v. FCC*, 208 F.3d at 1276 n.29).

[20] *See Gulf Power*, 534 U.S. at 341.

[21] *Pole Attachment Notice*, 22 FCC Rcd at 20195.

[22] *See* United States Telecom Association *Petition for Rulemaking*, RM-11293 (filed Oct. 11, 2005) (USTelecom Petition); Fibertech Networks, LLC, *Petition for Rulemaking*, RM-11303 (filed Dec. 7, 2005) (Fibertech Petition). The records generated by both petitions were incorporated by reference. *Pole Attachment Notice*, 22 FCC Rcd at 20200, para. 12, n.12.

[23] *Pole Attachment Notice*, 22 FCC Rcd at 20205, para. 24; 47 U.S.C. § 224 (a)(5) (excluding incumbent local exchange carriers from the definition of "telecommunications carrier"); 47 U.S.C. § 224(a)(4) (defining "pole attachment" to include attachments by "any . . . provider of telecommunications service"); 47 U.S.C. § 224 (b)(1) (requiring the Commission to regulate pole attachments).

[24] *Pole Attachment Notice*, 22 FCC Rcd at 20210, para. 37.

[25] *Pole Attachment Notice*, 22 FCC Rcd at 20206, para. 26.

greater than the telecommunications rate.[26] In addition to the concerns raised by USTelecom and Fibertech, the *Pole Attachment Notice* inquired about application of the telecommunications rate to wireless pole attachments[27] and other pole access concerns.[28]

6. The American Recovery and Reinvestment Act of 2009 included a requirement that the Commission develop a national broadband plan to ensure that every American has access to broadband capability.[29] On March 16, 2010, the National Broadband Plan was released, and identified access to rights-of-way—including access to poles—as having a significant impact on the deployment of broadband networks.[30] Accordingly, the Plan included several recommendations regarding pole attachment policies to further advance broadband deployment.[31] In particular, the Plan recommended that:

- The FCC establish rental rates for pole attachments that are as low and close to uniform as possible, consistent with Section 224 of the Communications Act of 1934, as amended, to promote broadband deployment;
- The FCC implement rules that will lower the cost of the pole attachment "make-ready" process. For example, the FCC should authorize attachers to use space- and cost-saving techniques, such as boxing or extension arms, where practical and in a way that is consistent with pole owners' use of those techniques;
- The FCC establish a comprehensive timeline for each step of the Section 224 access process and reform the process for resolving disputes regarding infrastructure access; and
- The FCC improve the collection and availability of information regarding the location and availability of poles, ducts, conduits and rights-of-way.[32]

III. ORDER

7. As discussed above, the National Broadband Plan recommended a number of actions intended to lower the cost and improve the speed of access to utility poles. We find that it is in the public interest to implement some of these recommendations immediately to clarify the rules governing pole attachments and to streamline the pole attachment process. In particular, we clarify that the statutory nondiscriminatory access requirement allows communications providers to use space- and cost-saving attachment techniques where practical and consistent with pole owners' use of those techniques. We also conclude that the statutory right to just and reasonable access to poles includes the right of timely access. In the Notice below, we seek comment on possible changes to the Commission's regulatory framework governing pole access.

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[26] *Pole Attachment Notice*, 22 FCC Rcd at 20209, para. 36.

[27] *Pole Attachment Notice*, 22 FCC Rcd at 20209, para 34.

[28] *Pole Attachment Notice*, 22 FCC Rcd at 20211, para. 38.

[29] American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, § 6001(k)(2) (2009).

[30] Omnibus Broadband Initiative, Federal Communications Commission, Connecting America: The National Broadband Plan, at 109 (2010), *available at* http://download.broadband.gov/plan/national-broadband-plan.pdf (National Broadband Plan or Plan).

[31] National Broadband Plan at 109-13.

[32] *Id.* at 110-12.

A. Nondiscriminatory Use of Attachment Techniques

8. We conclude that the nondiscriminatory access obligation established by section 224(f)(1) of the Act requires a utility to allow cable operators and telecommunications carriers to use the same pole attachment techniques that the utility itself uses.[33] For example, in the 2007 *Pole Attachment Notice*,[34] the Commission sought comment on the use of techniques such as boxing[35] and bracketing.[36] As attachers have explained, boxing and bracketing can help avoid the cost and delay of pole replacement or make-ready[37] work involving electrical facililties, and could be appropriate when practical—for example, when the facilities on the pole can be safely reached by a ladder or bucket truck—and when such techniques previously have been allowed by the pole owner.[38] Similarly, the National Broadband Plan recommends that the Commission give attachers the right to use these techniques "where practical and in a way that is consistent with pole owners' use of [them]."[39]

9. We now clarify that utilities must allow attachers to use the same attachment techniques that the utility itself uses in similar circumstances, although utilities retain the right to limit their use when necessary to ensure safety, reliability, and sound engineering. Our conclusion here is consistent with the interpretation of the Act in prior bureau orders.[40]

10. Clarifying this application of a utility's nondiscriminatory access obligation provides certainty that will spur competition and promote the deployment of a variety of technologies. As observed in the National Broadband Plan and by commenters, allowing attachers equal use of techniques like boxing and bracketing will encourage competition and advance the deployment of telecommunications, cable, and both wireless and wireline broadband services.[41] Accordingly, any

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[33] *See* 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 . . . owned or controlled by it.").

[34] *Pole Attachment Notice*, 22 FCC Rcd at 20208-09, 20214, paras. 33, 47.

[35] "Boxing" refers to the installation of communications on both sides of the same pole at approximately the same height.

[36] "Bracketing" refers to the installation of "extension arms," which extend from the pole to support communications lines at the same level as existing lines attached to the pole. *See, e.g.*, FPL et al. Comments at 18-19. All comments are in WC Docket No. 07-245 unless otherwise noted. A list of commenters is provided in Appendix C.

[37] "Make-ready" is any rearrangement of equipment and attachments in order to make room on either an existing pole or a new, different pole for a new attacher. *Florida Cable Order* at 2002 (quotation omitted).

[38] Fibertech Petition at 13.

[39] National Broadband Plan at 111.

[40] In *Salsgiver*, the Enforcement Bureau held that, when a utility allows boxing on some occasions, an agreement between it and an attacher banning the attacher from doing the same "is discriminatory and thus in violation of section 224." *Salsgiver Communications, Inc. v. N. Pittsburgh Tel. Co.*, File No. EB-06-MD-004, Order, 22 FCC Rcd 20536, 20543, para. 21 (Enf. Bur. 2007). Likewise, in *Cavalier*, the Enforcement Bureau found that a utility that "uses extension arms and boxing for its own attachments . . . must allow other attachers to do the same." *Cavalier Tel., LLC v. Virginia Elec. & Power Co.*, File No. PA-99-005, Order, 15 FCC Rcd 9563, 9572, para. 19 (Cab. Servs. Bur. 2000). Although *Cavalier* was later vacated at the joint request of the parties, the Enforcement Bureau granted the request because it found that "[t]he opportunity to resolve . . . numerous proceedings in multiple fora outweighs our interest in preserving [the decision]." *Cavalier Tel., LLC v. Virginia Elec. & Power Co.*, File No. EB-02-MD-005, Order, 17 FCC Rcd 24414, 24420, para. 19 (Enf. Bur. 2002).

[41] *See* National Broadband Plan at 111; Fibertech Petition at 14 ("The availability of these techniques has played a significant role in enabling Fibertech to deploy over 1,300 route-miles of fiber-optic cable in Connecticut since 2001."); Sunesys Comments, RM-11303, at 5 (filed Jan. 30, 2006).

attachment technique that a utility uses or allows to be used will henceforth be presumed appropriate for use by attachers on that utility's poles under comparable circumstances. We believe that this action will promote the deployment of and competition for telecommunications, cable, and broadband services.

11. Our holding is carefully tailored to reflect the legitimate needs of pole owners, as well. Some pole owners contend that the use of boxing and bracketing complicates pole maintenance and replacement,[42] can compromise safety,[43] and may not be consistent with sound engineering practices.[44] Commenters also assert that utilities should be free to prohibit their use or, at the very least, to consider the appropriateness of such techniques on a case-by-case basis.[45] We agree and emphasize that our commitment to ensuring this form of nondiscriminatory access is limited by the utility's existing practices. If a utility believes that boxing and bracketing are fundamentally unsafe or otherwise incompatible with proper attachment practice, it can choose not to use or allow them at all. Moreover, even once the presumption that such techniques are appropriate has been triggered, a utility may rebut it with respect to any single pole or class of poles for reasons of safety, reliability and generally applicable engineering purposes.[46]

12. We recognize that some pole owners employ these techniques sparingly[47] and may be concerned that this clarification will allow attachers to use boxing and attachment arms in situations

[42] *See, e.g.*, FPL et al. Comments at 18 ("Boxing and bracketing slow down the process of pole change-outs, complicates transfers, and makes both more costly."); Coalition of Concerned Utilities Comments at 83 ("Boxing . . . makes it more difficult to change-out poles."); Verizon Comments, RM-11303, at 2-3 (filed Jan. 30, 2006) (stating that boxing complicates pole replacements and removals, and that cable arms make it more difficult for technicians to work on nearby attachments); NSTAR Reply Comments, RM-11303, at 2 (filed Mar. 1, 2006) ("Boxing and/or extension arms significantly complicate the process of replacing [sic] a pole.").

[43] *See, e.g.*, Coalition of Concerned Utilities Comments at 82-83 ("[B]oxing and extension arms make it more difficult and hazardous for climbers to access the pole."); USTelecom Comments, RM-11303, at 4 (filed Jan. 30, 2006) (noting that boxing is hazardous to linemen who have to replace a pole); Western Massachusetts Electric Comments, RM-11303, at 2 (filed Jan. 30, 2006) ("The use of boxing and extension arms poses a hazard to [utility] employees and the general public."); EEI/UTC Comments at 84 ("The overwhelming majority of electric utilities rarely, if ever, allow boxing and extension arms because of serious safety and operational concerns.").

[44] *See, e.g.*, Coalition of Concerned Utilities Comments at 83 (stating that extension arms create loading concerns, and that boxing can compromise the integrity of poles); USTelecom Comments, RM-11303, at 4 (filed Jan 30, 2006) (explaining that extension arms create unbalanced tension in poles); Western Massachusetts Electric Company Comments, RM-11303, at 2 (filed Jan. 30, 2006) ("Extension arms . . . do not create a 40-inch vertical separation as required by the NESC.").

[45] *See, e.g.*, Coalition of Concerned Utilities Comments at 83 ("Pole owners need to retain the discretion to review each pole design and each proposed distribution route to determine whether boxing or extension arms should be allowed."); Verizon Comments, RM-11303, at 2 (filed Jan. 30, 2006) ("The safety and feasibility of using boxing or extension arms must be evaluated on a case-by-case basis, taking account of numerous factors, such as the location of the pole and the placement of prior attachments."); UTC Comments, RM-11303, at 10 (filed Jan. 30, 2006) (asserting that these activities should be reviewed on a case-by-case basis, and that factors like the age and size of a pole must be considered).

[46] *See* 47 U.S.C. § 224(f)(2).

[47] *See, e.g.*, Coalition of Concerned Utilities Comments at 83 (stating that some Coalition members prohibit the practices altogether, while others permit them only in limited quantities); Verizon Comments, RM-11303, at 3 (filed Jan. 30, 2006) (explaining that Verizon does not permit extension arms to be used merely to increase the capacity of a pole, but it sometimes employs them to obtain sufficient clearance or to improve cable alignment); PacifiCorp et al. Comments at 32 (explaining that, in many cases, these techniques have been used as a last resort after a detailed analysis of the affected pole).

where the pole owner itself would not.[48] We believe, however, that this framework will allow utilities to limit the use of these techniques whenever appropriate and, thereby, prevent attachers from employing the techniques inappropriately. Our present holding is not designed to broaden the range of circumstances in which these techniques are used. Rather, it is to prevent utilities from denying attachers the benefits of these techniques in situations where the utility itself would, or has, used them.[49]

13. If a utility chooses to allow boxing and bracketing in some circumstances but not others, the limiting circumstances must be clear, objective, and applied equally to the utility and attaching entity. They should also be publicly available—on a website, for instance—with the utility providing examples where helpful. Such *ex ante* guidance will help attachers make informed decisions and should facilitate the attachment process. If a utility denies an attachment technique that it uses for reasons not included in those made publicly available, it must explain its decision in writing to the requesting entity. In the Further Notice, we seek comment on additional considerations regarding boxing and bracketing, including the ability of utilities to prohibit boxing and bracketing going forward, and whether utilities' decisions regarding the use of boxing and bracketing should also be made publicly available.

14. We reject the argument that our conclusion is inconsistent with section 224(f)(2) of the Act, which allows electric utilities to deny access where there is "insufficient capacity."[50] Although we recognize that the Eleventh Circuit held in *Southern Co. v. FCC* that utilities are not obligated to provide access to a pole when it is agreed that the pole's capacity is insufficient to accommodate a proposed attachment, we do not find that to be the case when boxing and bracketing are able to be used.[51] The Eleventh Circuit held that the term "insufficient capacity" in section 224(f)(2) is ambiguous, and that the Commission has discretion in filling that "gap in the statutory scheme."[52] The court upheld the Commission's finding that "insufficient capacity" means the absence of usable physical space on a pole.[53] Applying that definition here, we find that a pole does not have "insufficient capacity" if it could accommodate an additional attachment using conventional methods of attachment that a utility uses in its

[48] *See, e.g.*, Coalition of Concerned Utilities Comments at 83 ("To grant an attaching entity global permission to box poles or attach extension arms simply because the utility pole owner has permitted it on other occasions would drastically add to the potential problems."); Verizon Comments, RM-11303, at 2 (filed Jan. 30, 2006) ("That boxing or extension arms could be safely employed on one pole does not mean that either can be safely used on a different pole in another location."); USTelecom Reply Comments, RM-11303, at 2 (filed Mar. 1, 2006) (stating that, when pole owners employ these techniques, it is usually, if not always, because they have gauged the safety and engineering soundness of the attachment in question).

[49] *See* 47 U.S.C. § 224(f)(1); *see also* Fibertech/KDL Comments at 12 ("Pole owners decrying boxing as unsafe have abandoned these objections when boxing became necessary to quickly and inexpensively deploy their services."); Alpheus and 360 networks Comments at 3 ("Utilities frequently use boxing and extension arms for their own facilities but prohibit competitive providers from using these space- and cost-saving methods with no rational explanation."); McleodUSA Comments, RM-11303, at 2-3 (filed Jan. 30, 2006) ("[B]oxing and extension arms have been widely used by telephone utilities throughout [McleodUSA's] service area, even on some of the utilities' poles where such practices are supposedly prohibited.").

[50] *See, e.g.*, AEP et al. Comments, RM-11303, at 17-18 (filed Jan. 30, 2006); Ameren et al. Comments, RM-11303, at 15-16 (filed Jan. 30, 2006); *see also* 47 U.S.C. § 224(f)(2).

[51] *See Southern Co. v. FCC*, 293 F.3d 1338, 1346-47 (11th Cir. 2002) (*Southern Company*) ("The FCC's position is contrary to the plain language of § 224(f)(2). . . . When it is agreed that capacity is insufficient, there is no obligation to provide third parties with access to a particular pole.").

[52] *Southern Company*, 293 F.3d at 1348 ("Nothing in the language of the statute specifies the conditions under which capacity should be deemed insufficient").

[53] *Id.* at 1349.

own operations, such as boxing and bracketing. Unlike requiring a pole owner to replace a pole with a taller pole, these techniques take advantage of usable physical space on the existing pole.

15. The Eleventh Circuit acknowledged in *Southern* that its decision was driven by the need to "construe statutes in such a way to 'give effect, if possible, to every clause and word of a statute.'"[54] By virtue of that decision, however, the statutory language of section 224(f)(2) *is* given effect, in that utilities may deny access for "insufficient capacity" when "it is agreed that capacity on a given pole or other facility is insufficient."[55] Thus, no particular interpretation of section 224(f)(2) is required in the context of boxing and bracketing simply to "give effect" to that statutory language.

16. We find that our reading of the ambiguous term "insufficient capacity" is a reasonable middle ground. Some utilities have argued that a pole has insufficient capacity—and thus access may be denied under section 224(f)(2)—if *any* make-ready work is needed.[56] At the other extreme, the statute might be read to require a utility to completely replace a pole—an interpretation that some commenters oppose.[57] We see no reason to adopt either of those extreme positions. Within those extremes is a range of practices, such as line rearrangement, overlashing, boxing, and bracketing that exploit the capacity of existing infrastructure in some way. Although commenters are divided regarding whether a pole has insufficient capacity if techniques such as boxing and bracketing are necessary to accommodate a new attachment,[58] we find more persuasive the position that a pole does not have insufficient capacity if a new

[54] 293 F.3d at 1346-47.

[55] *Id*. at 1346. *See also Florida Cable Telecomm. Assoc., Inc.; Comcast Cablevision of Panama City, Inc.; Mediacom Southeast, L.L.C; and Cox Communications Gulf, L.L.C., Complainants, v. Gulf Power Co., Respondent*, EB Docket No. 04-381, Initial Decision of Chief Administrative Law Judge Richard L. Sippel, 22 FCC Rcd 1997, 2005-06, para. 24 (2007) (*Florida Cable Order*) ("*Southern Co*. narrowly holds that 'when it is agreed [by pole owner and attacher] that capacity is insufficient,' a utility may not be required to provide an attacher with access to a pole. . . . since there was never an agreement between Complainants and Gulf Power regarding pole capacity, the *Southern Co.* decision is not relevant to any [Hearing Decision Order] issue, and has no decisional application in this case.").

[56] *See, e.g.*, *Florida Cable Order*, 22 FCC Rcd at 2006, para. 25 (rejecting a utility's "erroneous[] argu[ment] that a need to use make-ready to accommodate an attachment constitutes proof of full capacity"). We disagree with the claim that the Commission previously defined "capacity expansion" to include any form of make ready. *See*, *e.g.*, Gulf Power Co. Exceptions to the Initial Decision, EB Docket No. 04-381, at 7-9 (filed Mar. 7, 2007). In the excerpt from the prior order relied on by this position, the Commission discussed legislative history in which Congress noted that it may be necessary for a utility to replace an existing pole to accommodate a new attachment by a cable operator. The Commission used the phrase "[t]his capacity expansion process" in reference to the discussion of pole replacement in the legislative history; the Commission did not say that rearranging existing attachments constitutes "capacity expansion." S*ee Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 14 FCC Rcd at 18067, para. 53. Moreover, the term "capacity expansion" does not appear in the relevant provisions of the Act or our rules, so the Commission's discussion of that term has little regulatory significance for our interpretation of section 224(f)(2) here. The issue is whether a pole has "insufficient capacity," and we find that when a utility could accommodate a new attachment on a pole by using attachment techniques that the utility employs in its own operations, consistent with applicable safety codes, capacity is not "insufficient." To the extent the Commission's statement concerning "capacity expansion" in the prior order is any way inconsistent with that finding, we disavow that statement.

[57] *See, e.g.*, Ameren and Virginia Electric Reply Comments at 22.

[58] *Compare, e.g.,* Letter from Eric B. Langley, Counsel for Oncor Electric Delivery, Co. et al., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, at 8 (filed Dec. 3, 2009) ("Electric utilities are not required to expand capacity (perform make-ready) under section 224(f)(2)."), *and* AEP et al., Comments, RM-11303, at 17-18 (filed Jan. 30, 2006) ("Make ready work in general and the use of [boxing and bracketing] in particular are themselves expansions in capacity."), *with* TWTC Reply Comments at 35-37 ("pole capacity is insufficient . . . only (continued….)

attachment can be added to the existing pole using conventional attachment techniques. Utilization of existing infrastructure, rather than replacing it, is a fundamental principal underlying the Act.[59] As discussed above, we find that our interpretation still ensures that "insufficient capacity" is given some meaning, while also, to the greatest extent possible, helping spur competition and promoting the deployment of communications technologies, consistent with the broad "pro competitive" purposes of the 1996 Act, as well as the more specific direction of section 706 of the 1996 Act that the Commission promote the deployment of advanced services "by utilizing, in a manner consistent with the public interest, convenience, and necessity, . . . measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."[60] Accordingly, we conclude that, where a pole can accommodate new attachments through boxing, bracketing, or similar attachment techniques, there is not "insufficient capacity" within the meaning of section 224(f)(2).

B. Timely Access to Pole Attachments

17. We also hold that access to poles, including the preparation of poles for attachment, commonly termed "make-ready," must be timely in order to constitute just and reasonable access.[61] Section 224 of the Act requires utilities to provide cable television systems and any telecommunications carrier with nondiscriminatory access to any poles, ducts, conduits, and rights-of-way owned or controlled by it, and instructs the Commission to ensure that the terms and conditions for pole attachments are just and reasonable.[62] The Commission previously has recognized the importance of timeliness in the context of specific aspects of the pole attachment process.[63] The National Broadband Plan likewise recognized

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when space for new attachments cannot be made through reasonable make-ready construction by way of pole change-outs and line rearrangements."). In short, there is no "agree[ment] that capacity is insufficient" where an attachment can be accommodated through the use of boxing or bracketing. *See Southern Company*, 293 F.3d at 1347.

[59] *See generally, Local Competition Order*, 11 FCC Rcd at 15508-11, paras 10-15.

[60] 47 U.S.C. § 1302 (2010). Section 706 of the Telecommunications Act of 1996, Pub. L. No. 104-104, title VII, Sec. 706, 110 Stat. 56, 153 (1996) (the Act), as amended in relevant part by the Broadband Data Improvement Act, Pub. L. No. 110-385, 122 Stat. 4096 (2008), is now codified in Title 47, Chapter 12 of the United States Code. *See* 47 U.S.C. § 1301 *et seq*.

[61] Indeed, the Commission has long recognized that, with regard to pole attachment access, "time is of the essence." *Local Competition Order,* 11 FCC Rcd at 16102, para. 1224.

[62] 47 U.S.C. § 224(b)(1); 47 U.S.C. § 224(f)(1).

[63] *See, e.g.*, 47 C.F.R. § 1.1403(b) (requiring utilities to respond to applications within 45 days by either granting access to poles or confirming the denial in writing by the 45th day); *Kansas City Cable Partners d/b/a Time Warner Cable Of Kansas City v. Kansas City Power & Light Co.*, File Nos. PA 99-001, PA-99-002, Consolidated Order, 14 FCC Rcd 11599, 11607, paras. 20-21 (Enf. Bur. 1999) (holding that "because of the lengthy delay that Time Warner has already suffered, which is preventing Time Warner from providing upgraded services to its customers, we believe it is necessary to order KCPL to grant the applications and proceed with the make-ready and change-out work").

Other statutory "just and reasonable" requirements likewise have been interpreted to preclude unreasonable delay. *See, e.g.*, 47 C.F.R. § 51.305(a)(4) (inquiry into whether interconnection is "just" and "reasonable" includes "the time within which the incumbent LEC provides such interconnection"); *Core v. Verizon*, File No. EB-01-MD-007, Memorandum Opinion and Order, 18 FCC Rcd 7962, 7975-76, 7978, paras. 32-33, 41 (2003) (finding that Verizon failed to interconnect with Core in a timely manner, and thus violated the section 251(c)(2) obligation to interconnect on rates, terms, and conditions that are just and reasonable); *American Network, Inc., Petition for Declaratory Ruling Concerning Backbilling of Access Charges*, Memorandum Opinion and Order, 4 FCC Rcd 550, 552 at para. 19 (Com. Carr. Bur. 1989), petition for recon. denied, 4 FCC Rcd 8797 (1989) (stating that "[a] delay of (continued….)

the importance of timely access to poles.[64] We thus hold that, pursuant to section 224 of the Act, the duty to proceed in a timely manner applies to the entirety of the pole attachment process. Make-ready or other pole access delays not warranted by the circumstances thus are unjust and unreasonable under section 224.

18. Section 224 also provides for the adoption of rules to carry out its provisions, and we seek comment in the Notice below regarding a proposed comprehensive timeline for each step of the pole access process.[65] We clarify, however, that utilities must perform make-ready promptly and efficiently, consistent with evaluation of capacity, safety, reliability, and generally applicable engineering practices, whether or not a specific rule applies to an aspect of the make-ready process.[66]

IV. FURTHER NOTICE OF PROPOSED RULEMAKING

19. In this Further Notice, we seek comment on how to improve access to essential infrastructure, and expedite the build-out of affordable broadband services as well as telecommunications and cable services.[67] We propose a specific timeline for all wired pole attachment requests (including fiber or other wired attachments by wireless carriers), and seek comment on the timeline and exceptions or refinements, as well as the development of a timeline for the attachment of wireless facilities.

20. We also propose rules allowing the use of contract workers in certain circumstances, and propose reforming our access dispute-resolution process consistent with the aims of the National Broadband Plan. We seek comment on these reforms, and other ways to speed the availability of broadband by making it easier and less expensive for telecommunications and cable companies to use existing infrastructure.[68] We also seek to establish rental rates for pole attachments that are as low and close to uniform as possible, consistent with section 224 of the Act, and we seek comment on proposals to accomplish this goal.

A. The Need for a Revised Approach

21. When the Commission implemented the pole attachment access provisions of the 1996 Act, it decided not to adopt comprehensive access rules but rather to rely on negotiation and, where

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much less than 24 months between the rendering of service and the receipt of an initial bill for such service may be an unjust and unreasonable practice for purposes of Section 201(b) of the Act"); *MCI Telecommunications Corp. v. FCC*, 627 F.2d 322, 340 (D.C. Cir. 1980) ("[The Communications Act] assumes that rates will be finally decided within a reasonable time encompassing months, occasionally a year or two, but not several years or a decade. The standard of 'just and reasonable' rates is subverted when the delay continues for several years").

[64] *See, e.g.*, National Broadband Plan at 129 (citing assertions from an attacher that "the most significant obstacle to the deployment of fiber transport is FiberNet's inability to obtain access to pole attachments in a timely manner"); *id*. at 130 (noting the importance of accurate information about poles "if there is to be a timely and efficient process for accessing and utilizing this important infrastructure").

[65] 47 U.S.C. § 224(b)(2).

[66] 47 U.S.C. § 224(b)(1); 47 U.S.C. § 224(f)(2); *Local Competition Order*, 11 FCC Rcd at 16080-81, paras. 1175-77.

[67] Section 224 of the Act requires utilities to provide nondiscriminatory access to a "cable television system" or a "telecommunications carrier." 47 U.S.C. § 224(f)(1). Although we discuss the benefits of pole attachment access for the deployment of broadband, we do not alter the statutory rights regarding what type of entities have a statutory right to pole attachments under section 224.

[68] *See* 47 U.S.C. §§ 224(f)(1) (the attachers' right of access) and (f)(2) (the utilities' right to deny attachment where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes).

needed, case-specific adjudication to resolve disputes over access terms and conditions.[69] The Commission stated that it would monitor the effect of this approach and propose specific rules if needed.[70]

22. Experience since the *Local Competition Order* has not met the Commission's expectation that "swift and specific enforcement procedures"[71] would satisfy the need for timely access to pole attachments. This enforcement process has not always led to clear standards, due to the incentives to reach negotiated settlements as well as the fact-intensive nature of many disputes. Going forward, we intend to rely in part on new, broadly applicable rules to ensure that terms and conditions of access to pole attachments are just, reasonable, and nondiscriminatory,[72] as well as a continued reliance on an improved enforcement regime. We explain our reasons for this reassessment below.

23. We continue to endorse negotiated agreements, and to recommend mediation to parties that reach an impasse.[73] When a complaint is filed, negotiated agreement remains the quickest and least burdensome way for parties to resolve disputed terms of access. Settlement satisfies the criteria of speed and individual analysis, but has one significant drawback: it establishes no precedent for others to follow.[74] On the other hand, fully adjudicated pole attachment complaints establish precedent but can be lengthy and expensive, which may deter parties from pursuing some cases. Moreover, current remedies are largely prospective, and also may act to deter the pursuit of legitimate claims.[75] Further, some issues appear to remain subject to dispute even when formal complaints lead to controlling precedents. For example, disputes regarding the use of "boxing"[76] and drop poles[77] have been resolved through adjudication, but remain contentious. Finally, even when a precedent is established and acknowledged, the result may seem unwise to parties that had no say in the case, yet are bound by the result.[78]

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[69] *Local Competition Order*, 11 FCC Rcd at 16067-68, para 1143 (deciding to rely on case-specific resolution); *see generally Local Competition Order* at 16056-107, paras. 1123-1240 (addressing the right to non-discriminatory access under 47 U.S.C. § 224(f)).

[70] *Local Competition Order*, 11 FCC Rcd at 16067-68, para 1143.

[71] *Local Competition Order*, 11 FCC Rcd at 16101-02, para. 1224.

[72] The term "pole attachments" comprises ducts, conduit, and rights-of way except when a narrower meaning is clear in context, *e.g.*, wireless carriers do not attach "pole-top" facilities to underground conduit. If the term appears ambiguous, and is not clarified in the text, the full statutory meaning applies.

[73] The Enforcement Bureau offers to mediate disputes over pole attachments access, among others, as a public service.

[74] National Broadband Plan at 112.

[75] *See* 47 C.F.R. § 1.1410 (limiting remedies for pole attachment complaints to termination of an unjust rate, term, or condition; substitution of a rate, term, or condition established by the Commission; and order of a refund, or payment, if appropriate); *see also infra* Section [enforcement-remedies].

[76] *See Salsgiver*, 22 FCC Rcd at 20543, para. 21.

[77] *See Mile Hi Cable Partners et al. v. Public Serv. Co. of Colorado*, File No. PA 98-003, Order, 15 FCC Rcd 11450, 11460 at para. 17 (Cab. Servs. Bur. 2000) *(Mile Hi Order*) (describing a service "drop" as an adjunct to the main communications line that connects a subscriber to the distribution network, and a "drop pole" as the pole used to support the service drop when needed to maintain ground clearances or to cross a road).

[78] *See, e.g.*, Oncor Comments at 17 (maintaining that current penalty limits leave unlawful attachers in no worse position than if they complied); Empire Comments at 3 (arguing that current penalty limits make non-compliance a rational decision); NREC Reply Comments at 17 (stating that current penalty limits create perverse incentive not to comply with attachment procedures); Letter from Eric B. Langley and J. Russell Campbell, Counsel for Tampa (continued….)

24. For these reasons, we propose specific rules regarding access to pole attachments. We also propose to reform our pole attachment complaint rules to ensure that the enforcement process is suited to resolving access-related complaints and is fair to all parties.[79] We intend the rules we propose to clarify application of the "just and reasonable" and "nondiscrimination" legal requirements to terms and conditions of access. For the same reasons the Commission gave in 1996, we do not propose to adopt or endorse national engineering standards, however.[80] We also reaffirm that "no single set of rules can take into account all of the issues that can arise in the context of a single installation or attachment."[81] Nothing we propose alters the reliance utilities may place on the NESC and similar codes, or supplants or modifies regulations by FERC and OSHA.[82] State and local requirements affecting pole attachments remain entitled to deference unless they are in direct conflict with a federal policy.[83] Individual utilities will continue to make pole-by-pole determinations regarding capacity, safety, reliability, and generally applicable engineering purposes.[84]

B. Improving Access to Pole Attachments

1. Make-Ready Timeline

25. As discussed above, timely action by all the relevant participants in the pole attachment process is important to ensure just and reasonable access to poles.[85] Although we make clear that the statute mandates timely access to poles, consistent with the recommendation of the National Broadband Plan, we believe that a comprehensive timeline is appropriate to help ensure this obligation is satisfied.

26. In particular, the timing for obtaining access to poles can vary widely, with delays impacting not only communications providers' ability to serve particular customers,[86] but even their

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Electric Company et al., to Marlene Dortch, Secretary, FCC, WC Docket No. 07-245 at 7-8 & n.26 (filed Apr. 13, 2007).

[79] *See* 47 C.F.R. §§ 1.1401-1418 (The Commission's rules Part 1, Subpart J, Pole Attachment Complaint Procedures).

[80] *Local Competition Order*, 11 FCC Rcd at 16070-71, para. 1149 (stating that "[u]niversally accepted codes such as the NESC do not attempt to prescribe specific requirements applicable to each attachment request and neither shall we").

[81] *Local Competition Order*, 11 FCC Rcd at 16068, para. 1145.

[82] *Local Competition Order*, 11 FCC Rcd at 16071-72, paras. 1151-52.

[83] *Local Competition Order*, 11 FCC Rcd at 16072-73, para. 1154.

[84] Indeed, all decisions adopted in the *Local Competition Order* and subsequent Commission decisions remain fully in force unless and until expressly modified. *See, e.g.*, *Local Competition Order*, 11 FCC Rcd at 16083, para. 1182.

[85] *See supra* Section III.B (holding that just and reasonable access includes timely completion of make-ready).

[86] For example, KDL cites instances where a KDL wholesale customer "cannot provide requested Gigabyte Ethernet WAN networks to three Kentucky school districts because KDL has been unable to get the pole access necessary to complete construction of the necessary fiber network." Letter from Kelley A. Shields, Counsel for Fibertech and Kentucky Data Link, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, RM-11293, RM-I1303, Attach. at 1 (filed Jan. 7, 2010). KDL cites another example in Virginia, where "KDL has been working since February 2008 to build the network necessary to provide a WAN network for a school district, and is still waiting for the pole owner to complete make ready work. As a result of this delay, the school district has not been able to conduct standardized testing online as it had hoped and planned to do." *Id*. In addition, KDL observes that another wholesale customer "planned to provide broadband to eleven rural communities in Indiana by 2007, and secured a loan from the United States Department of Agriculture Rural Utility Service to fund this deployment. As a result of make ready delays, only three of those eleven communities' networks have been built (a fourth is currently (continued….)

decision whether to serve a particular market at all.[87] And although communications providers cite examples of utilities that provide swift access to poles,[88] there is evidence of many other examples of significant delays—in some cases multiple years.[89] Further, a survey of utilities indicates that while, in most cases, utilities meet their obligation to approve or deny a request for pole access within 45 days,[90] the performance of make-ready work can take 60-90 days in 27 percent of cases, and more than 90 days in 31 percent of cases.[91] Based on this evidence, our timeline below, which proposes a 45-day deadline

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underway)." *Id*. Other commenters cite an instance where a "utility failed to perform the make-ready work necessary to allow the provider to construct its plant on a timely basis, claiming that the utility lacked sufficient resources to meet the requested timetable. When the provider could not meet the customer's delivery date nor provide a reasonable estimate of a later delivery date, because of the utility's refusal to provide timetables or perform the work, the customer contacted the utility directly to attempt to obtain that information. The utility instead contracted directly with the customer and, using the utility's crews, quickly constructed the necessary fiber in the power space and leased it to the customer directly. The utility apparently had no trouble finding the resources to support the customer once it took over the account." Letter from Andrew D. Lipman et al., Counsel for 360networks et al., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, RM11293, RM-11303, Attach. at 5 (filed. Sept. 19, 2008).

[87] *See, e.g.*, Sunesys Comments at 9 (Sunesys "has determined that it is not economically feasible to compete in Delaware" in light of make-ready costs and delays by the utility).

[88] *See, e.g.*, Sunesys Comments at 14 (citing examples of utilities that provide access to poles within three months of receiving an application); segTEL Comments, RM-11303, at 5 (filed Jan. 30, 2006) (citing an example of a utility that provides access on average 60 days from the time of the application); TWTC Reply Comments, RM-11303, Jarvis Decl. at para. 4 (filed Mar. 1, 2006) (citing an example of a utility that generally provides access within 120 days of receiving an application).

[89] *See, e.g.*, Letter from Brita D. Strandberg, Counsel for Fibertech Networks, Inc. and Kentucky Data Link, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, GC Docket Nos. 09-29, 09-51, RM-11209, RM-11303, Attach. at 1 (filed Sept. 2, 2009) (citing an example of 6 months to provide make-ready estimates in Kentucky, with the start of make-ready work delayed "months" after payment of make-ready costs); *id*., Attach. at 2 (citing a providers' experience that it takes an average of 270 days to complete the pole licensing process in Montgomery county, Maryland); Letter from Andrew D. Lipman et al., Counsel for 360networks et al., to Marlene H. Dortch, Secretary, FCC, Docket No. 07-245, RM11293, RM-11303, Attach. at 7 (filed. Sept. 19, 2008) ("Comments describe delays reaching 12 months, 15 months, 16 months, 3 years and 4 years"); Sunesys Comments at 14 (citing examples of some utilities that take over 15 months to provide pole access, with another taking 4 years); Knology Comments at 21 (citing an instance where a make-ready project took "several years" for completion); TWTC Comments, Exh. A. (of 45 Time Warner Telecom pole applications to Verizon at the time, 13 were still pending, and six delays to "receive letter of make ready completion" were 240, 217, 215, 134, 115, and 108 days); segTEL Comments, RM-11303, at 5 (filed Jan. 30, 2006) (citing a utility dealing with "applications for as few as 40 pole attachments at a time, tolerates a backlog of applications that have been pending for more than 500 days, even after segTEL has paid in full for make-ready work"); TWTC Reply Comments, RM-11303, Jarvis Decl. at para. 5 (filed Dec. 7, 2005) (citing an example of a utility that "often approves applications within 30 days, but it does not schedule or perform make-ready work with the same expedience. Scheduling the make-ready alone can take months or even years.").

[90] UTC Comments, App. at 12-13 (a 2007 survey of utilities revealed that "approximately 19% of all applications on average take longer than 45 days to process").

[91] *Id*., App. at 17.

for completing make-ready work, appears to have the potential to speed pole access more than 50 percent of the time, and to cut average make-ready time in half (or better) in approximately 30 percent of cases.[92]

a. Background

27. Currently, Commission rules require that a utility provide a response to an application within 45 days, but do not otherwise address the duration of the process for obtaining access to poles.[93] Some attachers have requested that the Commission adopt a timeline governing the other aspects of the pole access process.[94] The National Broadband Plan similarly recommends that "[t]he FCC should establish a comprehensive timeline for each step of the Section 224 access process."[95] Both commenters and the National Broadband Plan recommend that any Commission-imposed timeline be informed by the experience of states that are implementing pole access timelines.[96]

28. Of the 20 states that have certified to regulating pole attachments,[97] at least five have imposed or are in the process of imposing mandatory timeframes governing aspects of the make-ready process.[98] For example, New Hampshire recently adopted comprehensive regulations addressing pole

[92] We note, however, that we seek comment below on the appropriate scope of the proposed timeline, and thus any timeline ultimately adopted might not encompass the identical set of make-ready scenarios included in the survey data.

[93] 47 C.F.R. 1.1403 (b),

[94] *See, e.g.*, Fibertech Petition; *see also Pole Attachment Notice*, 22 FCC Rcd at 20210-11, 20214, paras. 37, 47.

[95] National Broadband Plan at 111.

[96] *See, e.g.*, National Broadband Plan at 111 (Recommendation 6.3) (observing that "[s]everal states, including Connecticut and New York, have established firm timelines for the entire process, from the day that a prospective attacher files an application, to the issuance of a permit indicating that all make-ready work has been completed"); Letter from Thomas B. Magee, Counsel for Coalition of Concerned Utilities, to Marlene Dortch, Secretary, FCC, WC Docket Nos. 07-245, 09-154, GN Docket Nos. 09-29, 09-51 (filed Dec. 10, 2009) (citing as "more reasonable" the New Hampshire timeline); Sunesys Comments, GN Docket No. 09-51 at 10-11 (filed June 8, 2009) (describing timelines in New York and Connecticut); Letter from Edison Electric Institute and Utilities Telecom Council to Marlene Dortch, Secretary, FCC, WC Docket No. 07-245, RM-11293, RM-11303, at 8 (filed Apr. 16, 2009) (EEI/UTC Apr. 16, 2009 *Ex Parte* Letter) (arguing that "in Utah, a 120-day make-ready [timeline] may represent a better balance" than other proposed timelines); Letter from Thomas Magee, Counsel for the Coalition of Concerned Utilities, to Marlene Dortch, Secretary, FCC, WC Docket No. 07-245 at 8-9 (filed May 1, 2009) (Coalition of Concerned Utilities May 1, 2009 *Ex Parte* Letter) (citing Vermont as having "established more reasonable deadlines"); Fibertech Petition at 19 (praising New York's then-recent timeline).

[97] *Corrected List Of States That Have Certified That They Regulate Pole Attachments*, WC Docket No. 07-245, Public Notice, 23 FCC Rcd 4878 (Wireline Comp. Bur. 2008).

[98] *See* Utah Admin. Code § R746-345-3 (Utah Pole Attachment Rules); Rules and Orders of the Vermont Public Service Board, Rules Applicable to More than One Type of Utility at 3.700: Pole Attachments, at 3.708. Applications for Attachment and Make-ready Work (Vermont Pole Attachment Rules); Case 03-M-0432 – Proceeding on Motion of the Commission Concerning Certain Pole Attachment Issues, *Order Adopting Policy Statement on Pole Attachments*, at 3, (NY PSC Aug. 6, 2004) (New York Order); Filing of Adopted Rules, Puc 1300 Utility Pole Attachments, Final Proposal No, 2009-79, Commission Docket No. DRM 0&-004, New Hampshire Public Utilities Commission (New Hampshire Order); *Re The State's Public Service Company Utility Pole Make-Ready Procedures - Phase I*, Docket No. 07-02-13 (CT Dept. of Pub. Util. Control, Apr. 30, 2008) (Connecticut Order); *Oxford Networks f/k/a Oxford County Telephone Request for Commission Investigation into Verizon's Practices and Acts Regarding Access to Utility Poles*, Maine Public Utilities Commission, Order on Reconsideration, Docket No. 2005-486 (Feb. 28, 2007) (Maine Order on Reconsideration).

attachments.[99] Connecticut includes shorter time limits for small jobs, although its timeline is not yet fully implemented.[100] Both Utah and Vermont have adopted timelines that include deadlines for both surveys and make-ready completion that vary depending on the size of the request.[101] New York's timeline, which has been in use since 2004, sets specific deadlines for the survey, the estimate, acceptance, payment, and make-ready performance, and the use of contractors,[102] as well as rules regarding the application process, schedules of charges, and expedited dispute resolution.[103]

b. A Comprehensive Timeline for Section 224 Access

29. We propose a comprehensive timeline for the make-ready process, as recommended in the National Broadband Plan. We begin the process of establishing a federal timeline that covers each step of the pole attachment process, from application to issuance of the final permit.[104] We further believe that the federal timeline should be comprehensive and applicable to all forms of communications attachments. We also propose that we should adopt a timeline covering the process of certifying wireless equipment for attachment.[105] The record before the Commission includes many examples of delay in make-ready work in states without make-ready timelines, in contrast to evidence of more expedited deployment in those states that have adopted timelines.[106] To provide predictability and regularity for the deployment of broadband, telecommunications, and cable infrastructure, we support the adoption of a pragmatic timeline. We discuss the details of the proposed timeline in the section below.

30. In considering a timeline, we are unpersuaded by generalized assertions that the potential for resource diversion renders the establishment of an objective timeframe to be necessarily infeasible.[107] We recognize the challenges that introducing a timeline can create, and in particular the critical role that infrastructure personnel play in maintaining and restoring electric and telecommunications service. However, section 224 imposes a responsibility on utilities to provide just and reasonable access to any pole, duct, conduit, or right-of-way owned or controlled by it, in addition to preserving their ability to

[99] *See* N.H. Code Admin. R. Ch. Puc 1300 (adopted Dec. 2009).

[100] *See* Connecticut Order at section III.B.4.c

[101] Utah Pole Attachment Rules at C. 1-4.; Vermont Pole Attachment Rules at 3.708.

[102] New York Order at 3.

[103] *See* New York Order, App. A, at 2 (applications), 4-5 (schedule of charges), and 14 (expedited dispute resolution).

[104] National Broadband Plan at 111.

[105] *Id*.

[106] *See, e.g.*, *supra* note 89. *See also* National Broadband Plan at 111 n.21 (citing examples by KDL and Fibertech).

[107] For example, some commenters argue that the imposition of an "artificial" deadline ignores the realities of utility operations and, among other shortcomings, would be practically impossible for many utilities to meet. Coalition of Concerned Utilities May 1, 2009 *Ex Parte* Letter at 5. In particular, some utilities argue that timelines interfere with their primary mission to deliver electric service and ignore or disrupt the utility's maintenance schedule. *See, e.g.*, Coalition of Concerned Utilities Comments at 84-86 (maintaining that deadlines do not allow for how much work the utility already is doing, or has committed to do and that access requests should not come before the needs of the utility); PacifiCorp et al. Comments at 29 (arguing against mandatory response times because utilities' first priority must always be to supply electric power to customers on the grid); FPL et al. Comments at 5 (arguing against time limits that would interfere with its ability to meet customers' needs, which is its first priority). Utilities also raise a variety of other circumstances that they claim render timely performance outside of their control, including weather; coordination of electric interruptions; municipal permitting. *See* Coalition of Concerned Utilities May 1, 2009 *Ex Parte* Letter at 6.

deliver their traditional services.[108] We therefore are skeptical of the 'zero-sum' view that some commenters seem to take with respect to the resources devoted to pole attachments and regular maintenance.[109] To the extent utilities or other commenters assert that they are unable to satisfy these requirements, we ask commenters to provide further detail. Are utilities unable to hire enough workers to perform timely surveys and make-ready, and to ramp up their operations to meet demand? Inasmuch as they are unable to perform pole attachments as needed without impeding their provision of electric service, why is this so? Are these issues really a claim of insufficient cost recovery, rather than inability to provide make-ready work in a timely fashion? The fact that other states have successfully introduced timelines supports our proposal. To the extent the imposition of these timelines have raised issues of safety or unsound engineering, we seek specific comment identifying those instances.

c. A Proposed Five-Stage Timeline for Wired Pole Attachment

31. We propose adopting a specific five-stage timeline to govern the pole attachment process for wired attachments.[110] The National Broadband Plan identifies New York and Connecticut as states where a timeline speeds the process considerably,[111] and we agree with many of the commenters that assert that these state timelines appear to have expedited facilities deployment.[112] To further the goals of the National Broadband Plan, we propose to adopt the timeline outlined below, consisting of the following five stages: (1) survey; (2) estimate; (3) attacher acceptance; (4) performance; and, if needed, (5) multiparty coordination.

32. The timeline we propose today comprises elements of our existing rules, the New York timeline, and the Coalition Proposal.[113] Unlike the variable deadlines that apply in Utah and Vermont,[114] New York's 45-day survey deadline accords with our current 45-day response rule and thus leaves undisturbed the current practices and expectations that arise during the first 45 days after a request for

[108] 47 U.S.C. § 224(f)(1).

[109] *See, e.g.*, EEI/UTC Comments, RM-11303, at 8 (filed Feb. 1, 2006) (maintaining that the practical effect of Fibertech's proposal would require electric utilities to give telecommunications or cable television attachments priority over electric utility attachments); PacifiCorp et al. Comments at 29 ("Electric utilities deploy their crews in accordance with the needs of the electric grid, and their primary public service obligations. Their priorities should be set by their core business—supplying safe and reliable electric service to the public—and not by the commercial desires of companies wishing to install communications equipment on utility property.").

[110] For these proposed timelines, we draw a distinction based on the type of facility being attached by a provider of telecommunications services or cable system operator (such as a fiber-optic cable versus a wireless antenna). We do this because, although some providers of telecommunications services may predominantly provide wireless services, the pole attachments they seek may be the typical wired attachments, such as fiber-optic cable, for which there is no reason justifying different treatment. Accordingly, the proposed timeline would apply to all wired attachments and is not intended to be limited to traditional wireline carriers or cable system operators. *See infra* Section IV.B.1.e for discussion of timelines for the attachment of wireless equipment.

[111] National Broadband Plan at 111. The National Broadband Plan estimates that make-ready in New York is complete 105 days after receipt of a request for access. *Id*. at 111 n.22.

[112] *See, e.g.*, Fibertech/KDL Comments at 21-24; NextG Comments at 21.

[113] *See* 47 C.F.R. § 1.1403. The Coalition of Concerned Utilities opposes a comprehensive timeline covering request through the issuance of a permit. However, they submit a "Compromise Access Proposal" that would establish timeframes for certain aspects of "Non-Complex Make-ready" work. Letter from Thomas Magee and Jack Richards, Counsel for the Coalition of Concerned Utilities, WC Docket Nos. 07-245, 09-145, GN Docket Nos. 09-29, 09-51, at Attach. 2 (filed Oct. 7, 2009).

[114] *See* Utah Pole Attachment Rules at 1-4; Vermont Pole Attachment Rules at C. and E.

access.[115] We also incorporate aspects of the Coalition Proposal that accord with the New York timeline, as well as the Coalition Proposal request to exclude from this timeline pole replacement and attachment of wireless equipment.[116] Although we propose a specific timeline, we leave open the possibility of incorporating into our rules other elements of the state timelines if warranted by the record.

33. The five-step timeline we propose retains the current 45-day deadline for utilities to respond in detail to requests for attachment.[117] A utility would tender an estimate of charges to perform any make-ready work no later than 14 days after completing the initial survey and engineering assessment. That estimate would expire 14 days later unless the applicant accepts it and makes payment. Payment would trigger performance of make-ready, which in normal circumstances should be completed within 45 days.[118] If existing attachers fail to move their facilities as directed by the utility, the timeline would allow the utility an additional 30 days to complete the project. Depending how long the applicant reviews the estimate, and whether the existing attachers complete their work in a timely manner, make-ready should be complete within a 105 to 149 day window after the utility receives a complete application for access. As noted above, we do not propose at this time to apply this timeline to make-ready for wireless equipment or pole replacement.

34. We describe below the five stages of the proposed timeline, and the proposed length of each stage. We seek comment both on the appropriateness of breaking down make-ready into five stages, as well as the length of each stage.

35. *Stage 1 - Survey*: 45 Days. As current rules dictate, a request for access continues to trigger a 45 day period for the utility to respond. We propose that, as the first stage of our timeline, we should retain existing Commission rule 1.1403(b). A "request for access" is a complete application that provides the utility with the information necessary to begin to survey the poles. The current rule gives utilities 45 days to provide a written explanation of evidence and information for denying the request for reasons of lack of capacity, safety, reliability or engineering standards.[119] The rule is functionally identical to a requirement for a survey and engineering analysis when applied to wired facilities, and is generally understood by utilities as such.[120] For reasons we discuss below, the rule remains applicable to

[115] Compare the New York Timeline at 3 (45 days for surveys) with the Coalition Proposal (45 days for surveys; size of requests limited) and with 47 C.F.R. § 1.1403(b) (45 days for explanation of relevant evidence and information supporting denial, if access is not granted).

[116] We seek comment below on whether this timeline, or some variation, is appropriate for wireless attachments. *See infra* section IV.B.1.e.

[117] 47 C.F.R. § 1403(b).

[118] 47 C.F.R. § 1403(c).

[119] 47 C.F.R. § 1.1403(b):

> Requests for access to a utility's poles, ducts, conduits or rights-of-way by a telecommunications carrier or cable operator must be in writing. If access is not granted within 45 days of the request for access, the utility must confirm the denial in writing by the 45th day. The utility's denial of access shall be specific, shall include all relevant evidence and information supporting its denial, and shall explain how such evidence and information relate to a denial of access for reasons of lack of capacity, safety, reliability or engineering standards.

[120] *See, e.g.*, UTC Comments, Attach. at 12 (UTC Attach.) ("Under the FCC rules, an application must be approved or denied in writing within 45 days from the date that it is filed with the utility. The typical process involves reviewing the proposal for completeness, conducting a field survey, conducting an engineering analysis (load and clearance), estimating make-ready and construction costs, submitting the estimate to the applicant and approving the attachment."). No party of record disputes that a "denial" of access also encompasses partial or conditional grants of access, and grants of access that are contingent on make-ready.

wireless facilities, but could apply in a somewhat different manner.[121] A 45-day survey limit accords with the time allowed for surveys in New York, Connecticut, and the Coalition Proposal, as well as the current rule.[122]

36. We propose that all requests for attachment be included in the timeframe for the survey stage, even where the request ultimately indicates a lack of capacity. We note that the Eleventh Circuit has held that utilities are not obligated by statute to replace poles that are full to capacity.[123] In addition, pole replacement may take significantly longer than make-ready on existing poles.[124] Any right the owner has to refuse to install a new pole, and other questions about timing, however, do not affect the applicant's right to know whether the owner considers pole replacement necessary.

37. We also seek comment on whether we should clarify what constitutes a sufficient request to trigger the timeline. Utilities state that application errors cause them to miss deadlines,[125] and New York has adopted specific rules governing the application process. We seek comment on whether we should adopt similar regulations, or leave the details of the application process in the hands of individual parties.[126] We also seek comment on whether timing should be adjusted when an application that appears complete includes errors that delay the survey. Should significant errors justify stopping the clock? Should it matter whether the errors reflect lack of due care by the applicant, or lack of information that the utility could have provided?

38. *Stage 2 - Estimate*: 14 Days. We propose that, as the second stage in our pole access timeline, a utility must tender an estimate of its charges to perform any make-ready work within 14 days

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[121] *See infra* Section IV.B.1.e.

[122] New York Order at 3; *Re The State's Public Service Company Utility Pole Make-Ready Procedures - Phase I*, Docket No. 07-02-13 (CT Dept. of Pub. Util. Control, Apr. 30, 2008) (Connecticut Order) (stating that Verizon's current policy requires a 45-day time interval to provide make-ready estimates). The Coalition proposes that application of the 45-day limit should apply for routes of less than 10 miles when the total number of pole attachments from all attachers within a 30 day period do not exceed 600.

[123] *Southern Company*, 293 F.3d at 1338 (holding the Commission's requirement that utilities replace poles on a nondiscriminatory basis to be incompatible with the plain meaning of "lack of capacity" as used in section 224(f)(2) of the Act).

[124] segTEL Comments at 4, *citing Exhibit A. Oxford Networks f/k/a Oxford County Telephone Request for Commission Investigation into Verizon's Practices and Acts Regarding Access to Utility Poles, Maine Public Utilities Commission*, Order, Docket No. 2005-486 (Oct. 26, 2006); *Oxford Networks f/k/a Oxford County Telephone Request for Commission Investigation into Verizon's Practices and Acts Regarding Access to Utility Poles*, Maine Public Utilities Commission, Order on Reconsideration, Docket No. 2005-486 (Feb. 28, 2007) (contrasting Maine's 180-day timeframe when poles must be replaced with Maine's 90-day timeframe for make-ready without pole replacement).

[125] UTC Attach. at 13.

[126] New York Order, App. A at 2.

> Applications for pole attachment licenses shall be processed by the utility pole owner within five business days of receipt. All applications shall be reviewed promptly by the pole Owners for completeness, in order to avoid miscommunications and delay. Applicants shall be notified promptly of any deficiencies. If required information is missing, the clock will not start for the pole attachment process, provided the information is reasonably available to the Attacher. If the Owner cannot review the application within five business days and give a date to the Attacher for beginning the preconstruction survey because of multiple applications, the applicant must be contacted within the five business days and a proposed alternate schedule worked out between the parties.

after completing the survey. Both the New York timeline and the Coalition Proposal include a similar deadline,[127] and we propose that such a timeframe is reasonable. Although utilities commonly provide an estimate with the survey and engineering analysis,[128] an estimate of charges is not clearly required under the current 45-day response rule.[129] We propose a deadline for estimates that is separate from the survey in order to permit a utility to separate the engineering analysis from its estimation of charges, and to permit the attacher time to examine and consider the engineering assessment before it reviews an invoice.

39. *Stage 3 - Acceptance*: 14 Days. We propose that, as the third stage in our timeline, the applicant should have 14 days to accept the tendered estimate, consistent with New York's practice.[130] We consider it unreasonable to require a utility to commit indefinitely to its make-ready proposal and estimate of charges, and believe that imposing this time limit on prospective attachers will provide additional certainty. Limiting review also meets our intention that the timeline should be comprehensive, and address each phase of the process. The applicant may accept the estimate sooner, and need not wait 14 days before accepting or rejecting it.

40. *Stage 4 - Performance*: 45 Days. We propose that, as the fourth stage in our timeline, payment by the applicant should trigger a 45-day period for the completion of make-ready work, consistent with the approach in New York and Connecticut. Given the experience in New York and Connecticut, we find 45 days to be a reasonable time period for the actual performance of make-ready work. To implement this approach, we propose that, when it receives payment, a utility must notify immediately all entities whose existing attachments may be affected by the project. We further propose that notification must include a reminder that those attachers have 45 days to move, rearrange, or remove any facilities as needed to perform the make-ready work and that, if they fail to do so, the utility or its agents, or the new attacher, using authorized contractors, may move or remove any facilities that impede performance of make-ready, consistent with the fifth stage of the timeline, discussed below.[131]

41. Moreover, we propose that the obligation to complete make-ready work in this timeframe extend not only to the utility, but also to existing attachers. Existing Commission rules already impose obligations on attachers in certain circumstances,[132] and, as the National Broadband Plan recognized,

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[127] New York Order at 3 (14 day limit); Coalition Proposal (15 day limit).

[128] UTC Attach. at 12.

[129] 47 C.F.R. § 1.1403(b).

[130] New York Order at 3 ("Attachers have 14 days from receipt of the estimate to accept and pay for the make-ready work.").

[131] As described below, the proposed timeline is consistent with current Commission rules requiring that a "utility shall provide [an existing cable or telecommunications carrier attacher] 60 days written notice prior to [removing or modifying] facilities," because the utility will not actually remove or modify such attachers' existing attachers' facilities until immediately after the 60th day. 47 C.F.R. § 1.1403(c). Under our rules, these existing attachers have 15 days in which to file a request for a temporary stay, but we anticipate that existing attachers will cooperate in rearrangement of their facilities. *See* 47 C.F.R. § 1.1403(d), formerly 47 C.F.R. § 1.1403(b); *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, CC Docket No. 78-144, First Report and Order, 68 FCC 2d 1585, para. 8 (1978) (*Pole Attachments First Report and Order*) (petitions for temporary stay must be filed a minimum of 45 days in advance of modification likely to cause irreparable harm and likely cessation of service, and indicate unlawful nature of change); *Local Competition Order* 11 FCC Rcd at 16102, para. 1225 (doubting that stays or other equitable relief will be granted in the absence of a specific showing, beyond the *prima facie* case, that such relief is warranted).

[132] *See, e.g.*, 47 C.F.R. § 1.1403(e) (requiring cable attachers to notify pole owners when they begin offering telecommunications services); 47 C.F.R. § 1.1404(i) (before filing a complaint, attachers have an obligation to attempt to discuss resolution of disputes with the pole owner, unless they believe it would be fruitless to do so); 47 (continued….)

"[d]elays can also result from existing attachers' action (or inaction) to move equipment to accommodate a new attacher, potentially a competitor" and thus "reform must address the obligations of existing attachers as well as the pole owner."[133] Utilities also contend that existing attachers cause delays and have little incentive to cooperate, especially if the applicant will be a competitor, and this constrains their ability to provide timely pole access to new attachers.[134] We seek comment with regard to this assertion, as well as the incentive and ability of other attachers on a pole to discriminate against a new attacher. We invite comment on alternative or additional policies that could ensure the cooperation needed as part of the make-ready process.

42. By contrast, we note that the Coalition Proposal would not adopt a specific number of days for completion of relevant make-ready work, instead proposing to perform such work "in a manner that does not discriminate in favor of the utility's own needs or customer work."[135] We seek comment on what metrics and data would be needed to evaluate compliance with such an approach, and how it would be reported or otherwise made available.[136] We also seek comment on the balance reflected in the Coalition Proposal in this regard between attachers' interests in timely, predictable pole access and pole owners' interests in ensuring safety, reliability, and sound engineering.

(Continued from previous page)
C.F.R. § 1.1416(b) (existing attacher must share in the cost of any modifications to a pole if, after having been given notice of the modification, it adds to or modifies its attachment).

[133] National Broadband Plan at 129 (citing Letter from Joseph R. Lawhon, Counsel for Georgia Power Co., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, GN Docket Nos. 09-29, 09-51 (filed Nov. 17, 2009) Attach. B (noting one example covering 294 poles in Georgia in which the electric utility completed its work within 55 days but in which the process of coordinating with existing attachers took an additional 5 months)).

[134] FPL et al. Comments at 19-21 (citing other attachers as cause of make-ready delays); FPL et al. Reply Comments at 11-12 (arguing that delay caused by failure of other attachers to move, and that 60-day notice rule delays work, interferes with timeline); Coalition of Concerned Utilities Comments 73-74 (stating that utilities must often perform work that attachers are supposed to perform); EEI/UTC Comments 39-41 (attachers ignore 60-day notice, which creates a safety hazard and is unfair to other attachers, but the utility has no authority to force competing providers to coordinate the necessary transfer of wires). However, some utilities report that certain local exchange carriers strongly prefer to use their own employees to transfer facilities, and may be bound by collective bargaining agreements to use their own workers to handle certain facilities. AT&T Reply Comments at 40, n.114 (agreements with certain unions may impede their ability to respond to request for access); Coalition of Concerned Utilities Comments at 88 (arguing agreements with unions must be honored to preserve working relationship).

[135] Coalition Proposal at 1.

[136] For example, in the context of Bell Operating Company (BOC) applications for authority to offer in-region interLATA service, state commissions often adopted a number of performance metrics, accompanied by reporting, and penalties for failure to meet the relevant standards (such as parity between its affiliate and wholesale customers). *See, e.g.*, *Performance Measurements and Standards for Unbundled Network Elements and Interconnection*, *et al*., Notice of Proposed Rulemaking, 16 FCC Rcd 20641, 20649, para. 15 (2001) ("We recognize that many state commissions have already adopted an extensive set of performance measurements, standards, and penalty plans to capture incumbent LECs' performance in provisioning UNEs, interconnection trunks and collocation. For example, . . . in the context of section 271 proceedings, many states have developed measurements and standards to evaluate the extent to which the BOCs have opened their local markets to competition."). *See also*, *e.g.*, *Application by SBC Communications Inc., Southwestern Bell Tel. Co., and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Texas*, Memorandum Opinion and Order, 15 FCC Rcd 18354 (2000) (discussing Texas metrics); *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, 15 FCC Rcd 3953 (1999) (discussing New York metrics).

43. *Stage 5 – Multiparty Coordination*: 30 Days. We propose that the fifth stage of our timeline—if needed—will provide time for any coordination and make-ready work required in the event that some existing attachers fail to move their facilities as directed by the utility. We note that incumbent LECs typically occupy more space on a pole than other communications attachers and, due to their location on a pole, often must be the first to move their communications attachments as part of the make-ready process. And while current Commission rules provide that attachments by a cable operator or non-incumbent LEC telecommunications carrier may not be moved by the utility until 60 days have passed, that rule does not govern attachments by incumbent LECs.[137] Thus, after 45 days, the utility or its agent may move incumbent LEC attachments as needed and, after 60 days, may act independently of other existing attachers to finish the project.[138]

44. Consequently, it is reasonable to allow extra time for the utility or its agent to complete the make-ready with a free hand.[139] Given that the utility will have surveyed the poles and coordinated rearrangement, and, after 60 days, may act independently of other existing attachers, we consider 30 days after the 45th day a reasonable extension of time to undertake any coordination or planning required to finish the project.[140] We seek comment on this proposal.

45. In addition to defining a default timeline, we recognize the need to define certain exceptions or limitations in appropriate circumstances. We seek comment on those issues below.

d. Adjustments to the Timeline for the Number of Pole Attachment Requests

46. As noted above, many of the state timelines have modifications or limitations based on factors such as the number of pole attachments requested. In addition, we recognize the potential need to address utilities' concerns about possible operational or logistical challenges or the need to respond to factors outside their control. Thus, we seek comment on any necessary adjustments or exclusions from the timeline proposed above.

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[137] *See* 47 C.F.R. § 1.1403(c). Non-incumbent LEC attachers will retain the right to move their own attachments until the expiration of this 60-day period.

[138] Although some commenters contend that we lack authority over incumbent LEC pole attachments under section 224, their arguments appear to focus on the Commission's ability to regulate the rates, terms, and conditions under which other utilities provide incumbent LECs access to their poles, rather than suggesting that the Commission lacks authority to regulate the rearrangement of pole attachments of incumbent LECs. *See, e.g.*, Letter from Sean B. Cunningham, Counsel for AEP et al., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, WC Docket No. 09-154, GN Docket No. 09-51, at 2 (filed May 5, 2010) (AEP May 5, 2010 Ex Parte Letter); Letter from Sean B. Cunningham, Counsel for AEP et al., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, WC Docket No. 09-154, GN Docket No. 09-51 (filed May 12, 2010); EEI/UTC Comments at 99-104. We note that our pole attachment regulations have encompassed incumbent LEC attachments in other contexts, and we believe that we have legal authority to adopt the requirements proposed above. *See, e.g.*, *1998 Implementation Order*, 13 FCC Rcd at 6802, para. 50 (holding that incumbent LECs are attaching entities for purposes of allocating costs of unusable space). We seek comment below on other issues relating to regulation of incumbent LEC attachments. *See supra* Part IV.D.5.

[139] EEI/UTC maintains the utility has no authority to move attachments but cites no authority for this proposition. EEI/UTC Comments 39-41 (attachers ignore 60-day notice, which creates a safety hazard and is unfair to other attachers, but the utility has no authority to force competing providers to coordinate the necessary transfer of wires). The Commission's rule 1.1403(c) authorizes utilities to move attachments after 60 days, and permits utilities to move attachments in emergencies and for routine maintenance without notice.

[140] Compare 75 days (45-day performance deadline, plus 30 days of extra time) with 45 day limit in New York and Connecticut.

47. *Size of Request*. We seek comment on whether requests for access to a particularly large number of poles should be excepted from our timeline, or subject to an alternative timeline. Requests for access vary widely, and we seek comment on how best to incorporate the size or complexity of requests into our rules. Utah and Vermont adjust the duration of the survey and performance deadlines for both the size of the job and size of the utility. Utah divides requests for attachment into four categories: (1) up to 20 poles; (2) 21 to 300 poles, or up to .5 percent of the owner's poles in Utah; (3) 300 to 3,000 poles, or 5 percent of the owner's poles in Utah, up to 3,000 poles; and (4) requests that exceed 3,000 poles or 5 percent of the owner's poles in Utah, which are negotiated individually.[141] At each step, the lower outcome of the absolute number or percentage test applies.[142] Vermont staggers the timeline solely according to the percentage of the owner's poles where attachment is requested, which it divides at .5 percent, 3 percent, and 5 percent; any request that exceeds 5% of the owner's poles must be negotiated individually.[143] Similarly, New York requires applicants to give advance notice of "significant" attachment requests.[144]

48. We seek comment on the merits and effectiveness of the states' timeline adjustments or notice requirements as modifications to the proposed federal timeline described above. Utah and Vermont's approach has the virtue of calibrating the timeline to fit both the size of the request and the size of the utility, but implementation depends upon access to data that may not currently be readily available for utilities nationally. Should utilities below a certain size have the option of sorting attachment requests into categories determined by a percentage of the utility's in-state poles, and adjusting the timeline accordingly? If so, how should we define a large, medium, and small request, and what timeframe would be appropriate for each level? Should small utilities negotiate all timelines individually? Alternatively, should the timeline apply to small utilities for requests up to a certain size, with any larger requests subject to individual negotiation?

49. Providing access on a rolling basis, or capping the number of attachments in a given time period, might provide an alternative approach to modifying the proposed timeline to accommodate larger jobs. The Coalition Proposal would limit any individual request to 250 poles, with pole access requests limited to 600 attachments in any one month.[145] Utah considers a request to attach to more than 300 poles a large request, and counts all requests from any particular prospective attacher within a calendar month as one application.[146] Regarding surveys, UTC reports that, on average, approximately 19 percent of all requests take longer than 45 days to process and, of that number, the reason for 30 percent of missed deadlines was the size of the project.[147] We seek comment regarding whether, and if so, how, the reasonable size of a request would fit the timeline that we propose. We also ask whether that size should be adjusted for small utilities, and, if so, what thresholds are appropriate.

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[141] *See* Utah Pole Attachment Rules at 1-4.

[142] *See* Utah Pole Attachment Rules at 1-4.

[143] *See* Vermont Pole Attachment Rules at C and E.

[144] *See* New York Order, App. A at 1.

[145] *See* Coalition Proposal at 1.

[146] *See* Utah Pole Attachment Rules:

> All applications by a potential attacher within a given calendar month shall be counted as a single application for the purposes of calculating the response time to complete the make-ready estimate for the pole owner. The due date for a response to all applications within the calendar month shall be calculated from the date of the last application during that month.

[147] UTC Attach. at 12-13.

50. Just as some requests might prove too large for the timeline to accommodate, some attachers might seek faster action on smaller requests. Connecticut accelerates the deadline when an applicant requests access to four or fewer attachments.[148] Utah distinguishes access requests for 20 poles or less.[149] Should we adopt an alternative timeline for small requests, and, if so, how many poles should count as a small request and what deadlines should apply? Commenters should consider whether some deadlines may be easier to scale back than others, and address the concern that a utility that can act quickly alone may not be able to induce other attachers to act quickly in concert. Section 224 requires that the utility give existing attachers a "reasonable opportunity" to modify their attachments.[150] What notice would be appropriate in the context of particular small jobs?

51. *Stopping the Clock*. We acknowledge that circumstances beyond a utility's control may require prioritization, or otherwise warrant interrupting the timeline. In New York, "circumstances beyond the owner's control, other than resource problems, will excuse meeting the timetable. Non-payment of charges will also stop the clock for meeting timetables."[151] In Vermont, the clock stops for extraordinary circumstances or reasons beyond the pole owner's control.[152] We invite comment with regard to stopping and restarting the clock. Are guidelines necessary or helpful? What type of communication or notice between parties is expected? If so, what potential disputes would guidelines resolve, and should guidelines be specific or general? We would expect the utility to return to the timeline as soon as circumstances permit, which will generally be the same point that the utility resumes normal operation, and to keep all interested parties reasonably informed.

e. Wireless Attachment Timeline Issues

52. We also solicit comment on developing timelines for section 224 access other than wired pole attachments. First, we seek comment on whether the wired pole attachment timeline is appropriate for wireless equipment.[153] Utilities assert that wireless attachment presents different safety, reliability, and engineering concerns[154] because wireless equipment varies widely; is often placed in or near the

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[148] Connecticut Order at 18:

> "[T]he Department concludes that in those cases when the pole attachment application has no make-ready work activities or has four or less utility pole attachments, the time interval should be reduced considerably via either the make-ready estimate or make-ready work processes. Specifically, the Department expects that the total time interval be reduced from 90 days to between 30 and 50 days depending upon the circumstances. The working group should work out the details on this issue."

[149] *See* Utah Pole Attachment Rules at 1-4.

[150] 47 U.S.C. § 224(h).

[151] New York Order at 8.

[152] *See* Vermont Pole Attachment Rules, Article VII (L), Second Revised Sheet 55a ("The [utility] will complete Make-Ready Work within the following time frames, except for reasons beyond the Company's control").

[153] We affirm the right of wireless telecommunications carriers to attach pursuant to section 224, and their right to attachment of fiber or other wired facilities is the same as other telecommunications carriers. *See supra* note 110.

[154] *See, e.g.*, FPL et al. Comments at 16-17 (arguing that communications facilities in the power supply space would endanger utility employees and third party workers; would require additional safety precautions, and increase wind loading); Alabama Power et al. Comments at 34 (maintaining that pole top attachments could increase customer outages due to lightning and wind, and may emit a hazardous RF signal); EEI/UTC Comments at 25 (distinguishing wireless facilities from ordinary cable and telephone wires including power supplies and antennas; maintaining that wireless facilities emit hazardous RF levels, and citing lack of workers trained to work with wireless equipment and interference with pole maintenance).

electric lines; and requires a power source.[155] The current rule requiring a response to pole access requests within 45 days applies in full to utilities that receive requests by wireless carriers, however. We clarify that, where a utility has no master agreement with a carrier for wireless attachments requested, such as pole top attachments, the utility may satisfy the requirement to respond with a written explanation of its concerns with regard to capacity, safety, reliability, or engineering standards. We seek comment on whether we should require that the response be sufficiently detailed to serve as a basis for negotiating a master agreement, which would dictate a timely process for future attachments.[156]

53. We seek comment on considerations that would affect a timeline tailored to suit requests for attachment of wireless equipment after a utility and the carrier have reached a master agreement.[157] Attachment of wireless equipment may complicate engineering analyses, but may also avoid the multiparty notice and coordination issues that characterize rearrangement of wired facilities. Also, wireless carriers using a distributed antenna system (DAS) attach to relatively few poles compared to cable operators and wireline carriers that attach to every pole that their network passes. Should a timeline for requests for wireless equipment reflect these circumstances, and if so how? We particularly ask utilities that have permitted wireless equipment to be installed on their poles to report their experience, and to describe their typical timeframes for meeting wireless attachment requests. For example, PCIA and the DAS Forum submitted a "sample" pole attachment agreement used by Verizon New York Inc., permitting attachments including "antennas, transceivers, amplifiers, cables, and all associated equipment and hardware."[158] Our goal is to bring regularity and predictability to attachment of wireless facilities while acknowledging that the attachment of wireless telecommunications equipment in or near the electric space may raise different safety, reliability, and engineering concerns.

f. Other Section 224 Timeline Issues

54. Section 224 provides that, when an owner intends to modify a pole, the owner shall provide both written notification to "any entity that has obtained an attachment" and a "reasonable opportunity to add to or modify its existing attachment."[159] The record suggests that modification may be required during make-ready when, for example, a pole that has been grandfathered to a prior standard must be brought into compliance with current standards when a new attachment is added.[160] Similarly, a utility may have been unaware of a safety violation until make-ready is performed. Does the proposed

[155] *See, e.g.*, Letter from Thomas B. Magee and Jack Richards, Counsel for Coalition of Concerned Utilities, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 07-245, 09-154, GN Docket Nos. 09-29, 09-51, at 4 (filed Oct. 7, 2009) (utilities need considerable time to evaluate safety and feasibility of proposed wireless attachment configurations in electric space); *see also* New York Public Service Commission, Proceeding on Motion of the Commission Concerning Wireless Facility Attachments to Utility Distribution Poles, Case 07-M-0741 (June 27, 2007).

[156] Letter from Jack Richards, Counsel for Coalition of Concerned Utilities, to Julius Genachowski, Chairman, FCC, WC Docket Nos. 07-245, 09-154, GN Docket Nos. 09-29, 09-51 (filed Feb. 26, 2010) (listing concerns that must be addressed during negotiations of a first agreement).

[157] *See, e.g.*, T-Mobile Comments at 5 (urging the Commission to establish wireless-specific access requirements).

[158] Letter from Michael D. Sapperstein, Jr., Director of Gov't Affairs, PCIA—The Wireless Infrastructure Association, to Marlene H. Dortch, Secretary, FCC (filed Apr. 19, 2010), Attach. B at 3.

[159] 47 U.S.C. § 224(h).

[160] *See, e.g.*, Sunesys Comments at 8-9 (maintaining that the utility, and not the attacher, should pay for work performed to place the pole in compliance with applicable laws); Time Warner Cable Reply Comments at 43 (contending that violations alleged by utility may be unreasonable interpretations of safety code requirements or grandfathering).

timeline provide adequate time for utilities to implement this obligation? The definition of "pole attachment" in section 224(a)(4) includes attachments to a pole, duct, conduit, or right-of-way.[161] The record compiled in this proceeding almost exclusively addresses issues of attachments to poles.[162] Beyond timeline issues for access to poles, we seek comment on whether to implement this timeline for access to section 224 ducts, conduits, and rights-of-way owned or controlled by a utility. Has delayed access to infrastructure other than poles impeded the deployment of broadband or other services? If so, should the proposed pole attachment timeline set forth above be applied to requests for access to other infrastructure, or are modifications or other considerations needed?

2. Use of Outside Contractors

55. Attachers frequently seek the ability to use independent contractors to deploy their facilities when the utility fails to perform survey and make-ready work in a timely manner.[163] The National Broadband Plan recommends rules that allow attachers to use independent, utility-approved and certified contractors to perform engineering assessments and communications make-ready work, as well as independent surveys.[164] In defining how and when attachers may employ contractors in response to that recommendation, we first delineate between: (a) survey and make-ready work; and (b) the actual attachment of facilities. As a general matter, we believe it is appropriate to allow greater utility control over the former by permitting utilities to require the use of pre-approved contractors for this work, but continuing a less restrictive approach, originally established in 1996, for the latter. We also distinguish between electric utilities and incumbent LECs regarding the level of control that each may exercise over an attacher's use of independent contractors.

a. Background

56. The Commission previously has addressed aspects of attachers' rights to use independent contractors. In the *Local Competition Order*, the Commission "agree[d] that utilities should be able to require that only properly trained persons work in the proximity of the utilities' lines," but held that "we will not require parties seeking to make attachments to use the individual employees or contractors hired or pre-designated by the utility."[165] Rather, "[a] utility may require that individuals who will work in the proximity of electric lines have the same qualifications, in terms of training, as the utility's own workers, but the party seeking access will be able to use any individual workers who meet these criteria."[166] The Commission reasoned that "[a]llowing a utility to dictate that only specific employees or contractors be used would impede the access that Congress sought to bestow on telecommunications providers and cable operators and would inevitably lead to disputes over rates to be paid to the workers."[167]

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[161] 47 U.S.C. § 224(a)(4).

[162] We note that Fibertech raised an issue with access to incumbent LEC conduit for building access. *See* Fibertech Petition at 35-36.

[163] *See, e.g.*, Fibertech Petition at 18-21 (including praise for the New York Commission's requirement that entitles applicants for attachment to hire contractors from a utility-approved list if the utility cannot or will not meet survey and make-ready deadlines); Alpheus and 360networks Comments at 3; segTEL Comments at 7-8; Sunesys Comments at 13; TWTC Reply Comments at 23; *but see* TWTC Comments at 17 (maintaining that utilities often require cable operators to pay $100 a pole (or more) for the utility's hiring of contractors to conduct pre-attachment inspections).

[164] National Broadband Plan at 111 (Recommendation 6.2).

[165] *Local Competition Order*, 11 FCC Rcd at 16083, para. 1182.

[166] *Id*.

[167] *Id*.

57. On reconsideration, the Commission reaffirmed this approach.[168] Because it recognized "that utilities' requirements with respect to qualifications and training of individuals working in proximity to utility facilities flow from such codes and requirements as the NESC and OSHA . . . [but that some] utilities have training programs and qualifications that are more strict than the NESC or OSHA would require," the Commission declined to "adopt rules with respect to minimum skills and performance requirements for technicians or that parties provide minimum insurance for risks."[169]

b. Basic Right to Use Contractors

58. We note that although the *Local Competition Order* established a general principle that attachers may rely upon independent contractors, that order did not differentiate between two different types of work: (a) surveys and make-ready; and (b) post-make-ready attachment of lines. As a result, there have been ongoing disagreements regarding the ability of attachers to use contractors to perform survey and make-ready work under existing law.[170] As discussed below, addressing these issues in greater detail here we propose to clarify and revise this approach in several respects in the context of surveys and make-ready to reflect utilities' concerns regarding safety, reliability, and sound engineering. We also find differing approaches warranted for incumbent LEC pole owners as compared to other pole owners.

59. In particular, with respect to surveys and communications make-ready work, we propose that: attachers may use contractors to perform surveys and make-ready work if a utility has failed to perform its obligations within the timeline,[171] or as otherwise agreed to by the utility.[172] As discussed above, we propose a pole access timeline based in significant part on the approach taken in New York. Within that regulatory framework, the New York Commission gives utilities the option of using their own workers to do the requested work, or to hire outside contractors themselves, or to allow attachers to hire approved outside contractors.[173] Under our proposed approach, utilities likewise would be entitled to rely

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[168] *Local Competition Reconsideration Order*, 14 FCC Rcd at 18079, para. 86.

[169] *Id*. at 18079, para. 87.

[170] *Compare, e.g.*, EEI/UTC Apr. 16, 2009 *Ex Parte* Letter at 11 (Stating that "[e]lectric utilities generally do not allow attaching entities to perform their own make-ready"); EEI/UTC Comments at 87 ("Requiring utilities to allow third-party surveys and make-ready work would go far beyond current Commission rules requiring utilities to allow qualified third party workers to make attachments. Such a requirement would inappropriately allow contractors greater discretion than is currently given to third-party workers making attachments and could adversely affect critical infrastructure.") *with* PacifiCorp et al. Comments at 30 (arguing that the Commission should not require use of third-party contractors for field surveys and electric make-ready, but stating that "[t]he FCC has already determined that qualified third-party contractors should be permitted to conduct make-ready associated with communications facilities.") *with* Fibertech/KDL Comments at 25 (arguing that the Commission should require "[p]ole and conduit owners . . . to allow competitors to hire utility-approved contractors to perform field surveys, make-ready determinations, and make-ready work if the owner cannot or will not meet the relevant legal deadlines" which "is consistent with and codifies existing Commission policy").

[171] *See supra* Section IV.B.1.c.

[172] For example, while the Commission has not mandated the use of multi-party contractors for make-ready work, it can be an efficient means to accomplish make-ready work, and parties are encouraged to consider that option. *See, e.g.*, *Petition of Cavalier Telephone, LLC Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc. and for Arbitration*, WC Docket No. 02-359, Memorandum Opinion and Order, 18 FCC Rcd 25887, 25963-65, paras. 140-43 (Wir. Comp. Bur. 2003).

[173] *See* New York Order at 3 "[I]t is reasonable to require the utilities either to have an adequate number of their own workers available to do the requested work, to hire outside contractors themselves to do the work, or to allow (continued….)

on their own personnel unless they are unable to complete work within the timeline. If the utility decides to deploy its workforce on other projects or otherwise is unable to meet a deadline, the prospective attacher would be free to use contractors that are approved and certified by the utility. We seek comment on this general approach, including the relative benefits of preserving greater control for utilities as compared to potential time- or cost-savings that attachers might obtain if they have appropriate contractors available and ready to do make-ready work.

60. With respect to actual attachment of facilities to poles, we propose to retain our existing rules. The make-ready process is designed to address the utilities' safety, reliability and engineering concerns prior to a new attachment. So when that process is complete and facilities are ready to be attached, the utility's concerns are less pressing, and an attacher's interest in rolling out properly permitted facilities is proportionately larger. Therefore, for the post-make-ready attachment of facilities, we retain the existing standard of "same qualifications, in terms of training, as the utilities' own workers," and continue to deny utilities the right to predesignate or co-direct an attacher's chosen contractor.[174] We seek comment on this proposal, as well as other alternatives.

c. Approval and certification of contract workers

61. With respect to electric utilities and other non-incumbent LEC pole owners, we propose that: to perform surveys or make-ready work attachers may use contractors that a utility has approved and certified for purposes of performing such work. This is consistent with the approach of the New York Commission—cited approvingly by some attachers—which entitles applicants for attachment to hire contractors from a utility-approved list if the utility cannot or will not meet survey and make-ready deadlines.[175] A number of utilities express concern that the safety and reliability of their poles may be jeopardized by independent contractors.[176] Crucial judgments about safety, capacity, and engineering are made during surveys and make-ready, and we find the utilities' concerns reasonable.[177] We think that permitting such utilities to decide which contractors it will approve and certify for surveys and make-ready addresses the need that utilities maintain control over safety and engineering standards, although we seek comment on alternative approaches, as well.

62. Although we propose to allow electric utilities and other non-incumbent LEC pole owners to pre-approve the contractors they will permit to perform surveys and make-ready, we do not think their discretion should be unbounded, and we propose the following requirements. First, we

(Continued from previous page)
Attachers to hire approved outside contractors." *See also* Fibertech Petition at 19 (endorsing New York's requirement).

[174] *See Local Competition Order*, 11 FCC Rcd at 16083, para. 1182 (holding that properly trained persons not hired or pre-designated by the utility may work in proximity of the utilities' lines); *Local Competition Reconsideration Order*, 14 FCC Rcd at 18079, para. 86-87 (reiterating that utilities must permit use of contract workers with same qualifications, in terms of training, as the utilities' own workers to work in proximity of electric lines).

[175] Fibertech Petition at 19-20 (citing New York Order at 3).

[176] *See, e.g.*, PacifiCorp et al. Comments at 31 (maintaining that attachers are highly motivated to install facilities as quickly as possible to commence service and put speed before safety); Coalition of Concerned Utilities May 1, 2009 *Ex Parte* Letter at 10 (contending attachers are motivated by speed and not safety).

[177] One pole owner, Qwest, agrees that existing law requires utilities to permit prospective attachers to use contractors to complete field surveys and make-ready work, and states that it permits attachers to hire contractors that have demonstrated the requisite qualifications to perform both field surveys and make-ready. Qwest Comments, RM-11303, at 5-6 (filed Jan. 30, 2006). Qwest's view is reasonable, but the *Local Competition Order* standard—requiring utilities to permit the use of contractors with the same qualifications, in terms of training, as the utility's own workers—is open to interpretation, and leaves important questions unaddressed.

propose to require such utilities to post or otherwise share with attachers a list of approved- and certified contractors, including any contractors that the utility itself uses. Second, we propose to require each such utility to post or otherwise share with attachers the standards it uses to evaluate contractors for approval and certification and require the nondiscriminatory application of those standards. Under our proposal, these utilities may design their requirements as they see fit, by, for example, setting training standards, approving training manuals, or otherwise clarifying their requirements.

63. We believe that these requirements are minimally burdensome and are sufficient to prevent a utility from artificially limiting the list of approved contractors. We are unpersuaded by contentions from certain utilities that our decisions on outside contractors will lead to resource diversion of non-employee "resources," undercutting their ability to deliver traditional services.[178] We emphasize that nothing in this proposal affects a utility's control of its employees. We are aware of the need to balance the work of infrastructure personnel, but we are also mindful that section 224 imposes obligations on utilities that may require accommodations and adjustments. We seek further comment on the staffing issues, especially regarding the utilities' rights to the time and attention of contractors. We invite comment concerning whether the proposed requirements are necessary, appropriate, and sufficient for their purpose.

64. We seek comment on this proposal, including whether it strikes the right balance of rights and burdens of attachers and utilities, and any implementation issues the Commission should address. For example, if no list is provided, or if one is not available when the application is filed, should the existing "same qualifications" standard apply by default? We also seek comment on whether any additional criteria are warranted. For example, should this list contain a minimum number of contractors to ensure ready availability of contractors if make-ready work is needed? Should the list automatically include any contractors previously used by the utility for its own purposes? Should there be a presumption that contractors that are approved and certified by a utility (or multiple utilities) other than the pole owner be acceptable for make-ready work?

65. We take a different approach with respect to incumbent LECs, and propose that: to perform surveys or make-ready work attachers may use any contractor that has the "same qualifications, in terms of training, as the utilities own workers."[179] As discussed above, in the *Local Competition Order*, the Commission reasoned that "[a]llowing a utility to dictate that only specific employees or contractors be used would impede the access that Congress sought to bestow on telecommunications providers and cable operators . . . ."[180] We view these risks as heightened in the context of incumbent LEC utility poles, where the new attacher typically will be a competitor of the incumbent LEC. Thus, the balancing of safety concerns and protection for attachers differs from the context of electric utility-owned poles, and leads us to propose an approach that grants greater flexibility to attachers. We seek comment on this approach, however, including whether the same approach should be used for all types of pole owners.

[178] *See supra* para. 30. *See*, *e.g.*, Florida IOUs Comments at 21.

[179] *See Local Competition Order*, 11 FCC Rcd at 16083, para. 1182 (holding that properly trained persons not hired or pre-designated by the utility may work in proximity of the utilities' lines); *Local Competition Reconsideration Order*, 14 FCC Rcd at 18079, para. 86-87 (reiterating that utilities must permit use of contract works with same qualifications, in terms of training, as the utilities own workers to work in proximity of electric lines).

[180] *Id*.

d. Direction and Supervision of Outside Contractors

66. We propose that, for surveys and make-ready work, utilities and prospective attachers may jointly direct and supervise contractors.[181] As with approval and certification of contract workers, we propose a differing approach for incumbent LEC pole owners and other pole owners. And in the context of actual attachment of facilities to poles, we do not propose any affirmative right for utilities to jointly direct and supervise contractors.

67. For electric utilities and other non-incumbent LEC pole owners, we propose that: attachers performing surveys and make-ready work using contractors shall invite representatives of the utility to accompany the contract workers, and should mutually agree regarding the amount of notice to the utility. We further propose that, whenever possible, both parties' engineers should seek to find mutually satisfactory solutions to conflicting opinions, but when differences are irreconcilable, the pole owners' representative may exercise final authority to make all judgments that relate directly to insufficient capacity or safety, reliability, and sound engineering, subject to any otherwise-applicable dispute resolution process.[182] We find persuasive two arguments that electric utilities advance: first, that section 224 entrusts them with the responsible management of facilities that are both essential and potentially hazardous;[183] and second, that communications attachers wish to roll out service as quickly as possible, and consequently do not have the same incentives to maintain the safety and reliability of the infrastructure as utilities themselves would.[184] We see no conflict between the use of contractors as outlined above and the electric utilities' safety and engineering concerns.[185] Nor do we see a conflict with the attachers' desire to use independent contractors. Use of contractors is an appropriate tool to facilitate timely deployment of facilities only when it does not circumvent or diminish the electric utilities' vital role in maintaining the safety, reliability, and sound engineering of the pole infrastructure.

68. In the case of incumbent LEC-owned poles, we propose that: attachers performing surveys and make-ready work using contractors shall invite a representative of the incumbent LEC to accompany and observe the contractor, but the incumbent LEC shall not have final decision-making

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[181] The National Broadband Plan recommends that contractors should be able to "perform all engineering assessments and communications make-ready work, as well as independent surveys, *under the joint direction and supervision of the pole owner and the new attacher*." National Broadband Plan at 129 (emphasis added).

[182] *See infra* Section IV.C discussing recommended changes to the Commission's pole attachment enforcement process.

[183] *See, e.g.*, Alabama Power et al. Comments at 32 (maintaining that utilities seek to retain their statutory right to deny access for reasons of safety, reliability, insufficient capacity, and engineering concerns); Ameren and Virginia Electric Comments at 12 (stating that The Pole Attachments Act provides to pole owners the right to deny access to attaching entities for reasons of safety, reliability and engineering and citing 47 U.S.C. § 224(f)(2)).

[184] *See, e.g.*, EEI/UTC Comments at 38 (maintaining that cable systems and telecommunications carriers care more about quick deployment of attachments than electric safety and reliability); PacifiCorp et al. Comments at 30 (stating that the incentive of an attacher is to have its equipment installed as cheaply and as quickly as possible, which is often incompatible with prudent electric engineering practice).

[185] *See, e.g.*, Alabama Power et al. Comments at 32 (maintaining that utilities seek to retain their statutory right to deny access for reasons of safety, reliability, insufficient capacity, and engineering concerns); Ameren and Virginia Electric Comments at 12 (observing that section 224 provides pole owners the right to deny access to attaching entities for reasons of safety, reliability and engineering and citing 47 U.S.C. § 224(f)(2)); EEI/UTC Comments at 38 (maintaining that cable systems and telecommunications carriers care more about quick deployment of attachments than electric safety and reliability); PacifiCorp et al. Comments at 30 (stating that the incentive of an attacher is to have its equipment installed as cheaply and as quickly as possible, which is often incompatible with prudent electric engineering practice).

power. In the majority of cases, electric power companies and other non-incumbent LECs are typically disinterested parties with only the best interest of the infrastructure at heart; incumbent LECs may make no such claim. In contrast to the vast majority of electric utilities or similar pole owners, as discussed above, incumbent LECs are usually in direct competition with at least one of the new attacher's services, and the incumbent LEC may have strong incentives to frustrate and delay attachment. To allow an incumbent LEC a veto over contractors would provide them with an undue ability to act on that incentive. We believe that our proposal faithfully implements the intent of the statute by balancing the statutory rights of attachment with the statutory obligation to establish and implement just and reasonable terms and conditions of attachment.[186] We also seek comment on alternatives, however, including whether incumbent LECs have other legal responsibilities or obligations under joint use agreements that could counsel in favor of a different approach.

e. Working Among the Electrical Lines

69. We further propose that all utilities may deny access by contractors to work among the electric lines, except where the contractor has special communications-equipment related training or skills that the utility cannot duplicate.[187] In so doing, we clarify that "proximity of electric lines"[188] extends into the safety space between the communications and electrical wires but, not among the lines themselves. The Commission concluded in the *Local Competition Order* that "[a] utility may require that individuals who will work in the proximity of electric lines have the same qualifications, in terms of training, as the utility's own workers, but the party seeking access will be able to use any individual workers who meet these criteria."[189] Safety, reliability, and engineering concerns are strongest regarding work among energized power lines,[190] and the National Broadband Plan calls for the use of independent contractors to perform "engineering assessments and *communications* make-ready work."[191] In any event, the word "proximity" is ambiguous, and could mean either "up to the electric lines" or "among the electric lines." We think the former is the more reasonable choice and we believe it is appropriate to remove this ambiguity from our rules. Thus, we propose that, generally, attachers and their contractors may be limited to the communications space and safety space below the electric space on a pole. However, we

[186] 47 U.S.C. §§ 224(b)(1) and (2), (f)(2). We note that section 224(f)(2) gives electric utilities, but not incumbent LECs, specific additional bases to object to an attachment. 47 U.S.C. § 224(f)(2).

[187] Generally, attachments on a pole, from the bottom-up, include traditional communications attachments (including space for attachments by incumbent LECs, cable service providers, and other telecommunications service providers), followed by several feet of safety space separating the communications space from the upper space on a pole, traditionally used for the attachment of energized electrical lines. We do not imply in this discussion that this space is reserved for the use of electric utilities. *See, e.g.*, *Wireless Telecommunications Bureau Reminds Utility Pole Owners of Their Obligations to Provide Wireless Telecommunications Providers with Access to Utility Poles at Reasonable Rates*, 19 FCC Rcd 24930 (Wireless Tel. Bur. 2004); Letter from Jack Richards, Counsel for Allegheny Power et al., to Kevin Martin, Chairman, FCC, WC Docket No. 07-245 (filed June 3, 2008), Attach. 2 (visually depicting the spaces typically allocated on a utility pole).

[188] *See Local Competition Order*, 11 FCC Rcd at 16083, para. 1182 (holding that properly trained persons not hired or pre-designated by the utility may work in proximity of the utilities' lines); *Local Competition Reconsideration Order*, 14 FCC Rcd at 18079, para. 86-87 (reiterating that utilities must permit use of contract workers with same qualifications, in terms of training, as the utilities' own workers to work in proximity of electric lines).

[189] *See Local Competition Reconsideration Order*, 14 FCC Rcd at 18079, para. 86-87.

[190] *See* Coalition of Concerned Utilities May 1, 2009 *Ex Parte* Letter at 9 (arguing that the *Local Competition Order* enables attachers to hire contractors to move communications facilities that are in proximity to electric lines, not to move the energized electric lines themselves, which must be controlled by electric utility pole owners).

[191] National Broadband Plan at 111 (emphasis added).

propose that utilities must permit contract personnel with specialized communications-equipment training or skills that the utility cannot duplicate to work among the power lines, such as work with wireless antennae equipment.[192] Because of the heightened safety considerations, any such work shall be performed in concert with the utility's workforce and when the utility deems it safe.[193] We seek comment on this proposal.

3. Other Options to Expedite Pole Access

70. *Payment for Make-ready Work*. In addition to adopting a formal pole access timeline, we seek to correctly align the incentives to perform make-ready work on schedule. Accordingly, we propose to adopt the Utah rule that applicants pay for make-ready work in stages, and may withhold a portion of the payment until the work is complete. In Utah, applicants trigger initiation of performance by paying one half the estimated cost; pay one quarter of the estimated cost midway through performance; and pay the remainder upon completion.[194] We seek comment on this proposal or alternatives, including what schedule of payment is normal in comparable circumstances in other commercial contexts. Alternatively, should we adopt a general rule permitting payment for make-ready work in stages, and leave the details of the specific payment schedule to negotiation?

71. *Schedule of Charges*. We propose that utilities shall make available to attaching entities a schedule of common make-ready charges. The National Broadband Plan recommended that the Commission "[e]stablish a schedule of charges for the most common categories of work (such as engineering assessments and pole construction)" as an additional way to lower the cost and increase the speed of the pole attachment process.[195] Such a schedule could provide transparency to attachers seeking to deploy their networks and could fortify the "just and reasonable" access standard for pole attachments.[196] We seek comment generally on the benefits and any limitations associated with requiring utilities to prepare such a schedule. Further, we ask whether and how schedules of common make-ready charges are used and implemented by utilities today. We also seek comment on any comparable state requirements. For example, we note that the New York Commission's rules require that make-ready charges be in each pole owner's operating agreement, be posted on its website, with supporting documentation available to attachers on request, and can only be changed annually with notice.[197] We also ask if there are other mechanisms currently in use, such as standardized contract terms, that provide the necessary information and transparency to the make-ready process, without additional government mandate. Finally, we seek comment on whether particular make-ready jobs and charges are the most common, and thus would most easily be applied to a generalized schedule of charges.

72. *Administering Pole Attachments*. We seek comment on ways to simplify the relationship between prospective attachers and utilities when there is joint ownership. The record suggests that, when a pole is jointly owned, a prospective attacher may sometimes be required to obtain permission to attach

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[192] We note that some utilities "do not dispute that 'owner-approved contractors' are capable of performing this work safely, including make-ready work in the power space." Florida Investor Owned Utility Comments at 21.

[193] *See* EEI/UTC Comments at 31 (stating that electric utility workers generally are not trained to work with wireless equipment).

[194] Utah Rule R746-345-3 (c)(7).

[195] National Broadband Plan at 111.

[196] Section 224(b)(1) of the Act 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." 47 U.S.C. § 224(b)(1).

[197] New York Order, App. A at 4-5.

from both owners.[198] Consolidating administrative authority in one managing utility would simplify a prospective attacher's request for access, and clarify which utility will interact with the requesting entity and existing attachers during the make-ready process. We therefore propose that, when more than one utility owns a pole, the owners must determine which of them is the managing utility for any jointly-owned pole. We further propose that requesting entities need only deal with the managing utility, and not both utilities. We also propose that both utilities should make publicly available the identity of the managing utility for any given pole, and we seek comments on these proposals. We invite comment on whether the proposed regulations are sufficient to clarify joint owners' rights and responsibilities with regard to the right of access. In addition, we seek comment on joint use agreements, and whether they may inhibit the managing owner from administering the entire pole. If the joint user is an incumbent LEC, how should we address concerns that it might not be inclined to devote its resources to providing access for a competitor? Do joint use agreements sometimes give that user a degree of "control" over access to the pole to the point that the user may have a specific duty to provide access under section 224?[199]

73. We also seek comment regarding the managing utility's responsibility to administer the pole during the make-ready process.[200] In particular, under section 224, an existing attacher may not be required to bear any of the costs of rearranging its attachment to make room for a new attacher.[201] As a practical matter, only the utility has privity with both the requesting entity and the existing attachers, and it appears reasonable for the utility to manage the transfer of funds. We are reluctant, however, to entrust this responsibility to the managing utility without standards or guidance. Therefore, we propose to require the utility to collect from existing attachers statements of any costs that are attributable to rearrangement; to bill the new attacher for these costs, plus any expenses the utility incurs in its role as clearinghouse, and to disburse compensatory payment to the existing attachers. We seek comment on this proposal, and any alternatives for managing this process. We also ask whether utilities require any further clarification of their role in managing the pole during the make-ready process. For example, should the managing utility schedule the sequence for attaching entities to move their facilities during make-ready?

74. *Attachment Techniques*. In the Order, we clarified that the Act requires a utility to allow cable operators and telecommunications carriers to use the same pole attachment techniques that the utility itself uses or allows.[202] Some commenters state, however, that even if a utility has employed such practices in the past, it should be able to prohibit boxing and bracketing for both itself and other attachers going forward.[203] If a utility changes its practices over time to exclude attachment techniques such as

[198] *See, e.g.*, Letter from Brita D. Standberg, Counsel for Kentucky Data Link, Inc., to Marlene Dortch, Secretary, FCC, WC Docket No. 07-245, GN Docket Nos. 09-29, 09-51 (filed Apr. 23, 2010) at 2 (describing the relationship between a municipality and a utility with regard to pole ownership and control).

[199] 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).

[200] Under section 224(b)(1) and(2), the Commission has the authority to adopt rules to ensure that terms and conditions of attachment are just and reasonable, which terms and conditions include the specific right of access in section 224(f). Contrary to the claims of some commenters, we believe this provides ample authority for the Commission's proposed rules. *See* AEP May 5, 2010 *Ex Parte* Letter at 2 (arguing that the Commission lacks authority to require electric utilities to manage the transfer of communications facilities or otherwise function as the "traffic cop" in cases where communications attachers fail to make room for new facilities on utility poles).

[201] 47 U.S.C. § 224(i).

[202] *See supra* Section III.A.

[203] *See* Coalition of Concerned Utilities May 1, 2009 *Ex Parte* Letter at 20.

boxing, to what extent would the nondiscrimination standard in the statute automatically address this, or are rules necessary? We also seek comment on how standards should apply when a pole is jointly used or owned, and on whether utilities' decisions regarding the use of boxing and bracketing should be made publicly available.

4. Improving the Availability of Data

75. We seek comment on how the Commission can improve the collection and availability of information regarding the location and availability of poles, ducts, conduits, and rights-of-way.[204] As the National Broadband Plan points out, there are hundreds of entities that own and use this infrastructure, and accurate information about it is important for the efficient and timely deployment of advanced and competitive communications networks.[205] Initially, we ask what data would be beneficial to maintain, such as the ownership of, location of, and attachments on a pole. Should the Commission collect these data itself, or might industry, including third-party entities, be better suited for the task? If the latter, what is the appropriate role for the Commission regarding the establishment of common standards and oversight? We also ask to what extent this information, if collected and maintained by separate entities, could or should be aggregated into a national database.

76. To gain perspective on the scope of this task, we seek comment on the number of poles for which data would need to be gathered, how long it would take to inventory them, and the cost of such an inventory. We also ask what existing methods utilities currently use, such as the National Joint Utilities Notification System (NJUNS) or Alden Systems' Joint Use services.[206] How can we ensure participation by all relevant parties, including timely updates of information? For example, is it reasonable for a utility to require all attachers to actively use or populate a system it uses, such as NJUNS, to inventory pole attachments, perhaps as a term of the master agreement? How can we ensure that the costs are shared equitably by pole owners and other users of the data? We also seek comment on the challenges to creating and maintaining such a database, including security issues, access for prospective attachers, and the potential burden to small utilities, as well as on any additional benefits such data would have for maintaining safe and reliable infrastructure.[207]

77. We also expect that the timeline and related rules proposed above will help expedite pole access, and we propose that the Commission monitor whether those rules, if adopted, achieve the intended results. We seek comment on the most appropriate method for the Commission to use in this regard. Would the other possible improvements to the collection and availability discussed above provide a source of such information? If not, should the Commission otherwise collect such information, either formally, or through a periodic Public Notice or Notice of Inquiry? Similarly, is there other information that the Commission should collect to monitor the effectiveness of any other pole access, enforcement, or pricing rules it might adopt?

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[204] *See* National Broadband Plan at 112.

[205] *Id*.

[206] *See* National Joint Utilities Notification System—NJUNS, Inc., http://www.njuns.com/NJUNS_Home/default.htm (last visited Apr. 1, 2010); Letter from John T. Sciarabba, Alden Systems, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, GN Docket No. 09-51 (filed Apr. 26, 2010).

[207] At least one commenter argues that maps of utilities' networks should not be publicly disclosed because they may contain "Critical Infrastructure Information" under the USA Patriot Act. *See* EEI/UTC Apr. 16, 2009 *Ex Parte* Letter at 11.

C. Improving the Enforcement Process

1. Revising Pole Attachment Dispute Resolution Procedures

78. In response to the *Pole Attachment Notice*, we received several comments suggesting that the Commission modify its procedures for resolving pole attachment complaints.[208] In addition, the National Broadband Plan included recommendations that the Commission implement institutional changes, such as the creation of specialized forums and processes for attachment disputes, and adopt process changes to expedite dispute resolution.[209]

79. We seek comment on whether the Commission should modify its existing procedural rules governing pole attachment complaints.[210] Should the Commission adopt additional rules or procedures to address specific issues that arise with wireline or wireless attachments? Do any of the Commission's other procedural rules, such as the rules governing formal complaints under section 208 of the Act,[211] or the rules governing complaints related to cable service,[212] provide a suitable model in developing new procedural rules for pole attachment complaints? What other issues concerning dispute resolution processes should the Commission consider?

80. If the Commission were to establish specialized forums to handle pole attachment disputes, what form and structure should these forums take? Under what legal authority could the Commission authorize the formation of such forums? How would the forums be formed, managed, and funded? How should forum participants be selected? What specific expertise should staff of these forums have? What role should the Commission or Commission staff play with regard to the forums? What specific role should such forums play in the resolution of pole attachment disputes? Should the forums engage in mediation or other alternative dispute resolution mechanisms? Should the use of the forums for dispute resolution be mandatory or voluntary? Should these specialized forums issue decisions in specific cases? How could the decisions of the forums be challenged, and pursuant to what standard? Should such decisions be appealable to the Commission? What kinds of rules or procedures should govern the work of the specialized forums? How would the forum participants avoid conflicts of interest when engaging in dispute resolution processes with industry participants? Do the Transition Administrator procedures established in the *800 MHz Report and Order* provide a suitable model in developing these forums?[213] We invite comment.

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[208] *See, e.g.*, PCIA Comments at 6 (suggesting use of an "expedited complaint proceeding" where a utility fails to complete make-ready work and issue pole attachment permits within specified time periods); Knology Comments at 20 (suggesting that the Commission modify the pole attachment rule governing Petitions for Temporary Stay so that they may be used in make-ready situations); T-Mobile Comments at 8-9 (proposing accelerated treatment of pole attachment disputes).

[209] National Broadband Plan at 112.

[210] *See* 47 C.F.R. §§ 1.1401-1.418.

[211] 47 C.F.R. §§ 1.720-1.736.

[212] 47 C.F.R. § 76.7; *see also* 47 C.F.R. § 76.1003 (program access complaints).

[213] *Improving Public Safety Communications in the 800 MHz Band*, WT Docket No. 02-55, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order, 19 FCC Rcd 14969, 14986, para. 27 (2004) (*800 MHz Report and Order*) (creating an independent third party responsible for mediating certain spectrum reconfiguration disputes and, in the event mediation fails, compiling a record and transmitting it to the Commission for de novo review).

2. Efficient Informal Dispute Resolution Process

81. In the *Pole Attachment Notice*, we noted that the Commission has encouraged parties to participate in staff-supervised, informal dispute resolution processes and that these processes have been successful in resolving pole attachment matters.[214] If parties are able informally to agree to a resolution of their problems, they can avoid the time and expense attendant to formal litigation. Some attachment disputes may be more quickly or cost-effectively resolved by the companies involved themselves or through other local dispute resolution processes outside the Commission's auspices.[215] We seek comment on whether the Commission should attempt to encourage this type of local dispute resolution with a set of "best practices," or in other ways.[216] If the Commission were to develop a set of best practices, what would the likely impact be on the process compared with how disputes are resolved today? Should the best practices or local processes apply to all attachment disputes, safety and engineering issues only, or have some other scope? The New York Commission, for instance, requires some resolution at the company level before a formal complaint can be filed.[217] Should we encourage similar efforts, suggest that parties seek mediation or arbitration before filing a complaint, or are there other processes that parties have found helpful and can recommend? Are there other ways that the Commission should encourage this type of dispute resolution?

82. The *Pole Attachment Notice* questioned whether rule 1.1404(m)[218] has had the unintended consequence of discouraging informal resolution of disputes. For that reason, we sought comment on whether the rule should be amended or eliminated.[219] We received no substantive comment concerning rule 1.1404(m),[220] which provides that potential attachers who are denied access to a pole, duct, or conduit must file a complaint "within 30 days of such denial."[221] Our experience handling pole attachment complaints, however, leads us to believe that the rule hinders informal resolution of disputes.

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[214] *See Pole Attachment Notice* at 20210, para. 37 n.110 (citing *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*)).

[215] *See, e.g.*, Crown Castle Comments at 7-8 (filed Mar. 11, 2008) ("A greater use of mediation should provide attachers the ability to break through the utilities' "benign indifference" and come to some agreement without having to employ the Commission's lengthy and expensive formal complaint process."); National Broadband Plan at 112 ("The FCC also could . . . require utilities to post standards and adopt procedures for resolving safety and engineering disagreements and encourage appropriate state processes for resolving such disputes.")

[216] The Commission has always encouraged negotiation in pole attachment disputes, and its rules require that complainants include a brief summary of all steps taken to resolve problems prior to the filing of a complaint. *See* 47 C.F.R. § 1.1404 (k).

[217] New York Public Service Commission, Case No. 03-M-0432, Order, at 9 (rel. Aug. 6, 2004). Disputes must be "discussed at the intermediate level in a company" for ten days and then considered by a company "Ombudsman" for twelve days before a complaint can be filed. *Id*. at 27.

[218] 47 C.F.R. § 1.1404(m).

[219] *Pole Attachment Notice* at 20210, para. 37 n.110. We also sought comment on rule 1.1410(c), 47 C.F.R. § 1.1410(c), discussed below in "Remedies."

[220] *But see* Comcast Comments at 46 (stating, without amplification, that a change to rule 1.1404(m) would be unwarranted because the Commission's rules are "flexible enough to encourage pre-complaint mediation, while ensuring that attachers receive the relief to which they are entitled").

[221] 47 C.F.R. § 1.1404(m).

Specifically, the existence of the rule deters attachers from pursuing pre-complaint mediation and has prompted the premature filing of complaints. Indeed, several complainants have indicated to Commission staff that, although they would be interested in mediation, they felt they had no choice but to file a complaint first, because of rule 1.1404(m). Thus, we believe the rule unnecessarily pushes some parties into formal litigation at a stage when informal resolution still is possible. Accordingly, we propose that the 30-day requirement in rule 1.1404(m) be eliminated.[222] We seek comment on this proposal.

3. Remedies

83. Under section 224 of the Act, the Commission is charged with a duty to "regulate the rates, terms, and conditions for pole attachments" and to "adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions."[223] The Commission has broad authority to "enforc[e] any determinations resulting from complaint procedures" and to "take such action as it deems appropriate and necessary, including issuing cease and desist orders . . . ."[224] In furtherance of these statutory duties, the Commission has adopted procedural rules governing complaints alleging both unreasonable rates, terms, and conditions for pole attachment,[225] and the unlawful denial of pole access.[226]

84. Section 1.1410 of the pole attachment rules lists the remedies available in a complaint proceeding where the Commission determines that a challenged rate, term, or condition is not just and reasonable.[227] In such cases, the Commission may terminate the unjust and unreasonable rate, term, or condition,[228] or substitute a just and reasonable rate, term, or condition established by the Commission.[229] Moreover, rule 1.1410(c) also permits a monetary award in the form of a "refund, or payment," which will "normally be the difference between the amount paid under the unjust and/or unreasonable rate, term, or condition and the amount that would have been paid under the rate, term, or condition established by the Commission from the date that the complaint, as acceptable, was filed, plus interest."[230] Although the Commission occasionally has departed from the notion that the filing of a pole attachment complaint marks the beginning of a refund period,[231] it usually has used the complaint filing date as the starting point for determining refunds.

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[222] *See* Appendix B at para. 4 (proposed amendment to rule 1.1404(m)).

[223] 47 U.S.C. § 224(b)(1); *see also id.* § 224(e)(1) (directing FCC to establish regulations to govern when "parties fail to resolve a dispute over such charges").

[224] 47 U.S.C. § 224(b)(1). *See, e.g.*, *Knology, Inc. v. Georgia Power Co.*, Memorandum Opinion and Order, 18 FCC Rcd 24615, 24639, para. 57 (2003) (*Knology v. Georgia Power*) (noting that the Commission has "broad authority to fashion remedies in pole attachment complaint proceedings").

[225] *See, e.g.*, 47 C.F.R. §§ 1.1404(f), (g), (h).

[226] *See, e.g.*, 47 C.F.R. § 1.1404(m).

[227] 47 C.F.R. § 1.1410.

[228] 47 C.F.R. § 1.1410(a).

[229] 47 C.F.R. § 1.1410(b).

[230] 47 C.F.R. § 1.1410(c).

[231] *See Knology v. Georgia Power*, 18 FCC Rcd at 24639, para. 57 (holding that Georgia Power reasonably should have concluded that Knology objected to a lack of billing information and the necessity of certain make-ready work in a letter sent approximately five months prior to the filing of the complaint, and thus ordering refunds from the date of the letter); *Cable Texas, Inc. v. Entergy Serv., Inc.*, File No. PA 97-006, Order, 14 FCC Rcd 6647, 6653-54 (Cab. Servs. Bur. 1999) (ordering refund of the unreasonable portion of a fee for a pole survey that Cable Texas paid, under protest, prior to the filing of its complaint with the Commission).

85. The Commission's rules do not expressly set forth the remedies available where the Commission determines that a utility has wrongfully denied or delayed access to poles in violation of section 224(f) of the Act.[232] In addition, the rules do not provide for an award of compensatory damages in cases where either an unlawful denial or delay of access is established, or a rate, term, or condition is found to be unjust or unreasonable. We propose that section 1.1410 of the Commission's pole attachment complaint rules be amended to enumerate the remedies available to an attacher that proves a utility has unlawfully delayed or denied access to its poles.[233] We propose that the rule specify that one remedy available for an unlawful denial or delay of access is a Commission order directing that access be granted within a specified time frame, and/or under specific rates, terms, and conditions. Because the Commission already has authority to issue such orders, and has done so in the past, this rule change would simply codify existing precedent.[234]

86. We further propose amending section 1.1410 to specify that compensatory damages may be awarded where an unlawful denial or delay of access is established, or a rate, term, or condition is found to be unjust or unreasonable. Because the current rule provides no monetary remedy for a delay or denial of access, utilities have little disincentive to refrain from conduct that obstructs or delays access. Under the current rule, the only consequence a utility engaging in such conduct is likely to face in a complaint proceeding is a Commission order requiring the utility to provide the access it was obligated to grant in the first place. Currently, a utility that competes with the attacher may calculate that the cost of defending an access complaint before the Commission, even if it receives an adverse ruling, may be justified by the advantage the pole owner has gained by delaying a rival's build-out plans. Allowing an award of compensatory damages for unlawful delays or denials of access would provide an important disincentive to pole owners to obstruct access. It would also give the Commission the ability to ensure that the attacher is "made whole" for the delay it has suffered.

87. We also propose that section1.1410 be amended to provide for an award of compensatory damages where a rate, term, or condition is found to be unjust or unreasonable. Under the current rule, the only monetary remedy specified in such cases is a refund. Although the refund remedy may adequately compensate an attacher who has been charged excessive rental rates or make-ready fees, it does not compensate the attacher for unreasonable terms and conditions of attachment that do not involve payments to the pole owner. For example, a pole owner that unlawfully bars an attacher from using the boxing technique on poles may increase the charges an attacher must pay third parties to attach its facilities to poles.[235] Just compensation in such a case would not involve a refund by the pole owner, but might require it to reimburse the attacher for costs the attacher would not have incurred but for the owner's unreasonable ban on boxing.

88. Finally, as noted above, rule 1.1410(c) also permits a monetary award in the form of a "refund, or payment," measured "from the date that the complaint, as acceptable, was filed, plus

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[232] Although the Commission's pole attachment complaint rules do not specify the remedies available for an unlawful delay or denial of access, section 1.1415 broadly provides that the Commission "may issue such other orders and so conduct its proceedings as will best conduce to the proper dispatch of business and the ends of justice." 47 C.F.R. § 1.1415. Further, section 1.1412 states that if a respondent to a pole attachment proceeding fails to obey a Commission order, the Commission may "order the respondent to show cause why it should not cease and desist from violating the Commission's order." 47 C.F.R. § 1.1412.

[233] *See* Appendix B at para. 6 (proposed amendment to rule 1.1410).

[234] *See, e.g.*, *Salsgiver Telecom, Inc. v. N. Pittsburgh Tel. Co.*, File No. EB-06-MD-00, Memorandum Opinion and Order, 22 FCC Rcd 9285, 9297-98, paras. 27-28 (Enf. Bur. 2007).

[235] *See infra* Section III.A.

interest."[236] The Commission adopted rule 1.1410(c) in 1978 to "avoid abuse and encourage early filing when rates are considered objectionable by the CATV operator."[237] But our experience in handling pole attachment complaints leads us to believe that rule 1.1410(c) fails to make injured attachers whole. Generally speaking, a plaintiff is entitled to recompense going back as far as the applicable statute of limitations allows. There does not appear to be a justification for treating pole attachment disputes differently. Moreover, we find that rule 1.1410(c) discourages private negotiations between parties about the reasonableness of terms and conditions of attachment and instead encourages an attacher first to file a complaint and then to negotiate with the utility.[238] For these reasons, we propose that rule 1.1410(c) be modified by deleting the phrase "from the date that the complaint, as acceptable, was filed."[239] Additionally, we propose that the phrase "consistent with the applicable statute of limitations" be added to emphasize that any relief sought is governed by the relevant limitations period.[240] We seek comment on these proposals.

4. Unauthorized Attachments

89. In the *Pole Attachment Notice*, the Commission sought comment on the prevalence of attachments installed on poles without a lawful agreement with the pole owner (so-called "unauthorized attachments").[241] In response, several utilities claim that a significant number of pole attachments on their poles are unauthorized and violate relevant safety codes. For example, Florida Power and Light reports finding 33,350 unauthorized attachments in an audit conducted in 2006.[242] EEI and UTC maintain that, for some utilities, unauthorized attachments meet or exceed 30 percent of attachments.[243] AEP submits the results of surveys conducted by five utilities indicating that unauthorized attachment rates in the double-digits are common.[244] In contrast, other utilities report percentages that are significantly lower. For instance, Progress Energy, Xcel Energy, and Wheeling Power report unauthorized attachment rates of 6.18 percent, 4.79 percent, and 2 percent, respectively.[245]

90. Attachers maintain that utilities' allegations of unauthorized attachments are "overblown."[246] Time Warner Cable, for instance, contends that such assertions often are based on poor recordkeeping (including incorrect system maps), changes in pole ownership (*e.g.*, a utility considers a once-authorized attachment on a pole to be unauthorized after ownership is transferred to the utility), use of novel and inappropriate definitions of attachment that deviate from the parties' past practices and

[236] 47 C.F.R. § 1.1410(c).

[237] *See Pole Attachments First Report and Order*, 68 FCC 2d 1585, para. 45.

[238] *See, e.g.*, Knology Comments at 9.

[239] Knology Comments at 9.

[240] *See* Appendix B at 6 (proposed amendment to rule 1.1410).

[241] *Pole Attachment Notice*, 22 FCC Rcd at 20211, para. 38.

[242] FPL et al. Comments at 11-12.

[243] EEI/UTC Comments at 34 (34% of attachments unauthorized by CenterPoint Energy; 30% of attachments unauthorized by PPL Electric Utilities).

[244] AEP et al. Comments at 9-18 (table 1.1 through table 1.6).

[245] AEP et al. Comments at 16, 18, 11.

[246] Time Warner Cable Reply Comments at 47.

industry standards, and utilities' offering of financial incentives to their contractors to find unauthorized attachments.[247] Other attachers are of a similar mind.[248]

91. Based on the current record, we are unable to gauge with certainty the extent of the problem of unauthorized attachments. Indeed, the data suggest that the number of unauthorized attachments can vary dramatically from one pole system to another. Nevertheless, we believe the dangers presented by unauthorized attachments transcend the theoretical. True unauthorized attachments can compromise safety because they bypass even the most routine safeguards, such as verifying that the new attachment will not interfere with existing facilities, that adequate clearances are maintained, that the pole can safely bear the additional load, and that the attachment meets the appropriate safety requirements of the utility and the NESC.[249] The question becomes, then, how best to address the problem of unauthorized attachments.

92. The Commission sought comment in the *Pole Attachment Notice* on whether existing enforcement mechanisms adequately address alleged unlawful practices by attachers and ensure the safety and reliability of critical electric infrastructure.[250] Under current precedent, unauthorized attachment fees imposed by utilities are not "*per se* unreasonable," and the "penalty may exceed the annual pole attachment rate."[251] A "reasonable penalty," however, cannot "exceed an amount approximately equal to the annual pole attachment fee for the number of years since the most recent inventory or five years, whichever is less, plus interest . . . ."[252]

93. Pole owners complain that this precedent results in penalties that are not steep enough to deter attachers from mounting facilities for which they have no permit or that fail to comply with relevant safety and engineering standards.[253] In one utility's words, the unauthorized attachment penalty approved by the Commission is "not a penalty at all in most cases,"[254] because the attacher ends up having to pay only what it would have owed had it followed appropriate permitting procedures in the first place. In

[247] Time Warner Cable Comments at 54; Time Warner Cable Reply Comments at 47-49.

[248] *See* Knology Comments at 18 (unauthorized status of attachments often results from poor recordkeeping or the utility's retroactive enforcement of a change in attachment policies); Verizon Reply Comments (unauthorized attachments result from utilities' changing out poles or adding attachments without notifying attachers and from inaccurate pole records); NCTA Reply Comments at 25 (stating that utilities' unauthorized attachment figures "must be viewed with a healthy dose of skepticism").

[249] *See, e.g.*, Coalition of Concerned Utilities Comments at 73-74.

[250] *Pole Attachment Notice*, 22 FCC Rcd at 20211, para. 38.

[251] *Cable Television Ass'n of Ga. v. Georgia Power Co.*, File No. PA 01-002, Order, 18 FCC Rcd 16333, 16343, para. 22 (Enf. Bur. 2003) (citing *Mile Hi Order,* 15 FCC Rcd at 11457, para. 10).

[252] *Mile Hi Order*, 15 FCC Rcd at 11458, para. 14.

[253] *See, e.g.*, FPL et al. Comments at 14 (the Commission's unauthorized attachment policy creates a disincentive for attachers to follow attachment procedures because of the time and money saved by violating the procedures); Oncor Comments at 17 ("When the violating attachers are finally caught, the Commission's policy puts the attachers in no worse a position than had they complied with the process in the first place."); Empire Comments at 3 (attachers have "made a calculated decision that the competitive advantage they gain is worth the risk of paying back rental charges and modest penalties at some time in the future, if at all"); NREC Reply Comments at 17 ("Allowing attachers to simply pay what they should have been paying all along is a perverse incentive to continue their repeated theft of space on utility poles"); FPL et al. Reply Comments at 6 (the Commission must "move away from the prevailing 'economic loss only' paradigm, which creates a disincentive to follow permitting procedures"); Oncor Reply Comments at 14 ("With no real penalty, attaching entities will continue their practices of 'rolling the dice.'").

[254] EEI/UTC Comments at 77.

contrast, some attachers insist that the current regime is sufficient,[255] while others assert that allowing the imposition of penalties would contravene principles of contract law.[256]

94. Although we make no specific findings today as to whether the Commission should allow stricter penalties for unauthorized attachments, it appears that penalties amounting to little more than back rent may not discourage non-compliance with authorization processes. In other words, competitive pressure to bring services to market may overwhelm the deterrent effect of modest penalties. And so we seek additional comment on practical and lawful means of increasing compliance through the use of more substantial penalties.

95. One potential alternative to the Commission's present penalty regime is a system akin to the one adopted by the Oregon Public Utilities Commission (Oregon Commission).[257] The Oregon Commission specifies penalties of $500 per pole, per year, for attachment of facilities without an agreement, and, for attachments without a permit, $100 per pole plus five times the current annual rental fee per pole.[258] The Oregon system further includes, among other things, a provision for attacher notification,[259] opportunity for an attacher to correct violations or submit a plan for correction,[260] and a mechanism for resolution of factual disputes.[261] The Oregon penalties have been tested and refined with assistance from the Oregon Joint Use Association.[262]

96. We seek comment on whether the system of penalties instituted by the Oregon Commission has been effective in reducing the incidence of unauthorized attachments in that state.[263] What are the benefits and shortcomings of the Oregon system? Should the Commission adopt the Oregon standards as presumptively reasonable penalties for unauthorized attachments? Would the Commission need to modify the Oregon standards before adopting them as national standards? If so, in what ways? Should there be a threshold number of unauthorized attachments necessary before penalties apply? Should exceptions be made for violations caused or contributed to by the pole owner (*e.g.*, a utility that assumes ownership of a pole formerly owned by another entity, creates a hazard by adding facilities, changes its safety standards, renegotiates an attachment agreement, or otherwise causes a formerly permitted and safe attachment to lose that status)?

97. How could the Oregon standards be enforced – through provisions in pole attachment agreements, through the complaint resolution mechanism in section 224 of the Act, or through both?

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[255] Verizon Reply Comments at 17-18.

[256] TWTC Reply Comments at 31 (the Commission's current treatment of unauthorized attachment penalties is consistent with "sound principles of contract law that prohibit the enforcement of unreasonable penalties for breach of contract" and with the Supreme Court's admonition that punitive damages should only be awarded if a defendant's culpability is "so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence") (citations omitted)).

[257] *See* Oregon Administrative Rules, Division 28, Pole and Conduit Attachments, 860-028-0130 – 0220; http://arcweb.sos.state.or.us/rules/OARS_800/OAR_860/860_028.html.

[258] Oregon Administrative Rules, Division 28, Pole and Conduit Attachments, 860-028-0130 and 860-028-0140.

[259] *See* Oregon Administrative Rules, Division 28, Pole and Conduit Attachments, 860-028-0190.

[260] *See* Oregon Administrative Rules, Division 28, Pole and Conduit Attachments, 860-028-0170.

[261] *See* Oregon Administrative Rules, Division 28, Pole and Conduit Attachments, 860-028-0220.

[262] PGE Comments at 6 (describing the Oregon Joint Use Association as an industry group in which the interests of both attaching entities and utilities are represented).

[263] *See* PGE Comments at 4-7; UTC Comments at 33.

Would changes to the Commission's pole attachment rules (47 C.F.R. §§ 1.1401-1.1418) be necessary to enable utilities to bring unauthorized attachment complaints?

98. If the Oregon system is not adopted, what are alternative penalty systems that would deter unauthorized attachments? Are there other models the Commission should consider? What are the contours of such alternatives, including notice to attachers, safe harbors, opportunities for correction, exceptions for safety violations caused/contributed to by pole owners, and means of dispute resolution?

5. The "Sign and Sue" Rule

99. Under current Commission rules[264] and precedent, 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.[265] This process, sometimes called "the sign and sue rule," allows an attacher to seek relief where it claims that a utility has coerced it to accept unreasonable or discriminatory contract terms to gain access to utility poles. In the *Pole Attachment Notice*, we sought comment on the "sign and sue" rule, and asked whether the Commission should adopt some contours to the rule, such as time-frames for raising written concerns about a provision of a pole attachment agreement.[266] As discussed below, we propose that the sign and sue "rule" should be retained, but propose that it be modified through an amendment to the Commission's rules that would require an attacher to provide a pole owner with notice, during contract negotiations, of the terms it considers unreasonable or discriminatory.

100. In response to the *Pole Attachment Notice*, a number of attachers filed comments supporting retention of the sign and sue rule in its present form.[267] The attachers assert that, because utilities have inherently superior bargaining power in negotiating pole attachment agreements, attachers may be forced to accept unreasonable rates, terms, and conditions in order to gain the prompt access to poles that is vital to their business plans.[268] One commenter observes that "cable operators or telecom

[264] *See, e.g.*, 47 C.F.R. § 1410(a), (b) (providing that where the Commission determines in a pole attachment complaint proceeding that a rate, term, or condition of attachment is not just and reasonable, it may (a) "[t]erminate the unjust and unreasonable rate, term, or condition; and (b) [s]ubstitute in the pole attachment agreement the just and reasonable rate, term, or condition established by the Commission . . . .").

[265] *See, e.g.*, *Southern Co. Servs, Inc. v. FCC*, 313 F.3d 574, 582-84 (D.C. Cir. 2002) (*Southern Company II*) ("The agency's limited authority to review negotiated settlements is consistent with the statute and it does not interfere with any of the rights afforded petitioners under the Act.").

[266] *See Pole Attachment Notice*, 22 FCC Rcd at 20210, para. 37 n.110 (citing *Southern Company II*, 313 F.3d at 582-84).

[267] *See* NCTA Comments at 22-23; Knology Comments at 10-12; Comcast Comments at 42-45; Time Warner Cable Reply Comments at 59-60; Sunesys Reply Comments at 17-18.

[268] *See, e.g.*, Knology Comments at 10 ("The parties to a pole attachment agreement do not approach negotiations with equal bargaining positions. Often, attachers must accept onerous terms and conditions before they are permitted to attach to a pole…."); Time Warner Cable Reply Comments at 59-60 ("[P]arties to pole attachment agreements do not negotiate from equal bargaining positions, and thus cable operators (for whom poles are essential facilities) are frequently required to [accept] onerous and unreasonable utility terms in order to make vital pole attachments."); Sunesys Reply Comments at 17 ("pole attachment agreements are not negotiated - they are take it or leave it ultimatums from the utility"). *See also* NCTA Comments at 23 (noting that pole owners have "inherent bargaining power" and arguing that, if the Commission were to eliminate or limit the sign and sue rule, "attaching parties would face a Hobson's choice of agreeing to unreasonable terms proposed by a utility or delaying construction pending resolution of any negotiation and litigation to resolve disputes"); Comcast Comments at 42 ("the rule ensures that, notwithstanding a utility's unequal bargaining position in pole attachment agreement negotiations, attachers are not forced to choose between timely access to poles on the one hand, for example, while accepting unreasonable rates, terms and condition [sic] on the other").

providers may need to sign an unreasonable pole attachment agreement while they are undergoing time-sensitive build-outs or plant upgrades and cannot afford to be delayed by protracted negotiations or litigation before the Commission."[269] The Commission's willingness to review the reasonableness of contract provisions, in the view of some attachers, has served to check the utilities' abuse of their superior bargaining and encourage them to negotiate in good faith, thus reducing the incidence of disputes.[270]

101. Attachers oppose amending the Commission's rules to impose time limits on the right to challenge the provisions in a pole attachment agreement.[271] They argue that such time limits are inappropriate because a given term in a pole attachment agreement may not be unreasonable on its face, but may only become so through a utility's later interpretation or application.[272] They predict that imposing time limits on challenges to the reasonableness of terms would lead to unnecessary pole attachment litigation because attachers would be forced immediately to challenge terms that may, hypothetically, be unreasonably applied or interpreted in the future.[273]

102. Several utilities filed comments opposing the sign and sue rule and suggesting that it be modified or eliminated.[274] They contend that the rule has engendered distrust between pole-owning

[269] Comcast Comments at 44.

[270] *See, e.g.*, Comcast Comments at 42-43; Time Warner Cable Reply Comments at 60.

[271] *See, e.g.*, Comcast Comments at 45; Knology Comments at 11; Time Warner Cable Reply Comments at 60. Two commenters questioned whether the Commission has authority to impose temporal or other limitations on the filing of pole attachment complaints. They assert that the Commission has an obligation under section 224 to eliminate unjust and unreasonable terms and conditions of pole attachment, whether or not a pole attachment agreement permits the practice. Knology Comments at 11-12; Time Warner Cable Reply Comments at 60. Another commenter disagreed, asserting that the sign and sue rule is not mandated by section 224 and is entirely within the Commission's discretion to eliminate or revise. PacifiCorp et al. Comments at 33. *See generally* 47 C.F.R. § 1404(m) (imposing temporal limits on the filing of a pole attachment complaint by providing that, where a cable television system operator or telecommunications carrier claims it has been denied access to a pole in violation of section 224(f) of the Act, "the complaint shall be filed within 30 days of such denial").

[272] *See, e.g.*, Comcast Comments at 45 (arguing that imposing time limits on challenges to a pole attachment agreement would undermine effective regulation, because "an attacher must often sign an agreement containing a rate, term or condition that the utility will not adequately explain. In the event the utility eventually implements the rate, term or condition in an unreasonable manner, the attacher has some protection from the utility because the attacher retains recourse at the Commission"); Knology Comments at 11 ("Attachers do not know, in advance, whether unreasonable provisions in an agreement will be enforced or triggered."); Time Warner Cable Reply Comments at 60 (arguing that "imposing arbitrary time limits to challenge a pole attachment term or condition is inappropriate because a given term may not be unreasonable on its face, but become so through a utility's later interpretation or application.").

[273] *See, e.g.*, Time Warner Cable Reply Comments at 60 ("[A]n artificial deadline to challenge unreasonable terms would lead to greater litigation over pole attachment license agreement terms, because cable operators would be forced to litigate over terms that may not even be enforced simply because they may, in some hypothetical future applications, be unreasonably applied or interpreted."); Knology Comments at 11 ("Attachers do not know, in advance, whether unreasonable provisions in an agreement will be enforced or triggered. In light of this risk, … an attacher would be forced to file a complaint against the utility to modify the agreement."); Comcast Comments at 45 ("If utilities knew all they had to do was wait out a specific time-frame before imposing/interpreting the unreasonable conditions, monopoly abuses would be rampant. The only way attachers could avoid such consistent abuses would be to file a complaint following the execution of virtually every new pole attachment agreement . . . .").

[274] *See, e.g.*, PacifiCorp et al. Comments at 23; EEI/UTC Comments at 109-10; FPL et al. Reply Comments at 13.

utilities and attaching entities.[275] According to these utilities, attachers are willing to sign virtually any pole attachment agreement as a matter of expediency, knowing they can use the Commission's complaint process "to forestall or upset the utility's ability to enforce the agreement."[276] The Commission's willingness to entertain pole attachment complaints at any time, they argue, undermines a pole owner's confidence "that it will realize the bargain it has struck with an attaching entity."[277] As one commenter put it, the sign and sue rule "allows attachers to 'cherry pick' contractual provisions that they would like to disavow, while not extending the same privilege to utilities."[278]

103. Utilities have proposed a number of fixes to these perceived problems with the sign and sue rule. One commenter urged the Commission to adopt a presumption that an executed pole attachment agreement is just and reasonable.[279] Similarly, another commenter asked the Commission to make explicit that both parties to a pole attachment agreement are subject to a duty to negotiate in good faith, and bar complaints as to the reasonableness of executed pole attachment agreements, absent extrinsic evidence of coercion or undue influence as would be sufficient to make the agreement void or voidable under the common law.[280] Another utility asked the Commission to require that any challenges to pole attachment agreements be brought in state court under well-defined state law standards of unconscionability.[281]

104. The Commission adopted the sign and sue rule in recognition that utilities have monopoly power over pole access.[282] The Commission was concerned that a utility could nullify the statutory rights of a cable system or a telecommunications carrier by making "take it or leave it demand[s]" that it relinquish valuable rights under section 224 "without any *quid pro quo* other than the ability to attach its wires on unreasonable or discriminatory terms."[283] The record does not demonstrate that the potential for utilities to exert such coercive pressure in pole attachment agreement negotiations is less significant today than when the Commission first adopted the sign and sue rule. Because there remains a real possibility that utilities may abuse their monopoly power during the negotiating process, we propose that the sign and sue rule should be retained in some form. For similar reasons, we propose

[275] *See, e.g.*, PacifiCorp et al. Comments at 32-34; FPL et al. Reply Comments at 12-14.

[276] PacifiCorp et al. Reply Comments at 23. *See* FPL et al. Reply Comments at 13 ("The Commission's sign and sue rule allows attachers to make an illusory commitment to a bargain until they decide to abandon the bargain in search of a better deal.").

[277] PacifiCorp et al. Reply Comments at 22. *See* FPL et al. Reply Comments at 13 (arguing that the sign and sue rule "places utilities in a commercially tenuous 'wait and see' position, never knowing when any given attacher may decide that it wants to scrap certain terms of an existing, bargained-for agreement").

[278] FPL et al. Reply Comments at 13.

[279] EEI/UTC Comments at 109-10.

[280] PacifiCorp et al. Comments at 34. PacifiCorp further proposed that an attacher who "raises a complaint with respect to a fully-executed agreement without such evidence [of coercion or undue influence] … should be deemed to have breached its duty to negotiate in good faith, and the complaint should be summarily dismissed with prejudice." *Id*.

[281] FPL et al. Reply Comments at 13-14. Alternatively, FPL et al. argue that if the Commission retains the sign and sue rule, it should require attachers to show that the contract as a whole was negotiated in bad faith. If an attacher makes this showing, its remedy would be re-negotiation of the entire contract. *Id*. at 14.

[282] *See, e.g.*, *Southern Company II*, 313 F.3d at 583.

[283] *Southern Company II*, 313 F.3d at 583 (quoting the Commission's brief with approval) (internal quotes omitted).

that the record does not support adoption of a presumption that executed pole attachment agreements are just and reasonable.[284]

105. To be sure, utilities have raised valid concerns about the need to ensure that both parties to a pole attachment agreement negotiate in good faith. Their suggestion, however, that the Commission's review of pole attachment agreements be limited to determining whether the agreement would be deemed unconscionable or voidable under state contract law appears inconsistent with the Commission's statutory mandate under section 224.[285] Section 224 grants cable systems and telecommunications carriers rights to pole access, and to reasonable rates, terms, and conditions for pole attachment, that are independent and distinct from rights granted under contract law. The Commission has a duty under section 224 to "adopt procedures necessary and appropriate to hear and resolve complaints concerning . . . rates, terms, and conditions" of pole attachment pursuant to the requirements of section 224.[286] The Commission would not be fulfilling that duty if it were to substitute the requirements of contract law for the dictates of section 224.

106. It is important to note, however, that section 224 does not grant attachers an unfettered right to "cherry pick" contractual terms they wish to disavow, while retaining the benefits of more favorable terms. An attacher is entitled to relief under the sign and sue rule only if it can show that a rate, term, or condition is unlawful under section 224, not merely unfavorable to the attacher.[287] Further, the Commission has recognized that in some circumstances, a utility "may give a valuable concession in exchange for the provision the attacher subsequently challenges as unreasonable."[288] Where such a *quid pro quo* is established, the Commission will not disturb the bargained-for package of provisions.[289]

107. As the Commission has previously stated, we "encourage, support and fully expect that mutually beneficial exchanges will take place between the utility and the attaching entity."[290] We want to promote efforts by attachers and utilities to negotiate innovative and mutually beneficial solutions to contested contract issues. In furtherance of that goal, we propose that the Commission amend section 1.1404(d) of the rules to add a requirement that an attacher provide a utility with written notice of objections to a provision in a proposed pole attachment agreement, during contract negotiations, as a prerequisite for later bringing a complaint challenging that provision.[291]

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[284] EEI/UTC Comments at 109-10.

[285] PacifiCorp et al. Comments at 33-34; FPL et al. Reply Comments at 13-14.

[286] 47 U.S.C. § 224(b)(1). *See* § 224(e)(1) (directing the Commission to establish regulations to govern when "parties fail to resolve a dispute over such charges").

[287] *See Southern Company II*, 313 F.3d at 583.

[288] *Southern Company II*, 313 F.3d at 583 (quoting the Commission's brief with approval) (internal quotes omitted).

[289] *See id*. Evidence of such a *quid pro quo* could come from several sources, including communications between the parties during contract negotiations showing the parties engaged in an exchange of concessions on disputed terms.

[290] *Amendment of Commission's Rules And Policies Governing Pole Attachments*, CS Docket Nos. 97-98, 97-151, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12113, para. 14 (2001) (*Pole Attachments Reconsideration Order*).

[291] *See* Appendix B at para. 4 (proposed amendment to rule 1.1404(d)). We note that the Commission previously rejected arguments that attaching parties should be required to take exception to terms or conditions when the pole attachment agreement is negotiated or be estopped from filing a complaint about those issues. *See Pole Attachments Reconsideration Order*, 16 FCC Rcd at 12112-13, para. 13. The Commission did not, however, explain its reasons for rejecting this proposed requirement, and we believe comments from utilities in this proceeding raising questions (continued….)

108. We further propose that the amended rule include an exception addressing attachers' concerns that a given contract provision may not be unreasonable on its face, but only become so through a utility's later interpretation or application.[292] We thus propose to include language in amended rule 1.1404(d) allowing the attacher to challenge the lawfulness of a rate, term, or condition in an executed agreement, without prior notice to the utility during contract negotiations, where the attacher establishes that the rate, term, or condition was not unjust and unreasonable on its face, but only as later applied by the utility, and the attacher could not reasonably have anticipated that the utility would apply the challenged rate, term, or condition in such an unjust and unreasonable manner.[293] We believe that this amendment to rule 1.1404(d) will prevent utilities from being blind-sided by an attacher's post-execution challenge to the lawfulness of contract provisions, and will encourage the parties to reach mutually acceptable compromises on disputed terms, before the agreement is executed. We seek comment on this proposed amendment.

109. Finally, we ask for comment on when an attacher's cause of action challenging a rate, term, or condition in a pole attachment agreement accrues for purposes of applying the appropriate statute of limitations. We propose that the cause of action be deemed to accrue at the time the challenged contract provision is first applied against the attacher in an unlawful manner—regardless of whether the provision is facially invalid—because that is the point in time when the attacher suffers an injury. By contrast, if the cause of action were instead deemed to accrue at the time the agreement was executed, attachers might feel compelled to bring a complaint challenging a contract provision that may never be applied against them, merely to avoid having their claims extinguished by the statute of limitations. We seek comment on this proposed rule of accrual. Further, with respect to other claims involving pole attachments, we seek comment on whether the Commission should continue to follow common law principles in determining the time of accrual, or adopt other, alternative approaches.

D. Pole Rental Rates

110. Telecommunications carriers and cable operators generally pay for access to utility poles in two separate ways. First, as noted above, attachers pay nonrecurring charges to cover the costs of "make-ready" work—that is, rearranging existing pole attachments or installing new poles as needed to enable the provider to attach to the pole. Second, attachers generally also pay an annual pole rental fee, which currently is designed to recover a portion of the utility's operating and capital costs attributable to the pole. Both of these costs can impact communications service providers' investment decisions. In a prior section, this Further Notice seeks comment on ways to reduce make-ready costs.[294] Below, we seek comment on ways to minimize the distortionary effects arising from the differences in current pole rental rates, consistent with the objectives of the National Broadband Plan and the existing statutory framework.

1. Background

111. As discussed above, 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.[295] In a series of orders, the Commission implemented a formula

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about attachers' incentives to engage in *bona fide*, good faith negotiations warrant re-visiting the issue. *See, e.g.*, PacifiCorp et al. Reply Comments at 22-23; FPL et al. Reply Comments at 13.

[292] *See, e.g.*, Time Warner Cable Reply Comments at 60.

[293] *See* Appendix B at 4 (proposed amendment to rule 1.1404(d)).

[294] *See generally* Section IV.B.

[295] 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 (continued….)

that cable television system attachers and utilities could use to determine a just and reasonable rate, and procedures for resolving rate complaints.[296] In 1987, the U.S. Supreme Court found that the formula the Commission devised for pole attachments by cable television systems (the cable rate formula) provides pole owners with adequate compensation, and thus did not result in an unconstitutional "taking."[297]

112. Congress expanded the reach of section 224 in the 1996 Act. Among other things, Congress added "telecommunications carrier" as a category of attacher entitled to pole attachments on just and reasonable rates, terms, and conditions under section 224.[298] For purposes of section 224, Congress excluded incumbent LECs from the definition of "telecommunications carriers."[299] In prior orders, the Commission interpreted the exclusion of incumbent LECs from the term "telecommunications carrier" (and from the corresponding statutory right to attach to utility poles) to mean that section 224 does not apply to attachment rates paid by incumbent LECs,[300] which own many poles themselves, and historically have obtained access to other utilities' poles within their incumbent LEC service territory through "joint use" or other agreements.[301]

113. By virtue of the 1996 Act revisions, section 224 of the Act now sets forth two separate formulas to determine the maximum rates for pole attachments—one applies to pole attachments used by providers of telecommunications services (the telecom rate formula), and the other to pole attachments

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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).

[296] *See*, *e.g.*, *Pole Attachments First Report and Order*, CC Docket No. 78-144, 68 FCC 2d 1585 (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).

[297] *FCC v. Florida Power Corp*., 480 U.S. 245 (1987); *see also Alabama Cable Telecomm. Ass'n v. Alabama Power Co.*, File No. PA 00-003, Order, 16 FCC Rcd 12209 (2001).

[298] 47 U.S.C. § 224(a)(4).

[299] 47 U.S.C. § 224(a)(5).

[300] *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."); 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 operators have nondiscriminatory access to utility poles, ducts, conduits, and rights-of-way on rates, terms, and conditions that are just and reasonable.").

[301] Outside of the carrier's incumbent LEC service territory, it would be subject to the same pole attachment regulations as any other telecommunications carrier. *See* 47 U.S.C. § 224(a)(5) (excluding from the definition of "telecommunications carrier" for purposes of section 224 "any incumbent local exchange carrier as defined in section 251(h)"); 47 U.S.C. § 251(h)(1) (defining "incumbent local exchange carriers" in terms of their status with respect to a particular area).

used "solely to provide cable service" (the cable rate formula).[302] As the Commission has implemented these statutory formulas, the telecom rate formula generally results in higher pole rental rates than the cable rate formula. The difference between the two formulas under current Commission rules is the manner in which they allocate the costs associated with the unusable portion of the pole[303]—that is, the space on the pole that cannot be used for attachments.[304] The cable rate formula and the telecom rate formula both allocate the costs of usable space on a pole based on the fraction of the usable space that an attachment occupies.[305] Under the cable rate formula, the costs of unusable space on a pole are allocated in the same way, i.e., based on the portion of usable space an attachment occupies.[306] Under the telecom rate formula, however, two-thirds of the costs of the unusable space is allocated equally among the number of attachers, including the owner, and the remaining one third of these costs is allocated solely to the pole owner.[307]

114. At the same time that the Commission adopted a rule implementing the telecom rate formula, it addressed the issues of cable attachments used to offer commingled cable and Internet access services. In particular, the Commission held that cable television systems that offer commingled cable and Internet access service should continue to pay the cable rate.[308] In 2000, the Supreme Court upheld this decision, finding that section 224(b) gives the Commission authority to adopt just and reasonable rates for attachments within the general scope of section 224 of the Act, but outside the "self-described scope" of the telecom rate formula or cable rate formula as specified under sections 224(d) and (e).[309]

2. Effects of Current Pole Rental Rates

115. The National Broadband Plan recommends that the Commission "establish rental rates for pole attachments that are as low and close to uniform as possible, consistent with [s]ection 224 of the [Act], to promote broadband deployment."[310] In particular, the Plan observes that "[a]pplying different

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[302] 47 U.S.C. §§ 224(d), (e). In recognition of these differences, Congress provided that rates under the telecom rate formula—which also apply to cable television systems that offer telecommunications services—would be phased in over a five-year period. 47 U.S.C. § 224(e)(4).

[303] *See Amendment of Commission's Rules and Policies Governing Pole Attachments; Implementation of Section 703(e) of the Telecommunications Act, Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket Nos. 97-98, 97-151, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12131-32, para. 55 (2001) (*2001 Order on Reconsideration*). Explained another way, the "space factor" is calculated differently in each of the formulas. *Compare* 47 C.F.R. § 1.1409(e)(1) *with* 47 C.F.R. § 1.1409(e)(2). The Space Factor in the cable rate formula = Space Occupied by an Attachment/Total Usable Space. The Space Factor in the telecom rate formula = ((Space Occupied by an Attachment) + (2/3 x (Unusable Space/Number of Attachers)))/Pole Height.

[304] More specifically, as defined by the Commission's rules, the term unusable space "means the space on a utility pole below the usable space, including the amount required to set the depth of the pole." 47 C.F.R. § 1.1402(l). Usable space, in turn, "means the space on a utility pole above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment, and which includes space occupied by the utility." 47 C.F.R. § 1.1402(c).

[305] 47 U.S.C. § 224(d); 47 U.S.C. § 224(e).

[306] *See 2001 Order on Reconsideration,* 16 FCC Rcd at 12131, para. 53.

[307] *See 2001 Order on Reconsideration,* 16 FCC Rcd at 12131-32, para. 55 (citing *1989 Implementation Order*, 13 FCC Rcd at 6799-800, paras. 43-44).

[308] *See 1998 Implementation Order*, 13 FCC Rcd at 6796, para. 34.

[309] *Gulf Power*, 534 U.S. at 335-36, 338-39.

[310] National Broadband Plan at 110.

rates based on whether the attacher is classified as a 'cable' or a 'telecommunications' company distorts attachers' deployment decisions."[311] There have been many disputes about the applicability of "cable" or "telecommunications" rates to broadband, voice over Internet protocol and wireless services, among others.[312] The Plan found that "[t]his uncertainty may be deterring broadband providers that pay lower pole rates from extending their networks or adding capabilities (such as high-capacity links to wireless towers)," based on the risk that, by doing so, a higher pole rental rate might be applied for their entire network.[313]

116. The record here likewise bears out these concerns. A number of cable operators confirm that they have been deterred from offering new, advanced services, such as to anchor institutions or wireless towers, based on the possible financial impact if, as a result, they were required to pay the current telecom rate for all their poles.[314] The National Broadband Plan estimated an average annual difference between the telecom rate and cable rate of approximately $3 today.[315] Although that difference in rates might not seem significant in isolation, it could amount to approximately $90 million to $120 million annually, given the estimated 30-40 million poles subject to Commission-regulated rates used by the cable industry.[316] Cable commenters estimate an even greater difference between the two rates of $208 million to $672 million for the cable industry as a whole.[317] Moreover, the Commission anticipated that rate differences could deter cable operators from offering new services when it applied the cable rate to cable operators' attachments used for both video and Internet services, concluding that:

[311] *Id*. The Plan further notes that "[t]he impact of these rates can be particularly acute in rural areas, where there often are more poles per mile than households." *Id*. (citing, *e.g.*, ACA Comments in re National Broadband Plan NOI, at 8-9 (filed June 8, 2009); Amendment of the Commission's Rules and Policies Governing Pole Attachments, WC Docket No. 07-245, Report and Order, 15 FCC Rcd 6453, 6507-08, para. 118 (2000) (*2000 Fee Order*) ("The Commission has recognized that small systems serve areas that are far less densely populated areas than the areas served by large operators. A small rural operator might serve half of the homes along a road with only 20 homes per mile, but might need 30 poles to reach those 10 subscribers.")).

[312] *See, e.g.*, Ameren and Virginia Electric Comments at 17; Bright House Reply Comments at 9-11. *See also, e.g.*, *Gulf Power*, 534 U.S. at 327.

[313] National Broadband Plan at 110-11.

[314] *See, e.g.*, Letter from Daniel L. Brenner, Counsel, Bright House Networks, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 09-47, 09-51, 09-137 (Feb. 16, 2010) Attach. (Affidavit of Nick Lenochi) (providing example of how application of higher telecommunications rate for poles would increase expense of deploying Fast Ethernet connections to a large school district by $220,000 annually); NCTA Comments at 17 (filed Sept. 24, 2009) ("The fact that pole attachment costs are just one of many challenges facing rural operators in deploying broadband obviously provides no basis for rate increases that would make it even more difficult to justify future investment in, or continued operation of, broadband facilities"); Letter from Jill M. Valenstein, Counsel for the Arkansas Cable Telecommunications Association, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 07-245 at 1-2 (filed July 11, 2008) (noting the potential impact of an increase in pole rental rates on possible future broadband deployment).

[315] National Broadband Plan at 110.

[316] NCTA Comments, Pelcovits Decl. at para. 13 (filed Sept. 24, 2009).

[317] NCTA's study estimated a larger difference between the current telecom and cable rates, and estimated that the aggregate difference across the entire cable industry of paying the higher telecom rate would be between $208 million and $672 million. *Id*., Pelcovits Decl. at para. 22. Likewise, in the case of just one state—West Virginia—a rate difference of approximately $4 million between the current cable and telecom rates was estimated. *Id*., Attach. Gregg Decl. at para. 14 & Table 2.

> In specifying [the cable] rate, we intend to encourage cable operators to make Internet services available to their customers. We believe that specifying a higher rate might deter an operator from providing non-traditional services. Such a result would not serve the public interest. Rather, we believe that specifying the [cable rate] will encourage greater competition in the provision of Internet service and greater benefits to consumers.[318]

117. Previously, the *Pole Attachment Notice* sought comment on, among other things, the difference in pole attachment rates paid by cable systems, incumbent LECs, and competing telecommunications carriers that provide the same or similar services.[319] The Commission likewise recognized "the importance of promoting broadband deployment and the importance of technological neutrality," and thus "tentatively conclude[d] that all categories of providers should pay the same pole attachment rate for all attachments used for broadband Internet access service."[320] The *Pole Attachment Notice* went on to tentatively conclude, however, that "the [uniform] rate should be higher than the current cable rate, yet no greater than the telecommunications rate."[321]

118. We decline to pursue the approach proposed by the *Pole Attachment Notice* for several reasons. We believe that pursuing uniformity by increasing cable operators' pole rental rates—potentially up to the level yielded by the current telecom formula—would come at the cost of increased broadband prices and reduced incentives for deployment. Instead, by seeking to limit the distortions present in the current pole rental rates by reinterpreting the telecom rate to a lower level consistent with the Act, we expect to increase the availability of, and competition for, advanced services to anchor institutions and as middle-mile inputs to wireless services and other broadband services.

3. USTelecom and AT&T/Verizon Broadband Rate Proposals

119. As an initial matter, we seek comment on two alternatives, filed after the comment cycle closed in the *Pole Attachment Notice*, to establish a uniform rate for all pole attachments used to provide broadband Internet access services, including those by telecommunications carriers. As described below, both the USTelecom and AT&T/Verizon proposals would allocate costs among attachers differently than they are allocated today based on different assumptions about numbers of attachers and the space each occupies on a pole.[322] Presently, under the cable rate formula, attachers (other than a pole owner) pay an average of 7.4 percent of the annual costs of a pole.[323] Under the current telecom rate formula, each attacher (other than a pole owner), pays an average of 11.2 percent of the annual costs of a pole in urban areas and 16.89 percent in non-urban areas.[324] Under USTelecom's rate proposal, by contrast, any

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[318] *1998 Implementation Order*, 13 FCC Rcd at 6794, para. 32.

[319] *Pole Attachment Notice,* 22 FCC Rcd at 20200, 20206, paras.13, 26.

[320] *Pole Attachment Notice,* 22 FCC Rcd at 20209, para. 36.

[321] *Pole Attachment Notice,* 22 FCC Rcd at 20209, para. 36.

[322] Letter from Robert W. Quinn, Jr., AT&T Senior Vice President – Federal Regulatory and Suzanne A. Guyer, Verizon Senior Vice President – Federal Regulatory Affairs, to Marlene Dortch, Secretary, FCC, WC Docket No. 07-245, RM-11293, RM-11303 (filed Oct. 21, 2008) (AT&T/Verizon Oct. 21, 2008 *Ex Parte* Letter); Letter from Jonathan Banks, Senior Vice President, Law and Policy, United States Telecom Association, to Marlene Dortch, Secretary, FCC, WC Docket No. 07-245 (filed Oct. 27, 2008) (USTelecom Oct. 27, 2008 *Ex Parte* Letter).

[323] *See* 47 U.S.C. § 224(d).

[324] *See* 47 U.S.C. § 224(e). Calculations under the Commission's rules for the cable and telecom formulas are based on the rebuttable presumptions of one foot for space occupied by an attachment and 37.5 feet for pole height, including 13.5 feet of usable space and 24 feet of unusable space. 47 C.F.R. § 1.1418. Calculations under the (continued….)

attacher (other than a pole owner) would pay 11 percent of the annual cost of a pole, regardless of the number of attachers or amount of space each attacher uses.[325] Under the AT&T/Verizon proposal, it appears that each attacher (other than the pole owner) would pay 18.67 percent of the annual costs of the pole.[326]

120. Both rate proposals consist of formulas that are different from those prescribed in section 224 of the Act.[327] USTelecom and AT&T/Verizon argue that the Commission "is not limited to the particular rate formulas incorporating factors such as usable space set forth in [s]ection 224(d) and (e) for pole attachments of non-incumbent telecommunications carriers and cable television systems."[328] Thus, USTelecom asserts that the Commission "has broad authority, within the bounds of reasonableness, 'to derive its own view of just and reasonable rates' . . . regardless of conventional considerations such as usable space."[329] We seek comment on this view of the Commission's authority. Although the Supreme Court has confirmed that the Commission can rely on its general section 224(b) authority to ensure "just and reasonable rates" to regulate pole rental rates, under that holding the Commission would appear to be bound by the statutory rate formulas within their "self-described scope."[330] To the extent that Congress intended a particular rate formula to apply only when a provider was *exclusively* providing a particular type of service, it clearly knew how to do so. Thus, the statute provides that the section 224(d) cable rate formula applies to "any pole attachment used by a cable television system *solely* to provide cable service."[331] The section 224(e) telecom rate formula is not limited in this manner, and thus the "self-described scope" of that formula would seem to encompass any attachments by telecommunications carriers so long as they are being used to provide telecommunications services—whether exclusively or in combination with other services.[332] However, we seek comment on whether alternative interpretations of the statute would be reasonable. Alternatively, is there a way in which the USTelecom or AT&T/Verizon proposals could be reconciled with the pole rental rate formulas specified in sections 224(d) and (e) of the Act?

121. We also seek comment on whether the USTelecom or AT&T/Verizon proposals are in the public interest. In particular, we note that, under the USTelecom proposal, the rates paid by telecom

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Commission's rules for the telecom formula also are based on the Commission's rebuttable presumption of an average of five attaching entities in urban areas and three in non-urban areas.

[325] USTelecom Oct. 27, 2008 *Ex Parte* Letter at 4.

[326] *See* AT&T/Verizon Oct. 27, 2008 *Ex Parte* Letter at 2-4. The space factor used to allocate costs in the AT&T/Verizon formula is ((space occupied by an attachment) + (unusable space/4 attachers))/pole height. To determine the percentage of the pole costs that an attacher (other than the pole owner) would pay, assume the use of the Commission's rebuttable presumptions of 1 foot of space occupied by an attachment, 24 feet of unusable space, and 37.5 feet for the height of a pole. Substituting these values into the space factor yields the following: (1 + (24/4))/37.5, or .1867, which equals 18.67 percent.

[327] *See* 47 U.S.C. § 224(d) (cable rate formula); 47 U.S.C. § 224(e) (telecom rate formula).

[328] USTelecom Oct. 27, 2008 *Ex Parte* Letter at 9; *see also* AT&T/Verizon Oct. 21, 2008 *Ex Parte* Letter at 4 (citing 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.")).

[329] USTelecom Oct. 27, 2008 *Ex Parte* Letter at 9-10.

[330] *Gulf Power*, 534 U.S. at 335-36, 338-39.

[331] 47 U.S.C. § 224(d)(3) (emphasis added).

[332] 47 U.S.C. § 224(e)(1). *See also, e.g.*, FPL and Tampa Electric Comments at 13-14 (arguing that, under section 224, telecommunications carriers are required to pay no less than the telecommunications rate regardless of any other services they may provide); EEI/UTC Comments at 98 (same).

attachers generally would be lower than those rates are today, but the rates paid by cable attachers would be higher. With respect to the AT&T/Verizon proposal, we note that it appears that both telecommunications carriers and cable operators generally would pay higher pole rental rates than yielded by the current telecom rate formula. While those outcomes would provide uniformity of rates, would they undermine investment incentives or otherwise increase the cost of or reduce competition for communications services?

4. Reinterpreting the Telecom Rate

122. Rather than deviating from the statutory telecom rate formula, we seek comment on ways to reinterpret the section 224(e) telecom rate formula so as to yield pole rental rates that reduce disputes and investment disincentives which can arise from the disparate rates yielded by the Commission's current rules. As the National Broadband Plan recognizes, this disparity largely results from the existing statutory framework, as implemented by the Commission. Although the National Broadband Plan recommended that Congress "consider amending [s]ection 224 of the Act to establish a harmonized access policy for all poles, ducts, conduits and rights-of-way," it also recommended that the Commission take what actions it can to address these rate disparities within the existing statutory framework.[333] We seek comment below on alternatives for reinterpreting the telecom rate formula, our proposal based in part on one of those alternatives, as well as other alternative approaches to reinterpreting the telecom rate formula within the existing statutory framework.

a. TWTC Proposal

123. TWTC submitted a proposal to revise the interpretation of the telecom rate formula to "eliminate or dramatically reduce the differential in pole attachment rates."[334] The Commission sought comment on this proposal in the *Pole Attachment Notice* in the context of the somewhat different focus and proposals considered there.[335] We revisit this proposal in light of the pole rate recommendation of the National Broadband Plan. In addition to the specific comment sought below, we ask commenters to refresh the record regarding the questions raised about the TWTC proposal in the *Pole Attachment Notice* in the context of the issues under consideration here.

124. Specifically, TWTC asserts that, despite the textual differences between section 224(d) and section 224(e) regarding the costs to be included in the cable rate formula and the telecom rate formula, "the FCC currently includes the same cost categories in its implementing regulations" reflected in the two formulas.[336] In particular, TWTC contends that the telecom rate includes costs not mentioned in section 224(e),[337] citing: (1) rate of return; (2) depreciation; and (3) taxes.[338] TWTC alleges that such costs "bear no relation" to the cost of providing space for an attachment and are not necessitated by the language of section 224(e). In particular, TWTC contends that "none of these 'costs' has anything to do

[333] National Broadband Plan at 110-12.

[334] *See* TWTC White Paper, RM-11293, at 3, 20.

[335] Among other things, the *Pole Attachment Notice* tentatively concluded that there should be a uniform rate for pole attachments used to provide broadband Internet access service, and that rate should be higher than the rate produced by the current cable rate formula, but no higher than the rate produced by the current telecom rate formula. *Pole Attachment Notice,* 22 FCC Rcd at 20196, para. 3. Following from the National Broadband Plan, our focus here, however, is to consider ways to reinterpret the telecom rate formula to yield rates as low and close to uniform as possible. *See* National Broadband Plan at 110.

[336] *See* TWTC White Paper, RM-11293, at 19.

[337] *See* TWTC White Paper, RM-11293, at 18.

[338] *See* TWTC White Paper, RM-11293, at 19.

with actually providing 'space' on a pole for pole attachments because a utility would incur these costs 'regardless of the presence of pole attachments.'"[339] Thus, TWTC proposes that those costs should be eliminated from the telecom rate.[340]

125. TWTC suggests instead that utilities should 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)."[341] The underlying economic or analytical theory for TWTC's proposal is not entirely clear, however.

126. To the extent that TWTC is arguing for "costs" to be defined as marginal or incremental costs for purposes of section 224(e), we are skeptical of that theory.[342] Marginal cost can be defined either as the rate of change in total cost when output changes by an infinitesimal unit or as the change in total cost when output changes by a single unit. The term incremental cost refers to a discrete change in total cost when output changes by any non-infinitesimal amount, which might range from a single unit to a large increment representing a firm's entire output.[343] The Eleventh Circuit, in addressing a takings challenge, has held that a pole attachment rate above marginal cost can provide just compensation,[344] and marginal or incremental cost pricing can be an appropriate approach to setting regulated rates.[345] Indeed, section 224(d) establishes such an approach as the low end of permissible rates under the cable rate formula.[346] However, the section 224(e) formulas allocate the relevant costs in such a way that simply defining "cost" as equal to incremental cost would result in pole rental rates *below* incremental cost. In

[339] *See* TWTC White Paper, RM-11293, at 20 (comparing 47 U.S.C. §§ 224(e)(2)-(3) with *2000 Fee Order,* 15 FCC Rcd at 6477-91, paras. 44-76).

[340] *See* TWTC White Paper, RM-11293, at 19-20.

[341] *See* TWTC White Paper, RM-11293, at 20.

[342] *See, e.g.*, TWTC White Paper, RM-11293, at 20 (arguing that, to calculate the telecom rate, utilities should determine "how much *extra* a utility must incur to provide non-usable and usable space on poles for pole attachments").

[343] If $C(q)$ represents the cost of producing an output q and Δq represents an increment of output, then incremental cost is equal to $C(q+\Delta q) - C(q)$. If incremental cost is used as a guide to pricing, then price should be set equal to the average incremental cost $\frac{C(q+\Delta q)-C(q)}{\Delta q}$. If there are no fixed costs and initial output $q = 0$, then incremental cost pricing is equivalent to average cost pricing. If Δq is small, then incremental cost pricing approximates marginal cost pricing. *Cf. Local Competition Order,* 11 FCC Rcd at 15844, para. 675.

[344] *Alabama Power Co. v. FCC*, 311 F.3d at 1370 ("In some cases, then, marginal cost will be sufficient to compensate the pole owner."); *id*. at 1370-71 ("In short, before a power company can seek compensation above marginal cost, it must show with regard to each pole that (1) the pole is at full capacity and (2) either (a) another buyer of the space is waiting in the wings or (b) the power company is able to put the space to a higher-valued use with its own operations. Without such proof, any implementation of the Cable Rate (which provides for much more than marginal cost) necessarily provides just compensation.").

[345] *See, e.g.*, Alfred E. Kahn, The Economics of Regulation: Principles and Institutions, Vol. 1, 65-122 (1970); Charles F. Phillips, Jr., The Regulation of Public Utilities, 443-49 (1993).

[346] *See* 47 U.S.C. § 224(d)(1). Explaining the cable rate formula, the Supreme Court stated, "The minimum measure is thus equivalent to the marginal cost of attachments, while the statutory maximum measure is determined by the fully allocated cost of the construction and operation of the pole to which cable is attached." *FCC v. Florida Power Corp.*, 480 U.S. at 253; *see also* S. Rep. 95-580, *reprinted in* 1978 U.S.C.C.A.N. 109 ("The formula describes a range between marginal and a proportionate share of fully allocated costs within which pole rates are to fall.")

particular, section 224(e) allocates portions of the relevant "cost" to both the pole owner and the attachers. Thus, if the Commission precisely calculated the relevant incremental costs, and then applied the section 224(e) cost allocation formulas, the resulting pole rental rate would recover less than the utility's incremental cost, effectively resulting in a subsidy to the attacher. In other words, the pole owner would bear more costs than if there were no third party attachments on the pole at all. We thus believe that defining the "cost of providing space" as incremental cost in the manner TWTC seems to suggest would be inconsistent with the section 224(e) framework, given the manner in which the statutory provision allocates the relevant "costs." Nevertheless, we seek comment on whether any party believes that, to the contrary, such an interpretation is permissible.

127. We also seek comment on whether there are other rationales that, consistent with the existing statutory framework, could support TWTC's proposed approach, possibly in a modified form. For example, what standard could the Commission use to determine whether particular costs 'bear any relation' to the cost of providing space on a pole within the meaning of TWTC's proposal? To what extent would such an approach be consistent with the section 224 framework? As a practical matter, how would the particular costs be calculated, and what sources of data could be used to implement TWTC's proposal? In this regard, we believe that our proposal below draws on some of the underlying elements of TWTC's proposal, but is more consistent with the statutory framework and readily administrable. However, we also seek comment on other possible approaches as well, to the extent that they have advantages over that proposal.

b. Commission Rate Proposal

128. We propose an alternative approach which would recognize that the Commission has substantial—but not unlimited—discretion under the statutory framework to interpret the term "cost" for purposes of section 224(e). This proposal would view the range of possible interpretations of "cost" under section 224(e) as yielding a range of permissible rates, from the current application of the telecom rate formula at the higher end of the range, to an alternative application of the telecom rate formula based on cost causation principles at the lower end. Under this approach, the Commission would select a particular rate from within that range as the appropriate telecom rate.

(i) Interpretation of the Statutory Framework

129. The existing statutory framework consists of several key provisions, and any revised telecom rate formula must be consistent with those provisions. For one, section 224(b) imposes an over-arching duty that the Commission ensure that rates are "just and reasonable." As the Commission has recognized, "[r]ather than insisting upon a single regulatory method for determining whether rates are just and reasonable, courts and other federal agencies with rate authority similar to our own evaluate whether an established regulatory scheme produces rates that fall within a "zone of reasonableness." For rates to fall within the zone of reasonableness, the agency rate order must undertake a 'reasonable balancing' of the 'investor interest in maintaining financial integrity and access to capital markets and the consumer interest in being charged non-exploitative rates.'"[347] With respect to each of the alternatives for interpreting the telecom rate formula discussed below, as well as any others raised by commenters, we seek comment on how well the proposal ensures "just and reasonable" rates. In particular, we seek comment from pole owners, in addition to attachers and other interested persons. We note that pole owners' perspective regarding the costs and other characteristics of their infrastructure might give them unique insight into ways the Commission could reinterpret the section 224(e) telecom rate formula to

[347] *Long-Term Number Portability Tariff Filings*, CC Docket No. 99-35, Memorandum Opinion and Order, 14 FCC Rcd 11983, 12026-27, para. 98 (1999).

yield pole rental rates "that are as low and close to uniform as possible, consistent with [s]ection 224 of the [Act], to promote broadband deployment."[348]

130. In addition, sections 224(d) and (e) specify cable and telecom rate formulas. As discussed above, the Commission's rate rules already take account of one difference between those frameworks—namely, the treatment of unusable space.[349] Other differences in those statutory provisions are not currently reflected in the Commission's rules, however. Although section 224(e) specifies how the pole space costs are to be allocated between the owner and attacher, it does not specify a cost methodology. In particular, section 224(e) describes how "[a] utility shall apportion the cost of providing space" on a pole—whether usable or unusable—but does not define "the cost of providing space."[350] This is in contrast with the upper bound for the cable rate under section 224(d), which does identify particular costs to be included.[351] The Commission initially implemented section 224(e) by interpreting "cost" to include the same cost categories that it was using in the cable rate formula, relying on a fully-distributed cost approach. This initial approach was not inherently unreasonable, as noted above, but it has resulted in rate disparities and disputes over which formula applies and impacted communications service providers' investment decisions.

131. This statutory framework bounds the ways in which the Commission can interpret and apply the telecom rate formula in section 224(e). We agree with commenters that the Commission has discretion to reinterpret the ambiguous term "cost"[352] in section 224(e) and modify the cost methodology underlying the telecom rate formula to yield a different rate.[353] Depending upon the relative magnitude of costs included, the telecom rate formula will yield relatively higher or lower rates. Identifying the upper- and lower-bound interpretations of "cost" that are consistent with the statute thus provides an upper and lower limit on the possible telecom rates that would be consistent with section 224(e). Any of the resulting rates within that range potentially could be adopted by the Commission as the "just and reasonable" rate for purposes of section 224(e).

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[348] National Broadband Plan at 110.

[349] *See supra* para. 113.

[350] In particular, section 224(e)(2) provides: "A utility shall apportion the cost of providing space on a pole, duct, conduit, or right-of-way other than the usable space among entities so that such apportionment equals two-thirds of the costs of providing space other than the usable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities." 47 U.S.C. 224(e)(2). And section 224(e)(3) provides: "A utility shall apportion the cost of providing usable space among all entities according to the percentage of usable space required for each entity." 47 U.S.C. 224(e)(3).

[351] Section 224(d)(1) identifies the relevant costs as "the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way." 47 U.S.C. § 224(d)(1).

[352] *See, e.g.*, *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 500-01 (2002) ("The fact is that without any better indication of meaning than the unadorned term, the word 'cost' in § 251(d)(1), as in accounting generally, is 'a chameleon' . . . a 'virtually meaningless' term . . . . As Justice Breyer put it in *Iowa Utilities Bd*., words like 'cost' 'give ratesetting commissions broad methodological leeway; they say little about the 'method employed' to determine a particular rate.'") (citations omitted).

[353] *See, e.g.*, NCTA Reply Comments at 23 (asserting that "[i]t is well-established that the term 'cost' is a 'chameleon' that gives agencies 'broad methodological leeway' in determining a particular rate" and citing *Verizon v. FCC*, 535 U.S. at 500-01, *quoting Strickland v. Comm'r, Maine Dep't of Human Servs.*, 96 F.3d 542, 546 (1st Cir. 1996) and *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 423 (1999) (Breyer, concurring in part and dissenting in part)); TWTC White Paper at 18 (citing *Chevron v. Natural Res. Def. Council,* 467 U.S. 837, 843-44 (1984) (*Chevron*); EEI/UTC Comments at 93-94 (advocating a proposal to modify implementation of the telecom rate formula and citing *Gulf Power* and *Chevron*).

132. *Upper Bound Rate.* To begin identifying the range of reasonable rates that could result from the telecom rate formula, we first identify the present telecom rate as a reasonable upper bound. The Commission's current telecom rate formula is based on a fully distributed cost methodology,[354] which recovers costs that the pole owner incurs regardless of the presence of attachments.[355] It includes a full range of costs, some of which, as TWTC argues, do not directly relate to or vary with the presence of pole attachments.[356] For this reason, this interpretation of the statutory telecom rate formula could be considered at the higher end of the range of reasonable rates. In light of the National Broadband Plan's recommendation that we seek to achieve pole rental rates "that are as low and close to uniform as possible, consistent with [s]ection 224 of the [Act],"[357] under this alternative the Commission ultimately would select a rate closer to the lower end of the range. Thus, within the context of this alternative, we do not believe it is necessary to define the high end of the range more precisely, although we seek comment on that conclusion. We also seek comment on whether there is a cost methodology, other than a fully-distributed cost methodology, that could be considered as part of an upper-bound formula in addition, or instead.

133. *Lower Bound Rate*. In identifying the lower bound of reasonable rates under section 224(e), we propose that a rate that covers the pole owners' incremental cost associated with attachment would, in principle, provide a reasonable lower limit.[358] For the reasons described above in the context of TWTC's proposal, however, to remain consistent with the statutory framework, this outcome cannot be achieved simply by defining costs as a precise calculation of incremental cost.[359] Thus, the statutory framework makes it more difficult to identify a lower-bound rate that recovers a utility's marginal costs. Instead, some definition of "costs" somewhat above incremental cost would need to be used so that when those costs are allocated pursuant to the 224(e) formula, the resulting pole rental rate would allow the utility to recover the incremental cost associated with attachment.

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[354] *See, e.g.*, *2001 Order on Reconsideration,* 16 FCC Rcd at 12131-32, para. 55.

[355] *See, e.g.*, *Amendment of Rules and Policies Governing Pole Attachments*, CS Docket No.97-98, Notice of Proposed Rule Making, 12 FCC Rcd 7449, 7455, para. 11 (rel. Mar. 14, 1997) ("Carrying charges are the costs incurred by the utility in owning and maintaining poles regardless of the presence of pole attachments.").

[356] TWTC White Paper at 19. In particular, the Commission's current telecom rate formula, as with the current cable rate formula, includes a component for the net cost of a bare pole and a carrying charge rate. 47 C.F.R. § 1.1409(e)(1), (2). The net cost of a bare pole is the initial capital outlay, i.e., the investment, for a pole, minus accumulated depreciation. The carrying charge rate is a composite rate that reflects separate carrying charge rates for the costs of owning and maintaining poles. *See, e.g.*, *1987 Rate Order,* 2 FCC Rcd at 4391, para. 25; *2001 Order on Reconsideration,* 16 FCC Rcd at 12121, para. 28. The carrying charges include a pole owner's administrative, maintenance, and depreciation expenses, a return on investment, and taxes. *2001 Order on Reconsideration,* 16 FCC Rcd at 12121, para. 28. The net cost of a bare pole is multiplied by the carrying charge rate to determine the annual cost of a pole.

[357] National Broadband Plan at 110.

[358] As discussed previously, legal precedent has established that a pole attachment rate above marginal cost provides just compensation, and marginal or incremental cost pricing can be an appropriate approach to setting regulated rates. *See supra* para. 126. In theory, a "just and reasonable" rate could be lower than a marginal cost rate, but we see no evidence that Congress intended pole rental rates under section 224 to provide for such a subsidy. *See supra* para. [127] (describing how a pole rental rate below marginal cost would result in the pole owner subsidizing the attacher). In this regard, we note that the statute identifies a rate that allows the utility to recover its marginal costs as the lowest permissible just and reasonable rate under section 224(d). 47 U.S.C. § 224(d).

[359] As describe above, marginal cost can be defined as the change in total cost when output changes by a single unit. *See supra* para. 126. Put another way, such costs are viewed as costs that would not be incurred "but for" a particular event—in this case, the addition of a pole attachment.

134. For purposes of identifying such a lower-bound rate, we continue to rely on the basic principles of cost causation that would underlie a marginal cost rate. Under cost causation principles, if a customer is causally responsible for the incurrence of a cost, then that customer, the cost causer, pays a rate that covers this cost. This is consistent with the Commission's existing approach in the make-ready context where, for example, a pole owner recovers the entire capital cost of a new pole through make-ready charges from the new attacher when a new pole is needed to enable the attachment.[360] Under this proposed approach, cost causation principles could be applied separately to each category of a pole owner's costs—broadly consisting of capital and operating costs—for purposes of the pole rental rate, as well.[361]

135. We recognize that, under traditional ratemaking principles, rates may recover both operating expenses and capital costs, including a rate of return.[362] Under our proposal, however, capital costs would be excluded for purposes of identifying a lower bound for the telecom pole rental rate.[363] As an initial matter, we note that if capital costs arise from the make-ready process, our existing rules are designed to require attachers to bear the entire amount of those costs.[364] With respect to other capital costs, we believe it is likely that the attacher is the "cost causer" for, at most, a *de minimis* portion of these costs. It is likely that most, if not all, of the past investment in an existing pole would have been incurred regardless of the demand for attachments other than the owner's attachments.[365] As a result, under a cost causation theory, where there is space available on a pole, an attacher would be required to pay for none, or at most a *de minimis* portion, of the capital costs of that pole. Given Congress' intention that the Commission not "embark upon a large-scale ratemaking proceeding in each case brought before it, or by

[360] *See, e.g.*, *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, CC Docket No. 78-144, Memorandum Opinion and Second Report and Order, 77 FCC 2d 59, 62-63, 72-73, paras. 8-9, 28-30 (1979) (*Second Report and Order*) (defining make-ready cost). In particular, when there is no space available on an existing pole, a new attacher would pay make-ready fees for 100 percent of the actual capital cost if a new pole were placed to satisfy that attacher's demand. In this case, these capital costs would not have been incurred "but for" the pole attachment demand and the attacher—the cost causer—pays for these costs.

[361] Specifically, as discussed below, given the section 224(e) framework and Congress' expectations regarding the administrability of pole rental rate calculations, we cannot, and do not, seek to define precisely the marginal costs associated with pole attachments. Rather, in establishing the lower bound telecom rate, we adopt an approach that seeks to define "cost" in a manner that fully compensates the utility for the marginal costs of attachment once the statutory apportionments are applied.

[362] *See, e.g.*, CHARLES F. PHILLIPS, JR., THE REGULATION OF PUBLIC UTILITIES 176-80 (1993).

[363] As discussed below, the rate telecom attachers actually would pay under this approach would either be equal to, or in certain cases higher than, the rate yielded by the current cable rate formula, which does include an allocation of capital costs.

[364] *See, e.g.*, *Second Report and Order*, 72 FCC 2d at 72, para. 29 (noting that make-ready, or non-recurring costs, could include capital costs). Capital costs in the make-ready context differ from the way in which capital costs historically have been included in the telecom rate formula, where they have included depreciation expense and a return on investment.

[365] For one, we note that section 224 imposes no obligation on pole owners to anticipate the need to accommodate communications attachers when deploying poles. At the same time, there is uncertainty surrounding future attachment demand, and therefore there is the risk that the additional cost of extra pole capacity installed in anticipation of additional demand would not be recovered, leading us to believe that such extra capacity typically would be not be installed in advance purely to accommodate possible telecommunications carrier or cable attachers. It thus seems more likely that utilities would install poles based on an assessment of their own needs, and, to the extent that future attachments could not be accommodated on such poles, leave it to the new attacher to pay the cost of the new pole, to the extent that one is installed. The pole attacher therefore likely causes none, or at most a minimal portion, of the cost of the available space on an existing pole used to satisfy the attachment demand.

general order" to establish pole rental rates, this alternative would simply exclude capital costs from the pole rental rate rather than perform a detailed cost analysis to identify the likely *de minimis*, if any, capital costs to include in the lower bound telecom rate.[366] This is consistent with TWTC's argument, discussed above, that section 224(e) does not require the inclusion of these costs.[367]

136. We seek comment on whether the exclusion of capital costs from the lower bound telecom rate under this approach is consistent both with principles of cost causation and the existing section 224 framework. To the extent that pole owners contend that they do, in fact, incur significant capital costs outside the make-ready context solely to accommodate third party attachers, we seek comment on the nature and extent of those costs. For example, the Coalition of Concerned Utilities argues that: (a) communications attachers are responsible for incremental capital costs for the extra space on taller poles; and (b) those costs exceed the attachers' share of the capital costs for an entire pole that the attachers bear under the fully distributed cost methodology reflected in the Commission's existing rate formulas.[368] In particular, the Coalition argues that utilities install taller poles routinely throughout their networks to satisfy their own needs and anticipated third-party attachment demand, and that they do not receive sufficient compensation for this option.[369] For the reasons discussed above, we question how frequently such situations would arise.[370] We nevertheless invite parties to submit studies that isolate and quantify the effect of third-party attachment demand on pole height and therefore pole investment.[371]

137. In addition, under our proposal, taxes would be treated as part of the capital costs that are excluded from the lower-bound telecom rate, based on cost-causation principles. We seek comment on

[366] *See* Sen. Rep. No. 95-580, 1798 U.S.C.C.A.N. 109, at 23. The Commission explained that Congress recognized there would be "difficulties . . . in determining some cost components associated with erecting and maintaining pole line plant, and allocating those costs." *Adoption of Rules for the Regulation of Cable Television Pole Attachments,* CC Docket No. 78-144, Notice of Proposed Rulemaking, 68 FCC2d 3, 9, para. 15 (1978). In keeping with Congress' directive, our policy has been that not every detail of pole attachment cost must be accounted for, nor every detail of non-pole attachment cost eliminated from every account used. *See, e.g.*, *2000 Fee Order*, 15 FCC Rcd at 6463-64, para. 12.

[367] *See, e.g.*, TWTC White Paper, RM-11293, at 18-20.

[368] Letter from Jack Richards on behalf of the Coalition of Concerned Utilities to Edward P. Lazarus, Chief of Staff, FCC, WC Docket No. 07-245 at 2 (dated May 4, 2010) (CCU May 4, 2010 *Ex Parte* Letter) (contending that utility pole owners are not reimbursed for "the considerable additional costs ($180-$310 per pole) required to construct pole distribution systems that are taller and more expensive than the utilities need for their own purposes. These additional capital costs are caused directly by the communications attachments, but they are not recoverable by the utilities since the rate formula does not allow for recovery of incremental capital costs.").

[369] CCU May 4, 2010 *Ex Parte* Letter at 1-2.

[370] *See supra* n.365 for related discussion.

[371] Other variables in the study that might affect pole investment should be kept constant. We would expect such a study to demonstrate that investment in taller poles, if any, would not have been made 'but for' the communications attachers. For example, the study should separately quantify the additional investment in taller poles made in anticipation of third party communications attachers that was not recovered in make-ready fees and the additional investment in taller poles that was recovered in make-ready fees. In that regard, it would be useful if the study calculates the additional investment required to accommodate third-party attachers on a per pole basis and on a per pole per attacher basis. Finally, the study should describe the analytical techniques used, as well as what data was sampled.

our proposal to treat taxes as capital costs.[372] We also seek comment more generally regarding the availability of space on poles today and in the future.

138. By contrast, this approach would continue to include certain operating expenses—namely maintenance and administrative expenses—in the definition of "cost" for purposes of the lower bound telecom rate formula.[373] This is generally consistent with cost causation principles because it is likely that an attacher is causally responsible for some of the ongoing maintenance and administrative expenses relating to use of the pole. Although the attacher might not be the cost causer with respect to all the operating costs that would be included in the lower bound telecom rate under this approach, as noted above, Congress' intention was that the Commission not "embark upon a large-scale ratemaking proceeding in each case brought before it, or by general order" to establish pole rental rates, which we believe counsels in favor of including the costs in the context of maintenance and administrative expenses.[374] We seek comment on the reasonableness of including these operating costs, as well as the mechanics of such an approach. Is it appropriate to develop average per pole maintenance and administrative expenses from ARMIS or FERC 1 data and to allocate these per pole expenses between the owner and the attacher using the factors in section 224(e)?[375] Would such an approach over- or under-allocate these expenses relative to the amount actually caused by the attacher? We note that the Coalition of Concerned Utilities argues that the incremental operating costs for attachments, which utilities contend are caused by communications attachers, exceed the attachers' share of the operating costs for a pole that the attachers bear under the fully distributed cost methodology reflected in the Commission's existing rate formulas.[376] We are skeptical of this claim because we would expect that a significant portion of the pole-related maintenance and administrative expenses would be incurred for routine activities unrelated to the number of attachments. We nevertheless invite parties to submit studies that isolate and quantify the effect of third-party attachment demand on operating expenses.[377]

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[372] Income taxes are capital costs because they apply to the return equity holders receive for providing funds used to pay for the pole.

[373] The Commission's cost methodology under its current application of the telecom rate formula requires an attacher to pay for a portion of the operating expenses, specifically the maintenance and administrative expenses. *See, e.g.*, *2000 Fee Order,* 15 FCC Rcd at 6479-83, paras. 46-54. As noted above, the expenses in the pole rental rate are the recurring costs of the pole, as opposed to the non-recurring costs recovered through make-ready charges. *See generally Second Report and Order,* 72 FCC at 59 (distinguishing between non-recurring costs that are designed to be fully recovered through make-ready charges and ongoing, routine expenses incurred by the utility to maintain existing attachment facilities, which could be recovered through the pole rental rate).

[374] *See* Sen. Rep. No. 95-580, 1978 U.S.C.C.A.N. 109*,* at 23.

[375] Under the cable rate formula and the telecom rate formula, per pole maintenance and administrative expenses from ARMIS or FERC 1 data are allocated between the owner and the attacher.

[376] CCU May 4, 2010 *Ex Parte* Letter at 2 (contending that "annual operating expenses that are caused solely by communications attachers" add considerable costs, and "[t]he Commission's rate formulas allow recovery of only a small faction of these costs. . . . [F]or instance, the mechanics of the pole attachment formula reduce recovery to a minute percentage, far less than even the tiny 7.4% responsibility percentage for cable companies under the Commission's rules.").

[377] Other variables in the study that might affect pole investment should be kept constant. We would expect such a study to calculate the operating expenses, if any, that would not have been made 'but for' the communications attachers. Additional operating expenses incurred annually to provide third-party attachments should be calculated on a per pole basis and on a per pole per attacher basis, using reliable analytical techniques and valid samples of data.

139. We seek comment on alternative proposals for determining a lower bound telecom rate. For example, should the Commission instead require a more precise identification of the costs to be included under such an approach? If so, would this be consistent with Congress' goal that the Commission's rate formulas be administrable? Commenters advocating such an approach should provide data calculating these costs consistent with their proposals, and identify how such data could be obtained for purposes of implementing their recommended alternative.

(ii) Specific Rate Proposal

140. Having proposed upper- and lower-bound telecom rates, we consider the particular rate within that range that utilities may charge as the "just and reasonable" telecom rate. We note that it appears likely that, in most cases, the rates yielded by the current cable rate formula would fall within that range.[378] We seek comment on whether these findings hold for pole attachments more generally. How likely is it that the cable rate will be higher than the telecom rate calculated using only maintenance and administrative expenses?

141. In particular, under this proposal, utilities would calculate the low-end telecom rate and the rate yielded by the current cable formula, and charge whichever is higher. Significantly, the cable rate formula has been upheld by the courts as just, reasonable, and fully compensatory,[379] and would result in greater rate parity between telecommunications and cable attachers. This approach would seem to further goals of the Act—to promote communications competition and the deployment of "advanced telecommunications capability."[380] Moreover, as commenters point out, to the extent that attachers are, to the greatest extent possible, paying the same rates, this should minimize disputes that have resulted from the Commission's current rate formulas.[381] This proposed alternative also appears to be readily administrable,[382] consistent with Congress' instruction to develop a regulatory framework that may be

[378] *See* Appendix A. Based on staff calculations comparing the higher and lower bound telecom rates and the current cable rate formula under example scenarios, it appears that the current application of the telecom rate formula yields the highest pole attachment rate, the lower bound application of the telecom rate formula yields the lowest rate, and the current application of the cable rate formula yields a rate in between these upper and lower rates.

Note that, even under the Commission's original interpretation of the section 224(e) telecom rate formula, the Commission recognized that the resulting telecom rate could, in principle, be lower than the rate yielded by the cable rate formula. 47 C.F.R. § 1.1409(f) (providing for an immediate decrease in rates if the telecom rate formula yielded a rate lower than the cable rate formula, which telecom carriers were paying on an interim basis following the 1996 Act).

[379] *See, e.g.*, *FCC v. Florida Power,* 480 U.S. 245.

[380] Telecommunications Act of 1996, Public Law No. 104-104, 110 Stat. 56 (1996).

[381] *See, e.g.*, TWTC et al. Comments at 8-9; Knology Comments at 5; Bright House Reply Comments at 9-12. We note that even pole owners generally agree that we should adopt a uniform rate methodology for all pole attachments, and put forward various alternative approaches to achieving uniformity. *See, e.g.*, Coalition of Concerned Utilities Comments at 37-39 (urging a unified broadband rate methodology based on the pole attachers' avoided costs); EEI/UTC Comments at 94-97 (arguing that the Commission should apply a single rate formula, based on the current section 224(e) telecommunications formula, to all pole attachments subject to the Commission's jurisdiction); FPL et al. Comments at 2 (same).

[382] For example, it uses publicly filed data, such as FERC 1 data, that are verifiable and comply with the uniform system of accounts of the Commission and FERC. We note that AT&T, Qwest, and Verizon committed to continue filing pole attachment data publicly and annually that had been in ARMIS Report 43-01 as a condition of the Commission's forbearance from ARMIS financial reports. *Petition of Qwest Corporation for Forbearance from Enforcement of the Commission's ARMIS and 492A Reporting Requirements Pursuant to 47 U.S.C. § 160(c);Petition of Verizon for Forbearance Under 47 U.S.C. § 160(c) From Enforcement of Certain of the Commission's Recordkeeping and Reporting Requirements;* WC Docket Nos. 07-204, 07-273, Memorandum (continued….)

applied in a "simple and expeditious" manner with "a minimum of staff, paperwork and procedures consistent with fair and efficient regulation."[383] We seek comment on whether this proposal is consistent with other Commission policies, as well as whether it is consistent with the statutory mandate of section 224 to ensure "just and reasonable" pole rental rates, consistent with the statutory formulas.

c. Other Alternatives and Overarching Considerations

142. In addition to the specific alternatives for reinterpreting the telecom rate formula discussed above, we seek comment on any other possible approaches, including any approaches used by states that regulate pole attachments that commenters would recommend. For the approaches to reinterpreting the telecom rate formula discussed above, or other approaches identified by commenters, we seek comment on whether the proposal would be consistent with the Commission's obligations under the Act and whether it would further the public interest. How administrable is the proposed approach? To what extent would the proposed telecom rate be compensatory, and, when considered in conjunction with other revenues earned by the utility, would it both lead to adequate cost recovery and protect against double-recovery? Is the proposed approach consistent with the Commission's current rules governing make-ready charges—the other way in which attachers compensate pole owners for access to poles today? If not, how would the Commission's approach to make-ready payments need to be modified? Would it be possible for the Commission to forbear from applying the section 224(e) telecom rate, and adopt a different rate—such as the cable rate—pursuant to section 224(b), as some commenters have suggested?[384]

5. Incumbent LEC Rate Issues

143. As part of their proposals discussed above, AT&T/Verizon and USTelecom assert that incumbent LECs should be subject to the just and reasonable rates provision in section 224(b) in the same

(Continued from previous page)
Opinion and Order, 23 FCC Rcd 18483, 18490, para. 13 (2008), *pet. for recon. pending, pet. for review pending* (*NASUCA v. FCC,* Case No. 08-1353 (D.C. Cir. filed Nov. 4, 2008)).

[383] S. Rep. No. 95-580, 1978 U.S.C.C.A.N. 109, at 21.

[384] *See, e.g.*, NCTA Reply Comments at 18-20 (arguing that the Commission should "grant forbearance from the telecommunications rate formula with respect to non-ILEC companies providing broadband service"); Comcast Reply Comments at 17-18 (same). For example, to what extent would the Commission be forbearing from the application of a regulation or statutory provision "to a telecommunications carrier or telecommunications service" or a class thereof? *See, e.g.*, *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901, 5920, para. 53 (2007) ("Although section 10 specifically requires the Commission to override Section 332's application of common carrier regulations to CMRS providers if it determines that a three-part test is satisfied, this mandate applies only to telecommunications carriers and telecommunications services. Thus, if a non-telecommunications provider of mobile wireless broadband Internet access service is deemed a CMRS provider, we would not be authorized by section 10 to forbear from applying any applicable common carrier regulations to that provider."); *Forbearance from Applying Provisions of the Communications Act To Wireless Telecommunications Carriers*, WT Docket No. 98-100, First Report and Order, 15 FCC Rcd 17414, 17427, para. 28 (2000) (holding that "the three-prong [section 10] forbearance test is inapplicable to UTC's request because the Commission lacks forbearance authority over non-common carriers such as UTC," where UTC had sought modification of Commission rules "to allow private microwave licensees to act as providers to other carriers"). As another example, have circumstances differed from what Congress anticipated in a way that would counsel in favor of forbearance? *See, e.g.*, *Petition of Ameritech Corporation for Forbearance from Enforcement Of Section 275(c) of the Communications Act of 1934, As Amended*, 15 FCC Rcd 7066, 7070, paras. 8-9 (1999) ("Given Ameritech's failure to present any new or unanticipated circumstance that might have persuaded Congress to adopt an earlier sunset date, it would be inconsistent with the public interest for us to shorten the period during which Ameritech participation in alarm monitoring should be restricted or otherwise upset Congress' judgment on how to promote competitive conditions in the alarm monitoring market.").

manner as it applies to other providers.[385] The issues related to incumbent LEC attachment rates, however, raise complex questions, and although the National Broadband Plan noted the possible effects of these rate disparities, the Plan did not include a recommendation specifically addressing this matter.[386] As with the TWTC proposal discussed above, the Commission sought comment on the possibility of regulating the rates incumbent LECs pay for attachments in the *Pole Attachment Notice* in the context of the issues under consideration there.[387] In contrast to the rate regulation proposals discussed above, we do not propose specific rules in this Further Notice that would alter the Commission's current approach to the regulation of pole attachments by incumbent LECs. Rather, given the statutory and policy complexities, we revisit the issue of regulation of rates paid by incumbent LEC attachers both in light of the specific telecom rate proposals, as well as the factual findings of the National Broadband Plan. In addition to the questions below, commenters should refresh the record regarding the questions raised regarding regulation of rates paid by incumbent LECs in the *Pole Attachment Notice* in the context of the issues under consideration here.

144. As an initial matter, we seek comment on the relationship between incumbent LEC pole attachments rates and deployment of broadband networks and affordability of broadband services. USTelecom asserts that pole attachment rates "can disproportionately affect the cost of delivering broadband in [rural] areas because the typically longer loops in rural areas often require more pole attachments per end user."[388] Windstream, for example, argues that "[g]iven the importance of pole attachments in deploying advanced networks to rural consumers, any Commission action that reduces excessive pole attachment rates would promote, rather than stifle, a competitive marketplace for advanced communications networks," including broadband.[389] Windstream thus urges the Commission to extend a lower uniform attachment rate that it may adopt to incumbent LECs because it relies heavily on pole attachments to deploy broadband service to rural consumers.[390] Do commenters agree that uniform rates between incumbent LECs and other providers are necessary or helpful to promote broadband deployment in unserved or underserved areas of the country?[391]

145. We also seek comment on the relationship between the pole rental rates paid by incumbent LECs and any other rights and responsibilities they have by virtue of their pole access agreements with utilities. For instance, incumbent LECs generally asserted in response to the *Pole Attachment Notice* that they presently are forced to pay rates for pole attachments that are unreasonably higher than those available to other attachers and that they need the protection of just and reasonable rates under section 224 to preclude being placed at a competitive disadvantage.[392] Unlike other attachers, however, incumbent LECs generally attach to poles pursuant to joint use or joint ownership

[385] AT&T/Verizon Oct. 27, 2008 *Ex Parte* Letter at 4; USTelecom Oct. 27, 2008 *Ex Parte* Letter at 8.

[386] *See* National Broadband Plan at 110.

[387] Among other things, the *Pole Attachment Notice* tentatively concluded that there should be a uniform rate for pole attachments used to provide broadband Internet access service, and that rate should be higher than the rate produced by the current cable rate formula, but no higher than the rate produced by the current telecom rate formula. Following from the National Broadband Plan, our focus here, however, is to consider ways to reinterpret the telecom rate formula to yield rates as low and close to uniform as possible.

[388] USTelecom Oct. 27, 2008 *Ex Parte* Letter at 6.

[389] Windstream Comments at 3.

[390] Windstream Comments at 2.

[391] *See, e.g.*, USTelecom Oct. 27, 2008 *Ex Parte* Letter at 6.

[392] *See, e.g.*, CenturyTel Comments at 3-5, 12-15; Frontier Comments at 2-3; ITTA Comments at 1-6; Verizon Reply Comments at 7.

agreements.[393] These arrangements between incumbent LECs and electric companies historically provide more favorable terms and conditions to attaching incumbent LECs than competitive LECs and cable operators receive from electric companies under license agreements.[394] Electric utilities, cable operators, and competitive LECs thus argue that incumbent LECs have negotiated terms and conditions that give them advantages over cable operators and competitive LECs and, therefore, reducing attachment rates for incumbent LECs or allowing them to pay the same rate would provide them with an unfair competitive advantage.[395] We seek further comment on how to reconcile these assessments and how the Commission should best pursue competitively neutral policies in these circumstances.

146. To the extent that section 224(b)'s "just and reasonable" rate regulation could apply to attachments by incumbent LECs, how would those rates be regulated to ensure that they are "just and reasonable," and how might they affect joint use or joint ownership agreements? Should the rate be the same as other attachers pay, notwithstanding the possible differences in pole access and utilization, as discussed above? And how should any approach be implemented? For instance, AT&T argues that, if incumbent LECs are entitled to attachments at regulated "just and reasonable" rates under section 224, any rate assessed by an electric company in excess of the statutory maximum rate should be unenforceable "because it would, by definition, be unjust and unreasonable" even if contained in an existing joint use agreement.[396]

147. NCTA proposes an alternative plan whereby any attaching entity, including incumbent LECs, would be permitted to "opt in" to existing pole agreements.[397] Under this proposal, each pole owner would make each pole attachment, joint ownership, or joint use agreement publicly available, and attachers could opt in to those agreements, accepting all the terms and conditions of the agreement.[398] NCTA presumes "that pole owners will not be harmed by allowing third parties to attach to their poles at rates, terms, and conditions that the pole owner already has made available to at least one other attaching party in its service area."[399] NCTA anticipates that "many ILECs may be reluctant to give up the favorable attachment rights that they typically possess under most joint use agreements," but provides them an alternative in cases where they believe a pole owner's rates are unreasonable.[400] We seek input on the viability of these approaches, or other possible approaches. Could a remedy providing the ability for incumbent LECs unilaterally to opt out of joint use or joint ownership agreements in certain circumstances affect more than rate issues, such as safety and emergency response obligations, or negate

[393] *See, e.g.*, Comcast Comments at 6; Verizon Reply Comments at 13 n.34 (distinguishing between joint use and joint ownership agreements).

[394] *See, e.g.*, Comcast Comments at 6.

[395] *See, e.g.*, Alabama Power et al. Comments at 6-14; EEI/UTC Comments at 48-54; Time-Warner Cable Comments at 46-53; Letter from Thomas B. Magee on behalf of the Coalition of Concerned Utilities to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245 (filed Dec. 8, 2009) (providing information that cable operators and competitive LECs pay more in make-ready costs than incumbent LECs).

[396] *See, e.g.*, AT&T Reply Comments at 25, 27 (citing *Nevada State Cable Television Assoc. v. Nevada Bell,* File No. PA 96-001, 17 FCC Rcd 15534, 15535, para. 2 (2002)).

[397] NCTA Reply Comments at 21.

[398] NCTA Reply Comments at 21-22. Pole owners would be required upon request to provide information necessary for an attaching party to make an informed decision about whether it would want to opt in to an existing agreement. NCTA Reply Comments at 21.

[399] NCTA Reply Comments at 21.

[400] NCTA Reply Comments at 22.

other benefits that other utilities realize through joint use agreements? To what extent would any approach be readily administrable?

148. In addition to requesting the right to pay a uniform rate for pole attachments, incumbent LECs also generally assert that they should have "the same right as competitive LECs, wireless providers, and cable television systems to file complaints before the Commission to enforce their right to reasonable pole attachment rates, terms, and conditions for poles in which they lack an ownership interest."[401] Some incumbent LECs assert they are left without any or sufficient recourse if electric utilities impose unreasonable rates, terms, and conditions and that this conflicts with the Commission's goals of promoting competition and broadband deployment.[402] Electric utilities argue that incumbent LECs may seek recourse at the state level if they believe rates are unreasonable. We seek comment on what remedies incumbent LECs presently have to challenge any rates, terms, and conditions for pole attachments. Are those remedies sufficient? How, if at all, would the ability to file complaints with the Commission affect any state or local laws governing dispute resolution?

V. PROCEDURAL MATTERS

A. Paperwork Reduction Act Analysis

149. This document contains new information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new or modified information collection requirements adopted in this Order.

B. Regulatory Flexibility Analysis

150. As required by the Regulatory Flexibility Act of 1980, as amended,[403] the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) for this further notice of proposed rulemaking, of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this further notice of proposed rulemaking. The IRFA is 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 further notice of proposed rulemaking. The Commission will send a copy of the notice of proposed rulemaking, including this IRFA, to the Chief Counsel for Advocacy of the SBA.[404] In addition, the notice of proposed rulemaking and IRFA (or summaries thereof) will be published in the Federal Register.[405]

C. *Ex Parte* Presentations

151. This proceeding shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.[406] 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

[401] *See, e.g.*, Verizon Reply Comments at 12-13.

[402] *See, e.g.*, ITTA Comments at 5; Verizon Reply Comments at 13.

[403] 5 U.S.C. § 603.

[404] *See* 5 U.S.C. § 603(a).

[405] *Id*.

[406] 47 C.F.R. §§ 1.1200-1.1216.

views and arguments presented is generally required.[407] Other requirements pertaining to oral and written presentations are set forth in section 1.1206(b) of the Commission's rules.[408]

D. Comment Filing Procedures

152. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. All pleadings are to reference WC Docket No. 07-245 and GN Docket No. 09-51. 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.[409]

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: http://fjallfoss.fcc.gov/ecfs2/.
- Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

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

154. All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th Street, S.W., Room TW-A325, Washington, D.C. 20554. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. The filing hours are 8:00 a.m. to 7:00 p.m. 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 must be addressed to 445 12th Street, S.W., Washington D.C. 20554.

155. People with Disabilities: To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (tty).

156. Parties should send a copy of each filing to the Competition Policy Division, Wireline Competition Bureau, Federal Communications Commission, 445 12th Street, SW, 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, SW, Room CY-B402, Washington, D.C. 20554, (202) 488-5300, or via e-mail to fcc@bcpiweb.com.

157. Filings and comments will be available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, S.W., Room CY-A257, Washington, D.C. 20554. They may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street, S.W., Room CY-B402, Washington, D.C. 20554, telephone: (202) 488-5300, fax: (202) 488-5563, or via e-mail www.bcpiweb.com.

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[407] 47 C.F.R. § 1.1206(b)(2).

[408] 47 C.F.R. § 1.1206(b).

[409] *See Electronic Filing of Documents in Rulemaking Proceedings*, GC Docket No. 97-113, Report and Order, 13 FCC Rcd 11322 (1998).

VI. ORDERING CLAUSES

158. Accordingly, IT IS ORDERED that pursuant to sections 1, 4(i), 4(j), 224, 251(b)(4), and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i)-(j), 224, 251(b)(4), 303, this Order and Further Notice of Proposed Rulemaking in WC Docket No. 07-245 IS ADOPTED.

159. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this further notice, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

160. IT IS FURTHER ORDERED that, pursuant to sections 1.4(b)(1) and 1.103(a) of the Commission's rules, 47 CFR §§ 1.4(b)(1), 1.103(a), this Order and Further Notice of Proposed Rulemaking SHALL BE EFFECTIVE thirty days after publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Pole Attachment Rates

Commission staff calculated the pole attachment rates set out below based on: (1) the cable rate formula including all of the capital costs (i.e., rate of return, depreciation, and taxes) and operating expenses (i.e., maintenance and administrative expenses); (2) the telecom rate formula including all of the capital costs and operating expenses; and (3) the telecom formula including operating expenses but no capital costs.[1]

Incumbent LEC Pole Attachment Rates, Based on ARMIS Data
($ per attachment per year)

All Costs	VZ NY	VZ PA	AT&T CA	AT&T FL	AT&T IL	AT&T TX	Qwest CO	Qwest WA
Cable Rate	4.58	2.16	5.43	4.92	1.80	2.16	1.58	2.48
Telecom Rate - Urbanized (5 attachers)	6.92	3.26	8.21	7.44	2.72	3.26	2.39	3.75
Telecom Rate - Non-Urbanized (3 attachers)	10.43	4.92	12.39	11.22	4.11	4.92	3.60	5.65
No Capital Costs								
Telecom Rate - Urbanized (5 attachers)	1.71	0.49	2.47	2.03	0.51	0.94	0.82	0.66
Telecom Rate - Non-Urbanized (3 attachers)	2.58	0.74	3.72	3.06	0.77	1.41	1.24	0.99

Utility Pole Attachment Rates, Based on FERC Data
($ per attachment per year)

All Costs	Gulf Power	Alabama Power	Georgia Power	Tampa Electric	Jersey Central	Metro Edison	Penn Electric	NSTAR
Cable Rate	6.31	8.00	6.32	8.24	8.21	8.69	8.01	6.90
Telecom Rate - Urbanized (5 attachers)	9.54	12.09	9.56	12.46	12.41	13.13	12.11	10.43
Telecom Rate - Non-Urbanized (3 attachers)	14.38	18.23	14.42	18.79	18.71	19.81	18.26	15.73
No Capital Costs								
Telecom Rate - Urbanized (5 attachers)	2.85	4.32	3.52	3.23	3.29	3.64	1.90	2.90
Telecom Rate - Non-Urbanized (3 attachers)	4.29	6.52	5.31	4.87	4.96	5.50	2.86	4.37

[1] Commission staff calculated these pole attachment rates for both electric utilities and telecommunications providers. Pole attachment rate calculations are based on 2007 financial data from both the ARMIS and the FERC Form 1 accounts and the Commission's rebuttable presumptions of 37.5 feet for the height of a pole, 24 feet for the unusable space on a pole, 13.5 feet for the usable space, 1 foot for the space occupied by an attachment, 3 attachers in non-urban areas, and 5 attachers in urban areas. *See* 47 C.F.R. §§ 1.1417-18. Pole counts for utilities are based on filings in this record; incumbent LEC pole counts are from ARMIS data.

APPENDIX B

Proposed Rules

Part 1, Subpart J of Title 47 of the Code of Federal Regulations would be amended as follows:

1. The heading of Part 1, Subpart J would be amended as follows:

Subpart J—Pole Attachment ~~Complaint~~ Procedures

2. Section 1.1402 would be amended to include subsection (o), as follows:

§ 1.1402 Definitions.

* * * *

(o) The term *authorized contractor* means an independent contractor that is approved by a utility and is certified by the utility to perform field surveys, engineering analyses, or make-ready work, and includes any contractor that the utility itself employs to perform such work.

3. Section 1.1403(b) would be amended to read as follows:

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

* * * *

(b) Requests for access to a utility's poles, ducts, conduits, or rights-of-way by a telecommunications carrier or cable operator must be in writing. If access is not granted within 45 days of the request for access, the utility must ~~confirm~~ explain the denial or grant of access conditioned on performance of make-ready in writing by the 45th day. The utility's ~~denial of access~~ explanation shall be specific, shall include all relevant evidence and information supporting its ~~denial~~ decision and shall explain how such evidence and information relate to a denial or conditional grant of access for reasons of lack of capacity, safety, reliability or engineering standards.

4. Section 1.1404(d) and (m) would be amended to read as follows:

§ 1.1404 Complaint.

* * * *

(d) The complaint shall be accompanied by a copy of the pole attachment agreement, if any, between the cable system operator or telecommunications carrier and the utility. If the complainant contends that a rate, term, or condition in an executed pole attachment agreement is unjust and unreasonable, it shall attach to its complaint evidence documenting that the complainant provided written notice to the respondent, during negotiation of the agreement, that the complainant considered the rate, term, or condition unjust and unreasonable, and the basis for that conclusion. Proof of such notice to the respondent shall be a prerequisite to filing a complaint challenging a rate, term, or condition in an executed agreement, except where the complainant establishes that the rate, term, or condition was not unjust and unreasonable on its face, but only as applied by the respondent, and it could not reasonably have anticipated that the challenged rate, term, or condition would be applied or interpreted in such an unjust and unreasonable manner. If there is no present pole attachment agreement, the complaint shall contain:

(1) A statement that the utility uses or controls poles, ducts, or conduits used or designated, in whole or in part, for wire communication; and

(2) A statement that the cable television system operator or telecommunications carrier currently has attachments on the poles, ducts, conduits, or rights-of-way.

* * * *

(m) In a case where a cable television system operator or telecommunications carrier claims that it has been denied access to a pole, duct, conduit or right-of-way despite a request made pursuant to section 47 U.S.C. § 224(f), the complaint, ~~shall be filed within 30 days of such denial. I~~n addition to meeting the other requirements of this section, ~~the complaint~~ shall include the data and information necessary to support the claim, including:

(1) The reasons given for the denial of access to the utility's poles, ducts, conduits and rights-of-way;

(2) The basis for the complainant's claim that the denial of access is improper;

(3) The remedy sought by the complainant;

(4) A copy of the written request to the utility for access to its poles, ducts, conduits or rights-of-way; and

(5) A copy of the utility's response to the written request including all information given by the utility to support its denial of access. A complaint alleging improper denial of access will not be dismissed if the complainant is unable to obtain a utility's written response, or if the utility denies the complainant any other information needed to establish a prima facie case.

5. Section 1.1409(e) would be revised to read as follows:

1.1409 Commission consideration of the complaint.

* * * *

(e) * * *

(2) ~~Subject to paragraph (f) of this section the following formula shall apply to attachments to poles by any telecommunications carrier (to the extent such carrier is not party to a pole attachment agreement) or cable operator providing telecommunications services beginning February 8, 2001. [formula graphic]~~ With respect to attachments to poles by any telecommunications carrier or cable operator providing telecommunications services, the maximum just and reasonable rate shall be the higher of: (i) the rate yielded by section 1.1409(e)(1) of this Part or (ii) the rate yielded by the following formula:

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

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

6. Section 1.1410 would be revised to read as follows:

1.1410 Remedies.

(1) If the Commission determines that the rate, term, or condition complained of is not just and reasonable, it may prescribe a just and reasonable rate, term, or condition and may:

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

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

(c) Order a refund, or payment, if appropriate. The refund or payment will normally be the difference between the amount paid under the unjust and/or unreasonable rate, term, or condition and the amount that would have been paid under the rate, term, or condition established by the Commission ~~from the date that the complaint, as acceptable, was filed~~, plus interest, consistent with the applicable statute of limitations; and

(d) Order an award of compensatory damages, consistent with the applicable statute of limitations.

(2) If the Commission determines that access to a pole, duct, conduit, or right-of-way has been unlawfully denied or unreasonably delayed, it may:

(a) Order that access be permitted within a specified time frame and in accordance with specified rates, terms and conditions; and

(b) Order an award of compensatory damages, consistent with the applicable statute of limitations.

7. Section 1.1420 would be added to read as follows:

1.1420 Timeline for access to poles, ducts, conduits, and rights of way.

(a) All time limits in this subsection are to be calculated according to section 1.4 of this title.

(b) A request for access triggers a requirement to perform the obligations in section 1.1403(b) within 45 days, including a survey and engineering analysis used to support a utility's decision. If the utility fails to complete and deliver the survey to the requesting entity within 45 days after the request, the requesting entity may use a contractor to complete the survey and engineering analysis. The utility shall cooperate with the requesting entity in directing and supervising the authorized contractor.

(1) For poles, ducts, conduits, and rights-of-way owned by an incumbent LEC utility, the requesting entity shall use a contractor that has at least the same qualifications and training as the incumbent LEC's own workers that perform the same tasks.

(2) For poles, ducts, conduits, and rights-of-way owned by a non-incumbent LEC utility, the requesting entity shall use an authorized contractor.

(c) Within 14 days of providing a survey as required by section 1.1420(b), a utility shall tender an offer to perform all necessary make-ready work, including an estimate of its charges.

(1) The requesting entity may accept a valid offer and make an initial payment upon receipt, or until the offer is withdrawn.

(2) The utility may withdraw an outstanding offer to perform make-ready work after 14 days.

(d) Upon receipt of payment, a utility shall notify immediately all attaching entities that may be affected by the project, and shall specify the date after which the utility or its agents become entitled to move the facilities of the attaching entity.

(1)The utility shall set a date for completion of make-ready no later than 45 days after the notice.

(2) The utility shall direct and coordinate the sequence and timing of rearrangement of facilities to afford each attaching entity a reasonable opportunity to use its own personnel to move its facilities.

(3) Completion of all make-ready work and final payment by the requesting entity shall complete the grant of requested access and all necessary authorization.

(e) If make-ready work is not completed by any other attaching entities as required by paragraph

(d) above, the utility or its agent shall complete all necessary make-ready work.

(1) An incumbent local exchange carrier's facilities may be rearranged or replaced by the utility or its agents 45 days after the notice required in paragraph (d) above.

(2) A cable system operator's or telecommunications carrier's remaining facilities may be rearranged or replaced by the utility or its agents 60 days after the notice required by paragraph (d) above.

(f) If make-ready work is not completed in the time specified in paragraph (e)(2) above, the requesting entity may use a contractor to complete all necessary make-ready work. For poles owned by an incumbent LEC utility, the requesting entity shall use a contractor that has at least the same qualifications and training as the incumbent LEC's own workers that perform the same tasks. For poles owned by a non-incumbent LEC utility, the requesting entity shall use an authorized contractor.

(1) The utility shall cooperate with the requesting entity in directing and supervising the contractor.

(2) Upon completion of make-ready, the requesting entity shall pay the utility for any outstanding expenses charged by the utility for expenses incurred to complete the make-ready.

(3) Upon receipt of payment or establishment that no further payment is due, the utility shall confirm that the request for access is granted.

(4) Once all make-ready work is performed and the request for access is granted, the requesting entity may use any contractor to install its facilities that has the same qualifications, in terms of training, as the utility's own workers, whether or not the contractor is authorized by the utility.

8. Section 1.1422 would be added to read as follows:

1.1422 Contractors.

(a) Utilities shall make available

(1) a list of authorized contractors; and

(2) criteria and procedures for becoming an authorized contractor.

(b) If a contractor has been hired according to conditions specified in §1.1420, a utility may direct and supervise an authorized contractor in cooperation with the requesting entity.

(1) The attaching entity shall invite a utility representative to accompany the contractor and the utility representative may consult with the authorized contractor and the entity requesting access.

(2) The representative of a non-incumbent LEC utility may make final determinations on a nondiscriminatory basis that relate directly to insufficient capacity or the safety, reliability, and sound engineering of the infrastructure.

9. Section 1.1424 would be added to read as follows:

1.1424 Exclusion from work among the electric lines.

(a) Utilities may exclude non-utility personnel from working among the electric lines on a utility pole, except workers with specialized communications-equipment skills or training that the utility cannot duplicate which are necessary to add or maintain a pole attachment.

(b) Utilities shall permit workers with specialized skills or training concerning communications equipment to work among the electric lines:

(1) in concert with the utility's workforce; and

(2) when the utility deems it safe.

10. Section 1.1426 would be added to read as follows:

1.1426 Charges for access and make-ready.

(a) Utilities shall make available to attaching entities a schedule of common make-ready charges.

(b) Payment for make-ready charges is due in the following increments:

(1) payment of 50 percent of estimated charges requires the recipient utility to begin make-ready performance.

(2) payment of 25 percent of estimated charges is due 22 days after the first payment.

(3) payment of remaining make-ready charges is due when access is granted.

11. Section 1.1428 would be added to read as follows:

1.1428 Administration of pole attachment requests.

(a) Where a pole is jointly owned by more than one utility:

(1) the owners shall designate a single owner to manage requests for pole attachment; and

(2) each owner shall make publicly available the identity of the managing utility for its poles.

(b) Requesting entities shall not be required to interact with an owner other than the single managing pole owner.

(c) The managing pole owner shall:

(1) collect from each existing attacher a statement of any costs attributable to rearrangement of the existing attacher's facilities to accommodate a new attacher.

(2) bill the new attacher for these costs, plus any expenses the managing pole owner incurs in its role as clearinghouse; and

(3) disburse compensatory payment to the existing attachers.

APPENDIX C

List of Commenters

***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, 22 FCC Rcd 20195, 20198-99, para. 9 (2007).**

Commenter	Abbreviation
American Electric Power Service Corporation; Duke Energy Corporation; Entergy Services Company; PPL Electric Utilities Corporation; Progress Energy; Southern Company; and Xcel Energy Services, Inc.	AEP et al.
Alabama Power Company; Georgia Power Company; Gulf Power Company; and Mississippi Power Company	Alabama Power et al.
Alpheus Communications, L.P. and 360networks USA, Inc.	Alpheus and 360networks
Ameren Services Company; and Virginia Electric and Power Company	Ameren and Virginia Electric
AT&T Inc.	AT&T
Cavalier Telephone, LLC	Cavalier
CenturyTel, Inc.	CenturyTel
Charter Communications, Inc.	Charter
Coalition of Concerned Utilities	Coalition of Concerned Utilities
Comcast Corporation	Comcast
CTIA – The Wireless Association	CTIA
DAS Forum	DAS Forum
Edison Electric Institute and Utilities Telecom Council	EEI/UTC
Empire District Electric Company	Empire
ExteNet Systems, Inc.	ExteNet
Fibertech Networks, LLC; and Kentucky Data Link, Inc.	Fibertech/KDL
Fibertower Corporation	Fibertower
Florida Power & Light; and Tampa Electric Company	FPL and Tampa Electric
Florida Power & Light Company; Tampa Electric Company; and Progress Energy Florida, Inc.	FPL et al.
Frontier Communications	Frontier
Hance Haney	Hance Haney
Idaho Power Company	Idaho Power
Independent Telephone and Telecommunications Alliance	ITTA
Knology, Inc.	Knology
Mississippi Cable Telecommunications Association	MCTA
MetroPCS Communications, Inc.	MetroPCS
MI Connection Communications System	MI Connection
National Cable & Television Association	NCTA
NextG Networks, Inc.	NextG
National Telecommunications Cooperative Association	NTCA
Oncor Electric Delivery Company	Oncor
Oregon Public Utility Commission	Oregon Commission
PacifiCorp, Wisconsin Electric Power Company; and	PacifiCorp et al.

Wisconsin Public Service Corporation	
Portland General Electric Company	PGE
Qwest Communications International, Inc.	Qwest
State Cable Associations	SCA
segTEL, Inc.	segTEL
Sunesys, LLC	Sunesys
T-Mobile USA	T-Mobile
Time Warner Cable, Inc.	Time Warner Cable
Time Warner Telecom, Inc.; One Communications Corporation; and CompTel	TWTC
United States Telecom Association	USTelecom
Utilities Telecom Council	UTC
Utah Public Service Commissioners	Utah Commissioners
Verizon	Verizon
Windstream Corporation	Windstream
Wireless Communications Association International, Inc.	WCA
WOW! Internet Cable and Phone	WOW!
Zayo Bandwidth Entities	Zayo

Reply Commenter	**Abbreviation**
American Electric Power Service Corporation; Duke Energy Corporation; Entergy Services Company; PPL Electric Utilities Corporation; Progress Energy; Southern Company; and Xcel Energy Services, Inc.	AEP et al.
Alabama Power Company; Georgia Power Company; Gulf Power Company; and Mississippi Power Company	Alabama Power et al.
Ameren Services Company; and Virginia Electric and Power Company	Ameren and Virginia Electric
American Cable Association	ACA
American Corn Growers Association	ACGA
American Legislative Exchange Council	ALEC
Americans for Tax Reform and Media Free Project	ATR/MFP
AT&T Inc.	AT&T
Coalition of Concerned Utilities	Coalition of Concerned Utilities
Comcast Corporation	Comcast
CTIA – The Wireless Association	CTIA
DAS Forum	DAS Forum
Edison Electric Institute and Utilities Telecom Council	EEI/UTC
Embarq Local Operating Companies	Embarq
ExteNet Systems, Inc.	ExteNet
Fibertech Networks, LLC; and Kentucky Data Link, Inc.	Fibertech/KDL
Fibertower Corporation	Fibertower
Florida Cable Telecommunications Association, Inc.	FCTA
Florida Power & Light Company; Tampa Electric Company; and Progress Energy Florida, Inc.	FPL et al.
Georgia Power Company	Georgia Power
Grande Communications Networks, Inc.	Grande
Independent Telephone and Telecommunications Alliance	ITTA

National Association of State Utility Consumer Advocates	NASUCA
National Cable & Television Association	NCTA
National Rural Electric Cooperative Association	NRECA
National Telecommunications Cooperative Association	NTCA
NextG Networks, Inc.	NextG
Oncor Electric Delivery Company	Oncor
Organization for the Promotion and Advancement of Small Telecommunications Companies	OPASTCO
Pacific LightNet, Inc.	Pacific LightNet
PacifiCorp, Wisconsin Electric Power Company; and Wisconsin Public Service Corporation	PacifiCorp et al.
State Cable Associations	SCA
segTEL, Inc; Zayo Bandwidth Entities; and 360networks USA, Inc.	SegTEL et al.
Sunesys, LLC	Sunesys
T-Mobile USA	T-Mobile
Time Warner Cable, Inc.	Time Warner Cable
Time Warner Telecom, Inc.; One Communications Corporation; and CompTel	TWTC
United States Telecom Association	USTelecom
Verizon	Verizon

APPENDIX D

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 Further Notice of Proposed Rulemaking (Further 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 Further Notice provided on the first page of the Further Notice. The Commission will send a copy of the Further Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).[2] In addition, the Further 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 Further Notice seeks comment on a variety of issues relating to implementation of section 224 pole attachment rules in light of increasing intermodal competition since the Commission began to implement the 1996 Act. Specifically, the Further Notice seeks comment on the adoption of a specific timeline regarding the pole attachment request, survey, and make-ready time period in order to provide greater certainty for the timely deployment of telecommunications, cable, and broadband services. Additionally, the Further Notice seeks comment on the adoption of several proposals regarding the ability of new attachers to use contractors to perform pole attachment make-ready work. The Further Notice also proposes improvements to the existing enforcement process. Finally, the Further Notice seeks comment on existing rules governing pole attachment rates for telecommunications carriers and incumbent local exchange carriers (LECs) in pursuit of a low, compensatory rate that will improve incentives for network deployment.

B. Legal Basis

3. The legal basis for any action that may be taken pursuant to the Further Notice is contained in sections 1, 4(i), 4(j), 224, 251(b)(4), and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i)-(j), 224, 251(b)(4), 303.

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 and policies, if adopted.[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

[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).

[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 (continued….)

"small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[7]

5. *Small Businesses*. Nationwide, there are a total of approximately 29.6 million small businesses, according to the SBA.[8]

6. *Small Organizations*. Nationwide, as of 2002, there are approximately 1.6 million small organizations.[9] A "small organization" is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."[10]

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."[11] Census Bureau data for 2002 indicate that there were 87,525 local governmental jurisdictions in the United States.[12] We estimate that, of this total, 84,377 entities were "small governmental jurisdictions."[13] Thus, we estimate that most governmental jurisdictions are small.

8. We have included small incumbent local exchange carriers 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."[14] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not "national" in scope.[15] We have therefore included small incumbent local exchange carriers 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 Local Exchange Carriers ("ILECs")*. Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers.

(Continued from previous page)

agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[7] 15 U.S.C. § 632.

[8] *See* SBA, Office of Advocacy, "Frequently Asked Questions," http://web.sba.gov/faqs (accessed Jan. 2009).

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

[10] 5 U.S.C. § 601(4).

[11] 5 U.S.C. § 601(5).

[12] U.S. Census Bureau, Statistical Abstract of the United States: 2006, Section 8, p. 272, Table 415.

[13] 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, p. 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.*

[14] 15 U.S. C. § 632.

[15] 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).

Under that size standard, such a business is small if it has 1,500 or fewer employees.[16] According to Commission data,[17] 1,311 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,311 carriers, an estimated 1,024 have 1,500 or fewer employees and 287 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 proposed action.

10. *Competitive Local Exchange Carriers ("CLECs"), 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.[18] According to Commission data,[19] 1005 carriers have reported that they are engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 1005 carriers, an estimated 918 have 1,500 or fewer employees and 87 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, 89 carriers have reported that they are "Other Local Service Providers." Of the 89, all have 1,500 or fewer 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 that may be affected by our proposed action.

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.[20] According to Commission data,[21] 300 carriers have reported that they are engaged in the provision of interexchange service. Of these, an estimated 268 have 1,500 or fewer employees and 32 have more than 1,500 employees. Consequently, the Commission estimates that the majority of IXCs are small entities that may be affected by our proposed action.

12. *Satellite Telecommunications and All Other Telecommunications*. These two economic census categories address the satellite industry. The first category has a small business size standard of $15 million or less in average annual receipts, under SBA rules.22 The second has a size standard of $25 million or less in annual receipts.23 The most current Census Bureau data in this context, however, are from the (last) economic census of 2002, and we will use those figures to gauge the prevalence of small businesses in these categories.[24]

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[16] 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 517110.

[17] FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, "*Trends in Telephone Service*" at Table 5.3, Page 5-5 (Aug. 2008) ("*Trends in Telephone Service*"). This source uses data that are current as of November 1, 2006.

[18] 13 C.F.R. § 121.201, NAICS code 517110.

[19] "Trends in Telephone Service" at Table 5.3.

[20] 13 C.F.R. § 121.201, NAICS code 517110.

[21] "Trends in Telephone Service" at Table 5.3.

[22] 13 C.F.R. § 121.201, NAICS code 517410.

[23] 13 C.F.R. § 121.201, NAICS code 517919.

[24] 13 C.F.R. § 121.201, NAICS codes 517410 and 517910 (2002).

13. The category of Satellite Telecommunications "comprises establishments primarily engaged in providing telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications."[25] For this category, Census Bureau data for 2002 show that there were a total of 371 firms that operated for the entire year.[26] Of this total, 307 firms had annual receipts of under $10 million, and 26 firms had receipts of $10 million to $24,999,999.[27] Consequently, we estimate that the majority of Satellite Telecommunications firms are small entities that might be affected by our action.

14. The second category of All Other Telecommunications comprises, *inter alia*, "establishments primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems."[28] For this category, Census Bureau data for 2002 show that there were a total of 332 firms that operated for the entire year.[29] Of this total, 303 firms had annual receipts of under $10 million and 15 firms had annual receipts of $10 million to $24,999,999.[30] Consequently, we estimate that the majority of All Other Telecommunications firms are small entities that might be affected by our action.

15. *Wireless Telecommunications Carriers (except Satellite)*. Since 2007, the Census Bureau has placed wireless firms within this new, broad, economic census category.[31] Prior to that time, such firms were within the now-superseded categories of "Paging" and "Cellular and Other Wireless Telecommunications."[32] Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.[33] Because Census Bureau data are not yet available for the new category, we will estimate small business prevalence using the prior categories and associated data. For the category of Paging, data for 2002 show that there were 807 firms that operated for the entire year.[34] Of this total, 804 firms had employment of 999 or fewer employees, and three firms

[25] U.S. Census Bureau, 2007 NAICS Definitions, "517410 Satellite Telecommunications"; http://www.census.gov/naics/2007/def/ND517410.HTM.

[26] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 4, NAICS code 517410 (issued Nov. 2005).

[27] *Id*. An additional 38 firms had annual receipts of $25 million or more.

[28] U.S. Census Bureau, 2007 NAICS Definitions, "517919 All Other Telecommunications"; http://www.census.gov/naics/2007/def/ND517919.HTM#N517919.

[29] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 4, NAICS code 517910 (issued Nov. 2005).

[30] *Id*. An additional 14 firms had annual receipts of $25 million or more.

[31] U.S. Census Bureau, 2007 NAICS Definitions, "517210 Wireless Telecommunications Categories (Except Satellite)"; http://www.census.gov/naics/2007/def/ND517210.HTM#N517210.

[32] U.S. Census Bureau, 2002 NAICS Definitions, "517211 Paging"; http://www.census.gov/epcd/naics02/def/NDEF517.HTM.; U.S. Census Bureau, 2002 NAICS Definitions, "517212 Cellular and Other Wireless Telecommunications"; http://www.census.gov/epcd/naics02/def/NDEF517.HTM.

[33] 13 C.F.R. § 121.201, NAICS code 517210 (2007 NAICS). The now-superseded, pre-2007 C.F.R. citations were 13 C.F.R. § 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS).

[34] 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).

had employment of 1,000 employees or more.[35] For the category of Cellular and Other Wireless Telecommunications, data for 2002 show that there were 1,397 firms that operated for the entire year.[36] Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more.[37] Thus, we estimate that the majority of wireless firms are small.

16. *Common Carrier Paging*. As noted, since 2007 the Census Bureau has placed paging providers within the broad economic census category of Wireless Telecommunications Carriers (except Satellite).[38] Prior to that time, such firms were within the now-superseded category of "Paging."[39] Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.[40] Because Census Bureau data are not yet available for the new category, we will estimate small business prevalence using the prior category and associated data. The data for 2002 show that there were 807 firms that operated for the entire year.[41] Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more.[42] Thus, we estimate that the majority of paging firms are small.

17. In addition, 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.[43] 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.[44] The SBA has approved this definition.[45] An initial auction of Metropolitan Economic Area ("MEA") licenses was conducted in the year 2000. Of the 2,499 licenses auctioned, 985

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[35] *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."

[36] 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).

[37] *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."

[38] U.S. Census Bureau, 2007 NAICS Definitions, "517210 Wireless Telecommunications Categories (Except Satellite)"; http://www.census.gov/naics/2007/def/ND517210.HTM#N517210.

[39] U.S. Census Bureau, 2002 NAICS Definitions, "517211 Paging"; http://www.census.gov/epcd/naics02/def/NDEF517.HTM.

[40] 13 C.F.R. § 121.201, NAICS code 517210 (2007 NAICS). The now-superseded, pre-2007 C.F.R. citations were 13 C.F.R. § 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS).

[41] 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).

[42] *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."

[43] *Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems*, 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*, Memorandum Opinion and Order on Reconsideration, 14 FCC Rcd 10030, 10085-10088, ¶¶ 98-107 (1999).

[44] *Paging Second Report and Order*, 12 FCC Rcd at 2811, ¶ 179.

[45] *See* Letter from Aida Alvarez, Administrator, SBA, to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau ("WTB"), FCC (Dec. 2, 1998) ("*Alvarez Letter 1998*").

were sold.[46] Fifty-seven companies claiming small business status won 440 licenses.[47] A subsequent auction of MEA and Economic Area ("EA") licenses was held in the year 2001. Of the 15,514 licenses auctioned, 5,323 were sold.[48] 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, was held in 2003. Seventy-seven bidders claiming small or very small business status won 2,093 licenses. [49]

18. Currently, there are approximately 74,000 Common Carrier Paging licenses. According to the most recent *Trends in Telephone Service*, 281 carriers reported that they were engaged in the provision of "paging and messaging" services.[50] Of these, an estimated 279 have 1,500 or fewer employees and two have more than 1,500 employees.[51] We estimate that the majority of common carrier paging providers would qualify as small entities under the SBA definition..

19. *Wireless Telephony*. Wireless telephony includes cellular, personal communications services, and specialized mobile radio telephony carriers. As noted, the SBA has developed a small business size standard for Wireless Telecommunications Carriers (except Satellite).[52] Under the SBA small business size standard, a business is small if it has 1,500 or fewer employees.[53] According to *Trends in Telephone Service* data, 434 carriers reported that they were engaged in wireless telephony.[54] Of these, an estimated 222 have 1,500 or fewer employees and 212 have more than 1,500 employees.[55] We have estimated that 222 of these are small under the SBA small business size standard.

20. *Broadband Personal Communications Service*. The broadband personal communications services ("PCS") spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission has created a small business size standard for Blocks C and F as an entity that has average gross revenues of less than $40 million in the three previous calendar years.[56] For Block F, an additional small business size standard for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years.[57] These small business

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[46] *See* "*929 and 931 MHz Paging Auction Closes*," Public Notice, 15 FCC Rcd 4858 (WTB 2000).

[47] *See id.*

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

[49] *See* "Lower and Upper Paging Bands Auction Closes," Public Notice, 18 FCC Rcd 11154 (WTB 2003). The current number of small or very small business entities that hold wireless licenses may differ significantly from the number of such entities that won in spectrum auctions due to assignments and transfers of licenses in the secondary market over time. In addition, some of the same small business entities may have won licenses in more than one auction.

[50] "Trends in Telephone Service" at Table 5.3.

[51] "Trends in Telephone Service" at Table 5.3.

[52] 13 C.F.R. § 121.201, NAICS code 517210.

[53] *Id*.

[54] "Trends in Telephone Service" at Table 5.3.

[55] "Trends in Telephone Service" at Table 5.3.

[56] *See Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, Report and Order, 11 FCC Rcd 7824, 7850-7852, paras. 57-60 (1996) ("*PCS Report and Order*"); *see also* 47 C.F.R. § 24.720(b).

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

size standards, in the context of broadband PCS auctions, have been approved by the SBA.[58] 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.[59] In 1999, the Commission reauctioned 155 C, D, E, and F Block licenses; there were 113 small business winning bidders.[60]

21. In 2001, the Commission completed the auction of 422 C and F Broadband PCS licenses in Auction 35. Of the 35 winning bidders in this auction, 29 qualified as "small" or "very small" businesses.[61] 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. In 2005, the Commission completed an auction of 188 C block licenses and 21 F block licenses in Auction 58. There were 24 winning bidders for 217 licenses.[62] Of the 24 winning bidders, 16 claimed small business status and won 156 licenses. In 2007, the Commission completed an auction of 33 licenses in the A, C, and F Blocks in Auction 71.[63] Of the 14 winning bidders, six were designated entities.[64] In 2008, the Commission completed an auction of 20 Broadband PCS licenses in the C, D, E and F block licenses in Auction 78.[65]

22. *Advanced Wireless Services*. In 2008, the Commission conducted the auction of Advanced Wireless Services ("AWS") licenses.[66] This auction, which as designated as Auction 78, offered 35 licenses in the AWS 1710-1755 MHz and 2110-2155 MHz bands ("AWS-1"). The AWS-1 licenses were licenses for which there were no winning bids in Auction 66. That same year, the Commission completed Auction 78. A bidder with attributed average annual gross revenues that exceeded $15 million and did not exceed $40 million for the preceding three years ("small business") received a 15 percent discount on its winning bid. A bidder with attributed average annual gross revenues that did not exceed $15 million for the preceding three years ("very small business") received a 25 percent discount on its winning bid. A bidder that had combined total assets of less than $500 million and combined gross revenues of less than $125 million in each of the last two years qualified for entrepreneur status.[67] Four winning bidders that identified themselves as very small businesses won 17

[58] *See Alvarez Letter 1998*.

[59] FCC News, "Broadband PCS, D, E and F Block Auction Closes," No. 71744 (rel. Jan. 14, 1997).

[60] *See* "C, D, E, and F Block Broadband PCS Auction Closes," *Public Notice*, 14 FCC Rcd 6688 (WTB 1999).

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

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

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

[64] *Id*.

[65] *See* Auction of AWS-1 and Broadband PCS Licenses Rescheduled For August 13, 3008, Notice of Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures For Auction 78, *Public Notice*, 23 FCC Rcd 7496 (2008) ("AWS-1 and Broadband PCS Procedures Public Notice").

[66] *See* AWS-1 and Broadband PCS Procedures Public Notice, 23 FCC Rcd 7496. Auction 78 also included an auction of Broadband PCS licenses.

[67] *Id*. at 23 FCC Rcd at 7521-22.

licenses.[68] Three of the winning bidders that identified themselves as a small business won five licenses. Additionally, one other winning bidder that qualified for entrepreneur status won 2 licenses.

23. *Narrowband Personal Communications Services*. In 1994, the Commission conducted an auction for Narrowband PCS licenses. A second auction was also conducted later in 1994. For purposes of the first two Narrowband PCS auctions, "small businesses" were entities with average gross revenues for the prior three calendar years of $40 million or less.[69] Through these auctions, the Commission awarded a total of 41 licenses, 11 of which were obtained by four small businesses.[70] To ensure meaningful participation by small business entities in future auctions, the Commission adopted a two-tiered small business size standard in the Narrowband PCS Second Report and Order.[71] 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.[72] 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.[73] The SBA has approved these small business size standards.[74] A third auction was conducted in 2001. Here, five bidders won 317 (Metropolitan Trading Areas and nationwide) licenses.[75] Three of these claimed status as a small or very small entity and won 311 licenses.

24. *Cellular Radiotelephone Service*. Auction 77 was held to resolve one group of mutually exclusive applications for Cellular Radiotelephone Service licenses for unserved areas in New Mexico.[76] Bidding credits for designated entities were not available in Auction 77.[77] In 2008, the Commission completed the closed auction of one unserved service area in the Cellular Radiotelephone Service, designated as Auction 77. Auction 77 concluded with one provisionally winning bid for the unserved

[68] *See* "Auction of AWS-1 and Broadband PCS Licenses Closes, Winning Bidders Announced for Auction 78, Down Payments Due September 9, 2008, FCC Forms 601 and 602 Due September 9, 2008, Final Payments Due September 23, 2008, Ten-Day Petition to Deny Period", *Public Notice*, 23 FCC Rcd 12749-65 (2008).

[69] *Implementation of Section 309(j) of the Communications Act – Competitive Bidding Narrowband PCS*, Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 10 FCC Rcd 175, 196, para. 46 (1994).

[70] *See* "Announcing the High Bidders in the Auction of ten Nationwide Narrowband PCS Licenses, Winning Bids Total $617,006,674," *Public Notice*, PNWL 94-004 (rel. Aug. 2, 1994); "Announcing the High Bidders in the Auction of 30 Regional Narrowband PCS Licenses; Winning Bids Total $490,901,787," *Public Notice*, PNWL 94-27 (rel. Nov. 9, 1994).

[71] *Amendment of the Commission's Rules to Establish New Personal Communications Services*, Narrowband PCS, Second Report and Order and Second Further Notice of Proposed Rule Making, 15 FCC Rcd 10456, 10476, para. 40 (2000) ("*Narrowband PCS Second Report and Order*").

[72] *Narrowband PCS Second Report and Order*, 15 FCC Rcd at 10476, para. 40.

[73] *Id.*

[74] *See Alvarez Letter 1998*.

[75] *See* "Narrowband PCS Auction Closes," *Public Notice*, 16 FCC Rcd 18663 (WTB 2001).

[76] *See* Closed Auction of Licenses for Cellular Unserved Service Area Scheduled for June 17, 2008, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 77, *Public Notice*, 23 FCC Rcd 6670 (2008).

[77] *Id.* at 6685.

area totaling $25,002.[78]

25. *Private Land Mobile Radio ("PLMR")*. PLMR systems serve an essential role in a range of industrial, business, land transportation, and public safety activities. These radios are used by companies of all sizes operating in all U.S. business categories, and are often used in support of the licensee's primary (non-telecommunications) business operations. For the purpose of determining whether a licensee of a PLMR system is a small business as defined by the SBA, we use the broad census category, Wireless Telecommunications Carriers (except Satellite). This definition provides that a small entity is any such entity employing no more than 1,500 persons.[79] The Commission does not require PLMR licensees to disclose information about number of employees, so the Commission does not have information that could be used to determine how many PLMR licensees constitute small entities under this definition. We note that PLMR licensees generally use the licensed facilities in support of other business activities, and therefore, it would also be helpful to assess PLMR licensees under the standards applied to the particular industry subsector to which the licensee belongs.[80]

26. As of March 2010, there were 424,162 PLMR licensees operating 921,909 transmitters in the PLMR bands below 512 MHz. We note that any entity engaged in a commercial activity is eligible to hold a PLMR license, and that any revised rules in this context could therefore potentially impact small entities covering a great variety of industries.

27. *Fixed Microwave Services*. Fixed microwave services include common carrier,[81] private operational-fixed,[82] and broadcast auxiliary radio services.[83] At present, there are approximately 22,015 common carrier fixed licensees and 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. The Commission has not created a size standard for a small business specifically with respect to fixed microwave services. For purposes of this analysis, the Commission uses the SBA small business size standard for the category Wireless Telecommunications Carriers (except Satellite), which is 1,500 or fewer employees.[84] The Commission does not have data specifying the number of these licensees that have no more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of fixed microwave service licensees that would qualify as small business concerns under the SBA's small business size standard. Consequently, the Commission estimates that there are 22,015 or fewer common carrier fixed licensees and 61,670 or fewer private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave

[78] *See* Auction of Cellular Unserved Service Area License Closes, Winning Bidder Announced for Auction 77, Down Payment due July 2, 2008, Final Payment due July 17, 2008, *Public Notice*, 23 FCC Rcd 9501 (2008).

[79] *See* 13 C.F.R. § 121.201, NAICS code 517210.

[80] *See generally* 13 C.F.R. § 121.201.

[81] *See* 47 C.F.R. §§ 101 *et seq*. for common carrier fixed microwave services (except Multipoint Distribution Service).

[82] Persons eligible under parts 80 and 90 of the Commission's Rules can use Private Operational-Fixed Microwave services. *See* 47 C.F.R. Parts 80 and 90. Stations in this service are called operational-fixed to distinguish them from common carrier and public fixed stations. Only the licensee may use the operational-fixed station, and only for communications related to the licensee's commercial, industrial, or safety operations.

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

[84] 13 C.F.R. § 121.201, NAICS code 517210.

services that may be small and may be affected by the rules and policies proposed herein. We note, however, that the common carrier microwave fixed licensee category includes some large entities.

28. *Local Multipoint Distribution Service*. Local Multipoint Distribution Service ("LMDS") is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.[85] The auction of the 986 LMDS licenses began and closed in 1998. The Commission established a small business size standard for LMDS licenses as an entity that has average gross revenues of less than $40 million in the three previous calendar years.[86] An additional small business size standard for "very small business" was added as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years.[87] The SBA has approved these small business size standards in the context of LMDS auctions.[88] There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. In 1999, the Commission re-auctioned 161 licenses; there were 32 small and very small businesses winning that won 119 licenses.

29. *Rural Radiotelephone Service*. The Commission has not adopted a size standard for small businesses specific to the Rural Radiotelephone Service.[89] A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio System ("BETRS").[90] In the present context, we will use the SBA's small business size standard applicable to Wireless Telecommunications Carriers (except Satellite), *i.e*., an entity employing no more than 1,500 persons.[91] 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 proposed herein.

30. *Broadband Radio Service and Educational Broadband Service*. Broadband Radio Service systems, previously referred to as Multipoint Distribution Service ("MDS") and Multichannel Multipoint Distribution Service ("MMDS") systems, and "wireless cable," transmit video programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service ("BRS") and Educational Broadband Service ("EBS") (previously referred to as the Instructional Television Fixed Service ("ITFS")).[92] In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross

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[85] *See Rulemaking to Amend Parts 1, 2, 21, 25, of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, Reallocate the 29.5-30.5 Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rule Making, 12 FCC Rcd 12545, 12689-90, ¶ 348 (1997) ("*LMDS Second Report and Order*").

[86] *See LMDS Second Report and Order*, 12 FCC Rcd at 12689-90, ¶ 348.

[87] *See id.*

[88] *See Alvarez to Phythyon Letter 1998*.

[89] The service is defined in § 22.99 of the Commission's Rules, 47 C.F.R. § 22.99.

[90] BETRS is defined in §§ 22.757 and 22.759 of the Commission's Rules, 47 C.F.R. §§ 22.757 and 22.759.

[91] 13 C.F.R. § 121.201, NAICS code 517210.

[92] *Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, MM Docket No. 94-131 and PP Docket No. 93-253, Report and Order, 10 FCC Rcd 9589, 9593, ¶ 7 (1995) ("*MDS Auction R&O*").

revenues of no more than $40 million in the previous three calendar years.[93] The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas ("BTAs"). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent BRS licensees that are considered small entities.[94] After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 BRS licensees that are defined as small businesses under either the SBA or the Commission's rules. In 2009, the Commission conducted Auction 86, the sale of 78 licenses in the BRS areas.[95] The Commission offered three levels of bidding credits: (i) a bidder with attributed average annual gross revenues that exceed $15 million and do not exceed $40 million for the preceding three years (small business) will receive a 15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed $3 million and do not exceed $15 million for the preceding three years (very small business) will receive a 25 percent discount on its winning bid; and (iii) a bidder with attributed average annual gross revenues that do not exceed $3 million for the preceding three years (entrepreneur) will receive a 35 percent discount on its winning bid.[96] Auction 86 concluded in 2009 with the sale of 61 licenses.[97] Of the ten winning bidders, two bidders that claimed small business status won 4 licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses.

31. In addition, the SBA's Cable Television Distribution Services small business size standard is applicable to EBS. There are presently 2,032 EBS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities.[98] Thus, we estimate that at least 1,932 licensees are small businesses. Since 2007, Cable Television Distribution 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, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies."[99] 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

[93] 47 C.F.R. § 21.961(b)(1).

[94] 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standard.

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

[96] *Id.* at 8296.

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

[98] The term "small entity" within SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6). We do not collect annual revenue data on EBS licensees.

[99] U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers" (partial definition); http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.

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.[100] 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.[101] 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.[102] Thus, the majority of these firms can be considered small.

32. *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, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies."[103] 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.[104] 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.[105] 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.[106] Thus, the majority of these firms can be considered small.

33. *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.[107] Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard.[108] In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.[109]

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[100] 13 C.F.R. § 121.201, NAICS code 517110.

[101] 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).

[102] *Id*. An additional 61 firms had annual receipts of $25 million or more.

[103] U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers" (partial definition); http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.

[104] 13 C.F.R. § 121.201, NAICS code 517110.

[105] 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).

[106] *Id*. An additional 61 firms had annual receipts of $25 million or more.

[107] 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, 10 FCC Rcd 7393, 7408 (1995).

[108] 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.

[109] 47 C.F.R. § 76.901(c).

Industry data indicate that, of 6,635 systems nationwide, 5,802 systems have under 10,000 subscribers, and an additional 302 systems have 10,000-19,999 subscribers.[110] Thus, under this second size standard, most cable systems are small.

34. *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."[111] 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, do not exceed $250 million in the aggregate.[112] Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard.[113] 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,[114] and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

35. *Open Video Systems*. The open video system ("OVS") framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming services by local exchange carriers.[115] The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,[116] OVS falls within the SBA small business size standard covering cable services, which is "Wired Telecommunications Carriers."[117] 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 such 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.[118] According to Census Bureau data

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[110] Warren Communications News, *Television & Cable Factbook 2008*, "U.S. Cable Systems by Subscriber Size," page F-2 (data current as of Oct. 2007). The data do not include 851 systems for which classifying data were not available.

[111] 47 U.S.C. § 543(m)(2); *see* 47 C.F.R. § 76.901(f) & nn. 1-3.

[112] 47 C.F.R. § 76.901(f); *see* Public Notice, *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, DA 01-158 (Cable Services Bureau, Jan. 24, 2001).

[113] 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.

[114] 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).

[115] 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, Thirteenth Annual Report,* 24 FCC Rcd 542, 606 ¶ 135 (2009) ("*Thirteenth Annual Cable Competition Report*").

[116] *See* 47 U.S.C. § 573.

[117] U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers"; http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.

[118] 13 C.F.R. § 121.201, NAICS code 517110.

for 2002, there were a total of 1,191 firms in this previous category that operated for the entire year.[119] 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.[120] Thus, the majority of cable firms can be considered small. In addition, we note that the Commission has certified some OVS operators, with some now providing service.[121] Broadband service providers ("BSPs") are currently the only significant holders of OVS certifications or local OVS franchises.[122] The Commission does not have financial or employment information regarding the entities authorized to provide OVS, some of which may not yet be operational. Thus, again, at least some of the OVS operators may qualify as small entities.

36. *Cable Television Relay Service*. This service includes transmitters generally used to relay cable programming within cable television system distribution systems. This cable service is 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, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies."[123] 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 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.[124] 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.[125] 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.[126] Thus, the majority of these firms can be considered small.

37. *Multichannel Video Distribution and Data Service*. MVDDS is a terrestrial fixed microwave service operating in the 12.2-12.7 GHz band. The Commission adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits. It defined a very small business as an entity with average annual gross revenues not exceeding $3 million for the preceding three years; a small business as an entity with average annual gross revenues not exceeding $15 million for the preceding three years; and an entrepreneur as an entity with average annual gross revenues not exceeding $40 million for the preceding three years.[127] These

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[119] 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).

[120] *Id*. An additional 61 firms had annual receipts of $25 million or more.

[121] A list of OVS certifications may be found at http://www.fcc.gov/mb/ovs/csovscer.html.

[122] *See Thirteenth Annual Cable Competition Report*, 24 FCC Rcd at 606-07 ¶ 135. 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.

[123] U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers" (partial definition); http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.

[124] 13 C.F.R. § 121.201, NAICS code 517110.

[125] 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).

[126] *Id*. An additional 61 firms had annual receipts of $25 million or more.

[127] *Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range; Amendment of the Commission's* (continued….)

definitions were approved by the SBA.[128] On January 27, 2004, the Commission completed an auction of 214 MVDDS licenses (Auction No. 53). In this auction, ten winning bidders won a total of 192 MVDDS licenses.[129] Eight of the ten winning bidders claimed small business status and won 144 of the licenses. The Commission also held an auction of MVDDS licenses on December 7, 2005 (Auction 63). Of the three winning bidders who won 22 licenses, two winning bidders, winning 21 of the licenses, claimed small business status.[130]

38. *Internet Service Providers*. The 2007 Economic Census places these firms, whose services might include voice over Internet protocol (VoIP), in either of two categories, depending on whether the service is provided over the provider's own telecommunications connections (*e.g.* cable and DSL, ISPs), or over client-supplied telecommunications connections (*e.g.* dial-up ISPs). The former are within the category of Wired Telecommunications Carriers,[131] which has an SBA small business size standard of 1,500 or fewer employees.[132] The latter are within the category of All Other Telecommunications,[133] which has a size standard of annual receipts of $25 million or less.[134] The most current Census Bureau data for all such firms, however, are the 2002 data for the previous census category called Internet Service Providers.[135] That category had a small business size standard of $21 million or less in annual receipts, which was revised in late 2005 to $23 million. The 2002 data show that there were 2,529 such firms that operated for the entire year.[136] Of those, 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.[137] Consequently, we estimate that the majority of ISP firms are small entities.

39. *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

(Continued from previous page)
Rules to Authorize Subsidiary Terrestrial Use of the 12.2-12.7 GHz Band by Direct Broadcast Satellite Licenses and their Affiliates; and Applications of Broadwave USA, PDC Broadband Corporation, and Satellite Receivers, Ltd. to provide A Fixed Service in the 12.2-12.7 GHz Band, ET Docket No. 98-206, Memorandum Opinion and Order and Second Report and Order, 17 FCC Rcd 9614, 9711, ¶ 252 (2002).

[128] *See* Letter from Hector V. Barreto, Administrator, U.S. Small Business Administration, to Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, WTB, FCC (Feb.13, 2002).

[129] *See* "*Multichannel Video Distribution and Data Service Auction Closes*," Public Notice, 19 FCC Rcd 1834 (2004).

[130] *See* "*Auction of Multichannel Video Distribution and Data Service Licenses Closes; Winning Bidders Announced for Auction No. 63*," Public Notice, 20 FCC Rcd 19807 (2005).

[131] U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers", http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.

[132] 13 C.F.R. § 121.201, NAICS code 517110 (updated for inflation in 2008).

[133] U.S. Census Bureau, 2007 NAICS Definitions, "517919 All Other Telecommunications"; http://www.census.gov/naics/2007/def/ND517919.HTM#N517919.

[134] 13 C.F.R. § 121.201, NAICS code 517919 (updated for inflation in 2008).

[135] U.S. Census Bureau, "2002 NAICS Definitions, "518111 Internet Service Providers"; http://www.census.gov/eped/naics02/def/NDEF518.HTM.

[136] 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).

[137] An additional 45 firms had receipts of $25 million or more.

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."[138] 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."[139] According to Census Bureau data for 2002, there were 1,644 firms in this category that operated for the entire year.[140] 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.

40. *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."[141] The SBA has developed a small business size standard for this industry, which is: all such firms having 500 or fewer employees.[142] According to Census Bureau data for 2002, there were 468 firms in this category that operated for the entire year.[143] Of this total, 424 firms had employment of fewer than 500 employees, and 18 firms had employment of 500 to 999 employees.[144] Thus, the majority of firms in this category can be considered small.

41. *Water Supply and Irrigation Systems*. This economic census category "comprises establishments primarily engaged in operating water treatment plants and/or operating water supply systems."[145] 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.[146] According to Census Bureau data for 2002, there

[138] U.S. Census Bureau, 2002 NAICS Definitions, "2211 Electric Power Generation, Transmission and Distribution"; http://www.census.gov/epcd/naics02/def/NDEF221.HTM.

[139] 13 C.F.R. § 121.201, NAICS codes 221111, 221112, 221113, 221119, 221121, 221122, footnote 1.

[140] 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).

[141] U.S. Census Bureau, 2007 NAICS Definitions, "221210 Natural Gas Distribution"; http://www.census.gov/epcd/naics02/def/ND221210.HTM.

[142] 13 C.F.R. § 121.201, NAICS code 221210.

[143] 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).

[144] *Id*. An additional 26 firms had employment of over 1,000 employees.

[145] U.S. Census Bureau, 2007 NAICS Definitions, "221310 Water Supply and Irrigation Systems" (partial definition); http://www.census.gov/naics/2007/def/ND221310.HTM.

[146] 13 C.F.R. § 121.201, NAICS code 221310.

were 3,830 firms in this category that operated for the entire year.[147] 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.[148] Thus, the majority of firms in this category can be considered small.

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

42. Should the Commission adopt the proposed 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 and attaching entities. In particular, if the Commission adopts rules governing the timing of pole attachment preparation (i.e., survey and make-ready), as opposed to resolution on a case-specific complaint basis, reporting, recordkeeping or other compliance requirements could change.[149] 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 conduits, including information management; (2) performance of make-ready work, including timeliness, safety, capacity, and the use of boxing and extension arms; and (3) the use of qualified third-party contract workers.[150]

43. Should the Commission alter the enforcement process, such action could result in increased, reduced, or otherwise altered reporting, recordkeeping, or other compliance requirements for pole owners and attaching entities. In particular, if the Commission eliminates the 30-day requirement in rule 1.404(m), a cable television operator or telecommunications carrier would no longer be required to file a complaint that it was denied access to a pole, duct, conduit or right-of-way despite a request made pursuant to section 47 USC § 224(f) within 30 days of the denial.[151] If the Commission adopts a penalty regime for unauthorized attachments similar to Oregon's, pole owners might be required to notify occupiers of alleged violations, and to allow the occupiers an opportunity to correct violations or submit a plan for correction, before pursuing relief under the Commission's rules.[152] If the Commission modifies the "sign and sue" rule, such action might require attachers to provide notice during contact negotiations of terms they consider unreasonable or discriminatory.[153]

44. 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 pole attachments used for broadband Internet access service, providers of such services might be required to record and report where such service is offered.[154] 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

[147] 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).

[148] *Id*. An additional 36 firms had annual sales of $10 million or more.

[149] *See* Further Notice at paras. 29, 31.

[150] *See, e.g.*, Further Notice at paras. 35, 44.

[151] See Further Notice at para. 82.

[152] *See* Further Notice at para. 95.

[153] *See* Further Notice at para. 99.

[154] *See* Further Notice at para. 119.

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.[155]

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

45. 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.[156]

46. The Commission proposes to adopt a specific timeline and several additional rules that provide a predictable, timely process for parties to seek and obtain pole attachments, while maintaining a utility's interest in preserving safety, reliability, and sound engineering. In the consideration of these proposals, the Commission seeks comment on whether adjustments based on the size of the utility to which the timeline applies are warranted.[157] For instance, the Commission asks whether small utilities should negotiate all timelines individually or have the option of adjusting the timeline based on the size of the attachment request, and whether steps taken to improve the availability of pole data could potentially burden small pole owners.[158] Further, the Commission does not have authority to regulate (and the proposed rules, thus, do not apply to) small utilities that are municipally or cooperatively owned.

47. The Commission also proposes to modify its rules to ensure that its enforcement process is suited to resolving access-related complaints and is fair to all parties.[159] In particular, the Commission proposes to remove the 30-day requirement to file a complaint from section 1.404(m), amend section 1.1410 to enumerate the remedies available to an attacher and provide for compensatory damages, and amend section 1.404(d) to require an attacher to object in writing, during contract negotiations, to provisions it considers unreasonable or discriminatory.[160] These modifications aim to streamline the complaint process and remove barriers to informal dispute resolution, and they should have minimal, if any, economic impact on small entities.[161]

48. Finally, the Commission proposes to promote broadband deployment and competition by reinterpreting the section 224(e) telecom rate in a way that yields pole rental rates that are as low and close to uniform as possible.[162] The Commission considered requiring all categories of providers to pay a uniform rate that would have been higher than the cable rate but lower than the telecom rate, but found

[155] *See* Further Notice at paras. 142, 145.

[156] 5 U.S.C. § 603(c).

[157] *See* Further Notice at paras. 48-49.

[158] *See* Further Notice at paras. 48, 76.

[159] *See* Further Notice at para. 24.

[160] *See* Further Notice at paras. 82, 85-86, 107-08.

[161] *See, e.g.*, Further Notice at paras. 82

[162] *See* Further Notice at paras. 122, 129.

that pursuing uniformity by increasing cable operators' pole rental rates would come at the cost of increased broadband prices and reduced incentives for deployment.[163] The Commission also seeks comment on alternative proposals that would establish a uniform rate for all pole attachments used to provide broadband, and on whether the rates paid by incumbent LEC attachers should also be subject to the "just and reasonable" rates provision in section 224(b).[164]

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

49. None.

[163] *See* Further Notice at paras. 117-18.

[164] *See* Further Notice at paras. 119, 142.

STATEMENT OF
CHAIRMAN JULIUS GENACHOWSKI

Re: *Implementation of Section 224 of the Act*, WC Docket No. 07-245, *A National Broadband Plan for Our Future*, GN Docket No. 09-51

To achieve our vital goal of ubiquitous broadband, and to promote investment, competition, job creation, and our global competitiveness, we must ensure that the process for deploying broadband infrastructure is as efficient and streamlined as possible.

The National Broadband Plan identified reform in pole attachment rules as an important step in lowering the costs of broadband investment, and encouraging the deployment of new facilities. Today's action -- an *Order* as well as *Further Notice* -- represents more concrete progress towards achieving our Nation's vital broadband goals.

Timely, economical access to poles is essential to wired and wireless broadband deployment. The *Order* we adopt today sets out many of the specifics that will encourage investment and deployment.

Section 224 of the Communications Act guarantees cable operators and telecommunications carriers non-discriminatory access to poles, and directs the Commission to ensure that the rates, terms, and conditions for pole attachments are just and reasonable. Today's *Order* clarifies that these providers have a right to timely access and to use the same space- and cost-saving techniques that pole owners use, such as placing attachments on both sides of a pole.

The National Broadband Plan demonstrated that the U.S. is lagging globally in broadband, and that rapid progress is essential to our global competitiveness and to U.S. world leadership in innovation in the 21st century. The National Broadband Plan also demonstrated that there's no silver bullet to achieve these goals -- indeed, that many key rules and policies will involve the 'blood and guts' of broadband deployment. Our *Order* today is in this category -- I believe it will yield real results for real people: faster, cheaper, and more widely available broadband.

And the *Further Notice* we adopt sets the stage for the Commission to address additional essential topics in the near future -- such as a new methodology for setting pole rental rates, improved enforcement processes, and specific timelines for pole attachments. The item also recognizes that it is essential to maintain safety, reliability, and sound engineering practices as we work to improve the pole access process. We will continue to carefully consider suggestions from the utilities on these and other matters.

As this item moves forward, I encourage everyone -- pole owners, attachers, and customers -- to be active participants in the process. We welcome and need your thoughtful comments and constructive suggestions to ensure that broadband infrastructure is deployed quickly, safely, and economically, which will promote competition and benefit all consumers.

I know that staff has worked long and hard on this item. I applaud their efforts, thank them for what has been accomplished, and look forward to completing this rulemaking.

STATEMENT OF
COMMISSIONER MICHAEL J. COPPS

Re: *Implementation of Section 224 of the Act*, WC Docket No. 07-245, *A National Broadband Plan for Our Future*, GN Docket No. 09-51

There may be those who think the issues surrounding pole attachments are less than totally captivating and compelling, but that wouldn't be us, would it? "In-the-weeds" though it may often be, good pole attachment policy is integral to ensuring ubiquitous and robust broadband deployment. I may not have been a believer when I walked through these portals nine years ago, but I'm a believer now.

I am pleased that the National Broadband Plan recognizes, and places a priority on, these issues. The Commission has had opportunities to get this done before and somehow we didn't. So I am pleased with today's *Order and Further Notice of Proposed Rulemaking* and hope that the Commission will move forward expeditiously with this proceeding.

The Order correctly clarifies the statutory right of pole attachers to non-discriminatory and timely access to poles. And I am pleased with the *Further Notice of Proposed Rulemaking's* thorough inquiry into pole attachment access, enforcement and rates. I look forward to quickly completing a record upon which the Commission can act, and I am pleased to support this item.

STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL

Re: *Implementation of Section 224 of the Act*, WC Docket No. 07-245, *A National Broadband Plan for Our Future*, GN Docket No. 09-51

While not flashy, the statute and applicable rules relating to pole attachments are important pieces of the broadband deployment puzzle. Section 224 of the Communications Act sets forth the requirements for access to poles, ducts, conduits and rights-of-way for both cable television systems and telecommunications carriers (collectively "attachers"). Our action today seeks to provide immediate clarity on some issues that have impeded broadband deployment, while also seeking more advice to help us build a better record for important decisions to come.

Under Section 224(f)(1), a utility is required to provide access on a nondiscriminatory basis. Not surprisingly, there has been some confusion surrounding the meaning of "nondiscriminatory" in the context of Section 224. Today's order clarifies that "nondiscriminatory" means that a pole owner must allow an attacher to use space- and cost-saving techniques when practical and consistent with a pole owner's use of those techniques. This holding, however, does not take away any statutory rights of utilities to limit access when ensuring safety, reliability and sound engineering. Additionally, the order clarifies that Section 224's use of the term "just and reasonable access" includes timely preparation of the poles for attachment, commonly referred to as the "make-ready" process.

As interpreted by the Commission in the past, Section 224 embodies terms that have resulted in different treatment for cable systems and telecommunications service providers when they are seeking to attach to poles. I note that the disparities in this area highlight the overall need to streamline and provide parity wherever legally sustainable. As the stovepipe regulations of yesteryear become increasingly burdensome, we should strive to modernize our regulations so that similar offerings are treated equally. While, as a general rule, I favor parity of regulation for similar providers of services, at the same time, we must meet our statutory obligations. I will keep this in mind as comments are filed pursuant to the Further Notice of Proposed Rulemaking (FNPRM).

I thank Chairman Genachowski for his leadership in putting this topic at the front end of his broadband agenda. I also thank the staff in the Wireline Competition Bureau for their diligence on this order and FNPRM. Both documents are well written and thorough. With regard to the FNPRM, I recognize that some may have wished that some of the issues in the FNPRM actually be in the order rather than put out for further comment, especially regarding rates. However, the Chairman was wise to seek further comment on these issues so that all stakeholders can have one more opportunity to propose creative ideas and set forth additional statutory analysis. Such thoroughness will put any final comprehensive order on a solid legal footing.

In sum, I do recognize that Section 224(c) limits the Commission's action on pole attachment issues to areas of the country where such access issues are not regulated by a State. Nevertheless, each step forward, where possible, can make a difference in overall broadband deployment. I look forward to analyzing the record and applicable law in this docket as we encourage the continued deployment of broadband throughout America.

STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN

Re: *Implementation of Section 224 of the Act*, WC Docket No. 07-245, *A National Broadband Plan for Our Future*, GN Docket No. 09-51

I support today's item because access to poles, conduits and rights-of-way are the "nuts and bolts" of how providers deploy broadband to America. With clear rules, those entities requiring access to facilities and those companies owning the facilities will each respectively understand their rights and obligations under the Communications Act. The result will be more predictable and timely access to facilities, as well as an opportunity for providers to better plan and execute deployment of their networks. This clarity will enable us to meet our goals of expeditiously reaching those consumers who don't currently have broadband available to them offering a competitive broadband service in some cases. Moreover, I agree with this item's conclusion that pole rental rates should not discourage providers from offering broadband service over their networks. This item puts forward specific rules for comment in order to achieve our goal to encourage broadband deployment throughout the country to benefit consumers, while balancing the safety and reliability concerns of facility owners. Once this record is complete, we should move forward promptly in order to promote broadband deployment and competition.

STATEMENT OF
COMMISSIONER MEREDITH A. BAKER

Re: *Implementation of Section 224 of the Act*, WC Docket No. 07-245, *A National Broadband Plan for Our Future*, GN Docket No. 09-51

This Order and Further Notice are an important step forward in crafting policy to ensure broadband access by all people of the United States. Nondiscriminatory access to poles, ducts, conduits, and rights-of-way at just and reasonable terms and conditions is critical for deployment and achieving the broadband goals set out by Congress. We already have a substantial record on pole attachments and I recognize that these issues are contentious. All sides of these disputes have legitimate concerns. While it is our responsibility to address the public policy interests of broadband deployment and promoting competition, we must also consider the critical interests of safety, reliability, and sound engineering practices.

I am pleased that this Order clarifies some basic rights and responsibilities under section 224. I also appreciate that the Further Notice tees up some difficult issues related to both rates and access. On rates in particular, I am interested in carefully considering how our policy proposals fit within the statutory framework laid out by Congress. With regard to access, protracted disputes between pole owners and attachers must not become obstacles to broadband deployment and competition, but any rules we adopt must be flexible enough to account for the unique safety considerations related to live electricity and other exceptional circumstances of pole infrastructure.

I encourage all parties affected by our pole attachment rules to actively and constructively engage in this next phase of the proceeding and I look forward to reviewing the record. And as always, I appreciate the hard work of the staff on this item.