WASHINGTON—CARBON MONOXIDE—Continued

Designated area	Designation		Classification	
	Date[1]	Type	Date[1]	Type
Spokane County (part)				
Spokane urban area (as defined by the Washington Department of Transportation urban area maps).	.....	Nonattainment	4–13–98	Serious.
* * * * * * *				

[1] This date is November 15, 1990, unless otherwise noted.

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[FR Doc. 98–5978 Filed 3–11–98; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 1

[CS Docket No. 97–151; FCC 98–20]

Pole Attachments

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Report and Order describes rules and policies concerning a methodology for just, reasonable and nondiscriminatory rates for pole attachments, conduits and rights-of-way for telecommunications carriers. The Report and Order amends our regulations to reflect the provisions regarding rates for telecommunications carriers in the Telecommunications Act of 1996 (the ''1996 Act''). The Report and Order fulfills Congress' mandate in the 1996 Act and will provide guidance to pole owners, cable operators and telecommunications carriers.

DATES: Effective April 13, 1998, except §§ 1.1403, 1.1404, 1.1409, 1.1417 and 1.1418 which contain information collection requirements that are not effective until approved by the Office of Management and Budget. Sections 1.1403, 1.1404, 1.1409, 1.1417 and 1.1418 of the Commission's rules will become effective July 30, 1998, unless the Commission publishes a notice before that date stating that the Office of Management and Budget (''OMB'') has not approved the information collection requirements contained in the rules. Written comments by the public on the new and/or modified information collection requirements should be submitted on or before May 11, 1998. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: A copy of any comments on the information collection requirements contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 234, 1919 M St., N.W., Washington, DC 20554 or via internet to jboley@fcc.gov.

FOR FURTHER INFORMATION CONTACT: For additional information concerning the information collection requirements contained herein, contact Judy Boley at 202–418–0214 or via internet at jboley@fcc.gov.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order, CS Docket 97–151, adopted and released February 6, 1998. The full text of this decision is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 1919 M Street, NW, Washington, D.C. 20554, and may be purchased from the Commission's copy contractor, International Transcription Service, (202) 857–3800, 1231 20th Street, NW, Washington, D.C. 20036.

The requirements adopted in this Report and Order have been analyzed with respect to the Paperwork Reduction Act of 1995 (''1995 Act'') and found to impose new and modified information collection requirements on the public. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public to comment on the information collection requirements contained in this Report and Order, as required by the 1995 Act. Public comments are due May 11, 1998. Comments should address: (a) Whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

OMB Approval Number: 3060–0392.

Title: 47 CFR 1 Subpart J—Pole Attachment Complaint Procedures.

Type of Review: Revision of a currently approved collection.

Respondents: Business and other for-profit entities; State, local and tribal governments.

Number of Respondents: 1,381 calculated to account for the following activities: 256 notices regarding removal or termination of facilities, 10 petitions for stay and 10 responses to petitions for stay, 1,000 notices that telecommunications services are offered, 50 complaints and 50 responses to complaints, and 5 state certifications.

Estimated Time Per Response: .5–35 hours.

Frequency of Response: On occasion.

Total Annual Burden to Respondents: 3,047 hours, calculated to account for the following activities: Section 1.1403(c)(1) and (2) Notices regarding removal of facilities or termination of any service and notices regarding any increase in pole attachment rates. The Commission estimates that there are an average of 64 pole attachment contracts per state. 18 states are certified to regulate the rates, terms and conditions for pole attachments, while the Commission maintains jurisdiction in the remaining 32 states. 64 contracts per state × 32 states = 2,048 estimated contracts. We estimate that these contracts expire on a 7 to 8 year basis, thus requiring an average of 256 notices to be issued per year. Utilities will undergo an average burden of 2 hours per notice. 256 notices × 2 hours per notice = 512 hours.

Section 1.1403(d) Petitions for Stay. To account for burden hours associated with this collection of information, we estimate that 10 petitions of stay may be filed with the Commission within the next year with an average burden of 4 hours for each petitioner and 4 hours for each respondent. The burden estimates account for all aspects of the petition procedure. 10 petitions × 2 parties × 4 hours per party = 80 hours.

Section 1.1403(e) Cable operator notifications to pole owners upon offering telecommunications services. We estimate that 1,000 such notices will annually be made by cable operators who will undergo a burden of .5 hours per notice. 1,000 notices × .5 hours = 500 hours.

Section 1.1404 Complaints, Section 1.1407 Responses and Replies. We increase our estimates of both the annual number of complaints that may be filed with the Commission and the burden associated with the complaint procedure. We estimate that there may be as many as 50 complaint cases annually filed with the Commission. Parties in complaint cases are now estimated to undergo an average burden of 35 hours for all aspects of the complaint process, including the filing of responses and replies. Our estimate also accounts for the burden for parties to calculate rate formulas and to determine presumptive average numbers of attachments to poles. The Commission estimates that 50% of parties that undergo the complaint process will use the services of outside legal counsel. Parties that use outside legal counsel are estimated to undergo an average burden of 4 hours to coordinate information with outside legal counsel. 50 complaint cases; 100 parties. 50 parties (50% of 100) using their own legal staff × 35 hours = 1,750 hours. 50 parties (50% of 40) coordinating information with outside counsel × 4 hours = 200 hours.

Section 1.1414 State certification. We estimate that 5 states may file certifications with the Commission each year with an average burden of 1 hour per certification. 5 × 1 hour = 5 hours.

Total Annual Cost to Respondents: $267,122 calculated to account for the following activities: Section 1.1403(c) (1) and (2) Notices regarding removal or termination of facilities. Postage and stationery costs are estimated to be $2 for each notice. 256 notices × $2 = $512.

Section 1.1403(d) Petitions for Stay. Filings expenses (postage, stationery, etc.) for these petitions are estimated to be $5 per party. 10 petitions × 2 parties × $5 = $100.

Section 1.1403(e) Cable operator notifications to pole owners upon offering telecommunications services. Postage and stationery expenses are estimated to be $2 for each notice. 1,000 notices × $2 = $2,000.

Section 1.1404 Complaints, Section 1.1407 Responses and Replies. Filings expenses (postage, stationery, etc.) for these complaints are estimated to be $20 per party. 50 complaints × 2 parties × $20 = $2,000. In addition, we estimate that 50% of parties that undergo the complaint process will use the services of outside legal counsel paid at a rate of $150 per hour. 50 entities (50% of 100) paying outside legal counsel $150 per hour × 35 hours = $262,500.

Section 1.1414 State certification. Postage and stationery expenses for state certifications filed with the Commission are estimated to be $2 per certification. 5 certifications × $2 = $10.

Needs and Uses: Information collection requirements regarding pole attachment provisions are used by the Commission to hear and resolve petitions for stay and complaints as mandated by Section 224. Information filed has been used to determine the merits of the petitions and complaints. Additionally, the state certifications are used to make public notice of the state's authority to regulate the rates, terms and conditions for pole attachments.

Summary of Report and Order

I. Introduction

1. In this *Report and Order* (''*Order*''), the Commission adopts rules implementing section 703 of the Telecommunications Act of 1996 (''1996 Act'') relating to pole attachments. Section 703 amended Section 224 of the Communications Act and requires the Commission to prescribe regulations to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services. Section 703 also requires that the Commission's regulations ensure that a utility charges just, reasonable, and nondiscriminatory rates for pole attachments.

II. Background

2. The 1996 Act amended Section 224 in several important respects. While previously the protections of Section 224 had applied only to cable operators, the 1996 Act extended those protections to telecommunications carriers as well. Further, the 1996 Act gave cable operators and telecommunications carriers a mandatory right of access to utility poles, in addition to maintaining a scheme of rate regulation governing such attachments. In the *First Report and Order*, CC Docket No. 96–98, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (61 FR 45476, August 29, 1996), 11 FCC Rcd 15499, 16058–107, paras. 1119–1240 (1996) (''*Local Competition Order*''), we adopted a number of rules implementing the new access provisions of Section 224.

3. The rules we adopt in this *Order* implement the plain language of Section 224(e). That section provides that the regulations promulgated will apply ''when the parties fail to resolve a dispute over such charges.'' Accordingly, and as discussed below, we encourage parties to negotiate the rates, terms, and conditions of pole attachment agreements. Although the Commission's rules will serve as a backdrop to such negotiations, we intend the Commission's enforcement mechanisms to be utilized only when good faith negotiations fail. Based on the Commission's history of successful implementation and enforcement of rules governing attachments used to provide cable service, we believe that the new rules will foster competition in the provision of telecommunications services while guaranteeing fair compensation for the utilities that own the infrastructure upon which such competition depends.

III. Preference for Negotiated Agreements and Complaint Resolution Procedures

4. Our rules for complaint resolution will only apply when the parties are unable to arrive at a negotiated agreement. We affirm our belief that the existing methodology for determining a presumptive maximum pole attachment rate, as modified in this *Order*, facilitates negotiation because the parties can predict an anticipated range for the pole attachment rate. We further conclude that the current complaint procedures are adequate to establish just and reasonable rates, terms, and conditions for pole attachments. An uncomplicated complaint process and a clear formula for rate determination are essential to promote the use of negotiations for pole attachment rates, terms, and conditions. We are committed to an environment where attaching entities have enforceable rights, where the interests of pole owners are recognized, and where both parties can negotiate for pole attachment rates, allowing the availability of telecommunications services to expand.

IV. Charges for Attaching

A. Poles

i. Formula Presumptions

5. In determining a just and reasonable rate, two elements of the pole are examined: usable space and other than usable space. The costs relating to these elements are allocated to those using the pole. To avoid a pole by pole rate calculation, the Commission previously adopted rebuttable presumptions of an average pole height of 37.5 feet, an average amount of usable space of 13.5 feet, and an average amount of 24 feet of

unusable space on a pole. The Commission also established a rebuttable presumption of one foot as the amount of space a cable television attachment occupies. These presumptions serve as the premise for calculating pole attachment rates under the current formula. Until resolution of the *Pole Attachment Fee Notice* proceeding CS Docket No. 97–98, we will apply our presumptions as they presently exist and proceed with the implementation under the 1996 Act of a methodology to calculate a rate for pole attachments used in the provision of telecommunications services by telecommunications carriers and cable operators.

ii. Restrictions on Services Provided Over Pole Attachments

6. In the *Notice*, we sought comment on whether we disagree with the utility pole owners that assert that the Commission's decision in *Heritage Cablevision Associates of Dallas, L.P.* v. *Texas Utilities Electric Company* (''*Heritage*'') has been ''overruled'' by the passage of the 1996 Act insofar as it held that a cable system is entitled to a Commission-regulated rate for pole attachments that the cable system uses to provide commingled data and video. The definition of ''pole attachment'' does not turn on what type of service the attachment is used to provide. Rather, a ''pole attachment'' is defined to include any attachment by a ''cable television system.'' Thus, the rates, terms and conditions for all pole attachments by a cable television system are subject to the Pole Attachment Act. Under Section 224(b)(1), the Commission has a duty to ensure that such rates, terms, and conditions are just and reasonable. We see nothing on the face of Section 224 to support the contention that pole owners may charge any fee they wish for Internet and traditional cable services commingled on one transmission facility.

7. Having decided that cable operators are entitled to the benefits of Section 224 when providing commingled Internet and traditional cable services, we next turn to the appropriate rate to be applied. We conclude, pursuant to Section 224(b)(1), that the just and reasonable rate for commingled cable and Internet service is the Section 224(d)(3) rate. In specifying this 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 Section 224(d)(3) rate will encourage greater competition in the provision of Internet service and greater benefits to consumers.

8. We also disagree with utility pole owners that submit that all cable operators should be ''presumed to be telecommunications carriers'' and therefore charged at the higher rate unless the cable operator certifies to the Commission that it is not ''offering'' telecommunications services. We think that a certification process would add a burden that manifests no benefit. We believe the need for the pole owner to be notified is met by requiring the cable operator to provide notice to the pole owner when it begins providing telecommunication services. The rule we adopt in this *Order* will reflect this required notification. We also reject the suggestions of utility pole owners that the Commission should be responsible for monitoring and enforcing a certification of cable operators regarding their status. The record does not demonstrate that cable operators will not meet their responsibilities. If a dispute arises, the Commission's complaint processes can be invoked.

iii. Wireless Attachments

9. Wireless carriers are entitled to the benefits and protection of Section 224. Section 224(e)(1) plainly states: ''The Commission shall * * * prescribe regulations to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services.'' This language encompasses wireless attachments.

10. Statutory definitions and amendments by the 1996 Act demonstrate Congress' intent to expand the pole attachment provisions beyond their 1978 origins. Section 224(a)(4) previously defined a pole attachment as ''any attachment by a cable television system,'' but now states that a pole attachment is ''any attachment by a cable television system or provider of telecommunications service.'' Moreover, in Section 224(d)(3), Congress applied the current pole attachment rules as interim rules for ''any telecommunications carrier * * * to provide any telecommunications service.'' In both sections, the use of the word ''any'' precludes a position that Congress intended to distinguish between wire and wireless attachments. Section 224(e)(1) contains three terms whose definitions support this conclusion. Section 3(44) defines telecommunications carrier as ''any provider of telecommunications services.'' Section 3(46) states that telecommunications services is the ''offering of telecommunications for a fee directly to the public * * * regardless of the facilities used,'' and Section 3(43) specifies telecommunications to be ''the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.'' The use of ''any'' in Section 3(44) precludes limiting telecommunications carriers only to wireline providers. Wireless companies meet the definitions in Sections 3(43) and 3(46). In fact, the Commission has already recognized that cellular telephone, mobile radio, and PCS are telecommunications services.

11. There is no clear indication that our rules cannot accommodate wireless attachers' use of poles when negotiations fail. When an attachment requires more than the presumptive one-foot of usable space on the pole, or otherwise imposes unusual costs on a pole owner, the one-foot presumption can be rebutted. In addition, when wireless devices do not need to use every pole in a utility's inventory, the parties can agree on some reasonable percentage of poles for developing a presumptive number of attaching entities. If parties cannot modify or adjust the formula to deal with unique attachments, and the parties are unable to reach agreement through good faith negotiations, the Commission will examine the issues on a case-by-case basis.

iv. Allocating the Cost of Other Than Usable Space

a. *Method of Allocation.* 12. To determine the rate that a telecommunications carrier must pay for pole attachments, Section 224(e)(2) provides that:

> 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.

This statutory language requires an equal apportionment of two-thirds of the costs of providing other than usable (''unusable'') space among all attaching entities. The Commission proposed a methodology to apportion these costs which translates to the following formula:

$$\text{Unusable Space Factor} = \frac{2}{3} \times \frac{\text{Unusable Space}}{\text{Pole Height}} \times \frac{\text{Net Cost of a Bare Pole}}{\text{Number of Attachers}} \times \text{Carrying Charge Rate}$$

13. We adopt our proposed methodology to apportion the cost of unusable space. We believe this formula most accurately determines the apportionment of cost of unusable space. As mandated by Congress, it equally apportions two-thirds of the costs of unusable space among attaching entities.

b. *Counting Attaching Entities. (1) Telecommunications Carriers, Cable Operators and Non-Incumbent LECs.* 14. We will count as separate entities any telecommunications carrier, any cable operator, and any non-incumbent local exchange carrier (''LEC''). This approach is consistent with the language of the statute and comports with Congress' intent to count all attaching entities when allocating the costs of unusable space. The statute uses the term ''entities'' not ''telecommunications carriers'' when indicating how the costs of unusable space should be allocated. We interpret this use to indicate the inclusion of cable operators as well as telecommunications carriers when allocating the cost of unusable space.

(2) Pole Owners Providing Telecommunications Services and Incumbent LECs. 15. We affirm our tentative conclusion that any pole owner providing telecommunications services, including an incumbent local exchange carrier (''ILEC''), should be counted as an attaching entity for the purposes of allocating the costs of unusable space under Section 224(e)(2). This includes pole owners that use only a part of their physical plant capacity to provide these services and is consistent with our recognition that pole attachments are defined in terms of attachments by a ''provider of telecommunication service.'' Section 224(e)(2) states that the costs of unusable space shall be allocated on the basis of ''all attaching entities.'' There is no indication from the statutory language or legislative history that any particular attaching entity should not be counted.

16. We also believe this conclusion is supported by Section 224(g) which requires that a utility providing telecommunications services impute to its costs of providing service an amount equal to the rate for which it would be liable under Section 224. This section reflects Congress' recognition that as a provider of telecommunications services, a pole owner uses and benefits from the unusable space in the same way as the other attaching entities. Section 224(g) also directs the utility to impute the costs relating to these services to the appropriate affiliate, making clear that another entity is using the facility and should be counted as an attaching entity. We will count any pole owner providing telecommunications services, including an ILEC, as an attaching entity for the purpose of allocating costs of unusable space.

(3) Government Attachments. 17. To the extent that government agencies provide cable or telecommunications service, we affirm our proposal that they be included in the count of attaching entities for purposes of allocating the cost of unusable space. We will not include government agencies in the count as a separate entity if they only provide certain attachments for public use, such as traffic signals, festoon lighting, and specific pedestrian lighting. We conclude that, where a government agency's attachment is used to provide cable or telecommunications service, the government attachment can accurately be described as a ''pole attachment'' within the meaning of Section 224(a)(4) of the 1996 Act. Like a private pole attachment, it benefits equally from the unusable space on the pole and the costs for this benefit are properly placed on the government entity or the pole owner. Since the government attacher and the pole owner have a relationship that benefits both parties, we are not persuaded that the pole owner is unfairly absorbing the cost of the government's telecommunications attachments to the extent the pole owner's franchise so provides. We will not include a government agency with an attachment that does not provide cable or telecommunications service as an entity in the count when apportioning the costs of unusable space because such an attachment is not a ''pole attachment'' within the meaning of Section 224(a)(4).

(4) Space Occupied on Pole. 18. In suggesting the alternative approach that entities using more than one foot be counted as a separate entity for each foot or increment thereof, we sought to ensure that entities be allocated the costs of the unusable space through a means reflecting their relative use. The record does not indicate whether use of more than one foot by an entity will be a pervasive or occasional circumstance. We agree with those parties that state that allocating space in such a manner will add a level of complexity, and not necessarily produce a fairer allocation of the cost of unusable space. We are also convinced that the alternative proposal is inconsistent with the plain meaning of Section 224(e) which apportions the cost of unusable space ''under an equal apportionment of such costs among all attaching entities.''

19. As another alternative method to apportioning cost equally, MCI argues that the apportionment of two-thirds of the costs of unusable space should be based on the number of attachments rather than the number of attaching entities. Allocating costs by the number of entities, it argues, would not allocate any unusable space to overlashings and will result in an incentive for ''speculative'' overlashing by existing attachers. We also will not adopt MCI's proposal to count attachments instead of attaching entities. The record does not demonstrate that overlashing leads to distortion of the allocation of the costs of the pole.

c. *Overlashing.* (a) *Overlashing One's Own Pole Attachment.* 20. We have been presented with no persuasive reason to change the Commission's policy that encourages overlashing, and we agree with representatives of the cable and telecommunications industries that, to the extent that it does not significantly increase the burden on the pole, overlashing one's own pole attachment should be permitted without additional charge. To the extent that the overlashing does create an additional burden on the pole, any concerns should be satisfied by compliance with generally accepted engineering practices. We note that we have deferred decision on the issue of the effect any increased burden may have on the rate the utility pole owner may charge the host attacher. We believe that the *Pole Attachment Fee Notice* rulemaking is a more appropriate forum for resolution of this issue. As stated above, we affirm our current presumptions for the time being. We also do not believe that overlashing is an expansion of a pole owners' obligation. Overlashing has been in practice for many years. We believe utility pole owners' concerns are addressed by Section 224's assurance that pole owners receive a just and reasonable rate and that pole attachments may be denied for reasons

of safety, reliability, and generally applicable engineering purposes.

(b) Third Party Overlashing. 21. The record does not indicate that third party overlashing adds any more burden to the pole than overlashing one's own pole attachment. We do not believe that third party overlashing disadvantages pole owners in either receiving fair compensation or in being able to ensure the integrity of the pole. Facilitating access to the pole is a tangible demonstration of enhancing competitive opportunities in communications. Allowing third party overlashing will also reduce construction disruption (and the expense associated therewith) which would otherwise likely take place by third parties installing new poles and separate attachments. Accordingly, we will allow third party overlashing subject to the same safety, reliability, and engineering constraints that apply to overlashing one's own pole attachment. Concerns that third party overlashing will increase the burden on the pole can be addressed by compliance with generally accepted engineering practices.

22. We believe that when a host attaching entity allows an overlashing attachment to be installed to its own pole attachment by a third party for the purposes of that third party offering and providing cable or telecommunications services to the public, that third party overlashing entity should be classified as a separate attaching entity for purposes of allocating costs of unusable space because Congress indicated that the unusable space was of equal benefit to all attaching entities. In order to implement the allocation of unusable space, the third party overlasher will necessarily need to have some understanding or agreement with the pole owner, and an agreement with the host attaching entity. Commenters assert that overlashing under these circumstances should be classified as a separate attachment. We agree.

(c) Lease and Use of Excess Capacity/ Dark Fiber. 23. There is general consensus among cable operators and telecommunications carriers that the leasing and use of dark fiber by third parties places no additional spatial or physical requirements on the utility pole. Cable operators, telecommunications carriers, and utility pole owners all contend that the use of dark fiber is a pro-competitive, environmentally sound and economical use of existing facilities. We agree and conclude that the leasing of dark fiber by a third party is not an individual pole attachment separate from the host attachment. Such use will not require payment to the pole owner separate from the payment by the host attaching entity. We also agree with cable operators, telecommunications carriers, and utility pole owners that, if an attachment previously used for providing solely cable services would, as a result of the leasing of dark fiber, also be used for providing telecommunications services, the rate for the attachment would be determined under Section 224(e), consistent with our discussion regarding restrictions on services provided over pole attachments.

(d) Presumptive Average Number of Attaching Entities. 24. We believe that the most efficient and expeditious manner to calculate a presumptive number of attaching entities is for each utility to develop its own presumptive average number of attaching entities. Utilities not only possess this information but have familiarity and expertise to structure it properly. Based on the record, we think the alternative of the Commission undertaking a survey is too cumbersome and would not necessarily enhance accuracy. We do not believe that the *Fiber Deployment Update* is an appropriate resource from which to develop the presumptive average. *The Fiber Deployment Update* presents data about fiber optic facilities and capacity built or used by interexchange carriers, Bell operating companies, and other LECs and competitive access providers. These data are inadequate for the purposes of creating a presumptive average number of attaching entities because it does not include data pertaining to cable operators. Our decision providing that the utility will establish a presumptive number of attaching entities is also premised on the information developed reflecting where the service is being provided, instead of a broad national average. We think there will be a range of presumptive averages depending on rural, urban, or urbanized areas. To ensure that rates are appropriately representative, each utility shall determine a presumptive average for its rural, urban and urbanized service areas as defined by the United States Census Bureau.

25. We will require each utility to develop, through the information it possesses, a presumptive average number of attaching entities on its poles based on location (urban, rural, urbanized) and based upon our discussion herein regarding the counting of attaching entities for allocating the costs of unusable space. A utility shall, upon request, provide all attaching entities and all entities seeking access the methodology and information by which a utility's presumption was determined. We expect a good faith effort by a utility in establishing its presumption and updating it when a change is necessitated. For example, when a new attaching entity has a substantial impact on the number of attaching entities, the utility's presumptive average should be modified. This method should be consistent with present practice, as we understand most pole attachment agreements ''provide for periodic field surveys, generally once every three to seven years, to determine which entities have attached what facilities to whose poles.''

26. Challenges to the presumptive average number of attaching entities by the telecommunications carrier or cable operator may be made in the same manner as challenges presently are undertaken. The challenging party will initially be required to identify and calculate the number of attachments on the poles and submit to the utility what it believes to be an appropriate average. Where the number of poles is large, and complete inspection impractical, a statistically sound survey should be submitted. The pole owner will be afforded an opportunity to justify the presumption. Where a presumption is successfully challenged, the resulting figure will be deemed to be the number of attaching entities.

v. Allocating the Cost of Usable Space

27. Section 224(e)(3) provides that a utility shall apportion the cost of providing usable space among all entities according to the percentage of usable space required for each entity. The Commission has defined usable space as the space on the utility pole above the minimum grade level that is usable for the attachment of wires, cable, and related equipment. In the *Second Report and Order,* 72 FCC 2d 59, the Commission considered comment regarding the amount of usable space for various size poles in different service areas. The Commission subsequently adopted a rebuttable presumption that a pole contains 13.5 feet of usable space. The usable space presumption has been contested in complaint proceedings before the Commission. In 1986, the Commission revisited the usable space issue and upheld the presumption. In 1997, the Commission sought comment on the presumptive amount of usable space in the *Pole Attachment Fee Notice.* In the *Notice,* we sought comment on the usable space presumption to establish a full record for attachments made by telecommunications carriers under the 1996 Act. The Commission also proposed to modify the current

methodology to reflect only the cost associated with usable space to arrive at a factor for apportioning the costs of usable space for telecommunications carriers under Section 224(e)(3). For allocating the costs of usable space to telecommunications carriers, the following basic formula was proposed:

$$\text{Usable Space Factor} = \frac{\text{Space Occupied by Attachment}}{\text{Total Usable Space}} \times \frac{\text{Total Usable Space}}{\text{Pole Height}} \times \text{Net Cost of Bare Pole} \times \text{Carrying Charge Rate}$$

(1) Applying the 13.5 Foot Presumption and the One Foot Presumption to Telecommunications Carriers. 28. We believe that the information we received in this proceeding regarding calculation of usable space is more appropriately addressed in the *Pole Attachment Fee Notice* proceeding and we will thus reserve our decision on the total amount of usable space issue until the resolution of that proceeding. For the present time, the presumption that a pole contains 13.5 feet of usable space will remain applicable. We adopt our proposed methodology to apportion the cost of the usable space. We believe this formula most accurately determines the apportionment of the cost of usable space. As mandated by Congress, it incorporates the principle of apportioning the cost of such space according to the percentage of space required for each entity.

29. The Commission's one foot presumption has been in place since 1979. Neither the 1996 Act's amendments to Section 224 nor the record in this proceeding suggest that a different presumption should be applicable to telecommunications carriers. Circumstances that are unique or that clearly warrant a departure from the formula may be used to rebut the presumption.

(2) Overlashing and Dark Fiber. 30. Consistent with our above discussion regarding overlashing, we find that the one foot presumption shall continue to apply where an attaching entity has overlashed its own pole attachments. We also determine that facilities overlashed by third parties onto existing pole attachments are presumed to share the presumptive one foot of usable space of the host attachment. To the extent that the overlashing creates an additional burden on the pole, any concerns should be satisfied by compliance with generally accepted engineering practices. We again note that we have deferred decision to the *Pole Attachment Fee Notice* proceeding on the issue of the effect any increased burden may have on the rate the utility pole owner may charge the host attacher. As stated above, we believe that that proceeding is a more appropriate forum for resolution of this issue. As also stated above, we affirm our current presumptions for the time being.

B. Application of Pole Attachment Formula to Telecommunications Carriers

31. We agree with cable operators and telecommunications carriers that the continued use of a clear formula for the Commission's rate determination is an essential element when parties negotiate for pole attachment rates, terms and conditions. We think that a formula encompassing these statutory directives of how pole owners should be compensated adds certainty and clarity to negotiations as well as assists the Commission when it addresses complaints. We conclude that the addition of the unusable and usable space factors, developed to implement Sections 224(e)(2) and (e)(3), is consistent with a just, reasonable, and nondiscriminatory pole attachment rate for telecommunications carriers. We affirm the following formula, to be used to determine the maximum just and reasonable pole attachment rate for telecommunications carriers, including cable operators providing telecommunications services, effective February 8, 2001, encompassing the elements enumerated in the law:

$$\text{Maximum Rate} = \text{Unusable Space Factor} + \text{Usable Space Factor}$$

C. Application of Pole Attachment Formula to Conduits

32. Section 224(e)(2) requires that two-thirds of the cost of the unusable space be apportioned equally among all attaching entities. In the *Notice*, the Commission proposed a methodology to apportion the costs of unusable space among attaching entities. The following formula was proposed as the methodology to determine costs of unusable space in a conduit:

$$\text{Conduit Unusable Space Factor} = \frac{2}{3} \times \frac{\text{Net Linear Cost of Unusable Conduit Space}}{\text{Number of Attachers}} \times \text{Carrying Charge Rate}$$

In the *Notice*, the Commission also sought comment on what portions of duct or conduit are ''unusable'' within the terms of the 1996 Act. The Commission proposed that a presumptive ratio of usable ducts to maintenance ducts be adopted to establish the amount of unusable space.

33. Section 224(e)(3) states that the cost of providing usable space shall be apportioned according to the percentage of usable space required for the entity using the conduit. Usable space is based on the number of ducts and the diameter of the ducts contained in a conduit. In the *Pole Attachment Fee Notice*, the Commission sought comment on a proposed conduit methodology for use in determining a pole attachment rate for conduit under Section 224(d)(3). In the *Notice*, the Commission sought comment on a proposed half-duct methodology for use in a proposed formula to determine a conduit usable space factor. The proposed usable space formula under Section 224(e)(3) for pole attachments in conduits is as follows:

$$\text{Conduit Usable Space Factor} = \frac{1}{2} \times \frac{1 \text{ Duct}}{\text{Average Number of Ducts, less Adjustments for maintenance ducts}} \times \text{Net Linear Cost of Usable Conduit Space} \times \text{Carrying Charge Rate}$$

In the *Notice*, the Commission sought comment on the half-duct presumption's applicability to determine usable space and to allocate costs of providing usable space to the telecommunications carrier. The Commission also sought comment on how its proposed conduit methodology impacts determining an appropriate ratio of usable to unusable space within a duct or conduit.

a. Counting Attaching Entities for Purposes of Allocating Cost of Other than Usable Space. 34. For the purpose of allocating the cost of unusable space in a conduit system, we agree that each party that actually installs one or more wires in a duct or duct bank should be counted as a single attaching entity, regardless of the number of cables installed or the amount of duct space occupied. The statutory preference for clarity is preeminent and we perceive no generally applicable method that does not involve complexity and confusion other than counting each entity within the conduit system as a separate attaching entity.

b. *Unusable Space in a Conduit System*. 35. We disagree that no unusable space exists in a conduit system. There appear to be two aspects to the unusable space within conduit systems. First, there is that space involved in the construction of the system, without which there would be no usable space. Second, there is that space within the system which may be unusable after the system is constructed. We believe that the costs for the construction of the system, which allow the creation of the usable space, should be part of the unusable space allocated among attaching entities. We also believe that maintenance ducts reserved for the benefit and use of all attaching entities should be considered unusable space.

36. With regard to space in a conduit that is deteriorated, the record is less clear. We are reluctant to require that the costs of space that cannot be used by, and provide no benefit to, an existing attaching entity should be allocated beyond the utility conduit owner. In contrast, unusable space on a pole is largely attributed to safety and engineering concerns, adherence to which benefits the pole owner and attaching entities. Space in a conduit that has deteriorated serves no benefit to the existing rate-paying attaching entities. Deteriorated duct creates space that has been rendered unused by the utility. If such space could, with reasonable effort and expense, be made available, the space is usable and not unusable.

c. *Half-Duct Presumption for Determining Usable Conduit Space*. 37. We adopt our proposed rebuttable presumption that a cable or telecommunications attacher occupies a half-duct of space in order to determine a reasonable conduit attachment rate. We note that the National Electric Safety Code rule relied on by the electric utilities does not prohibit the sharing of space between electric and communications. Rather, the rule conditions the sharing of such space on the maintenance and operation being performed by the utility. We continue to believe that the half-duct methodology is the simplest and most reasonable approximation of the actual space occupied by an attacher. This method, patterned after the one used by the Massachusetts Department of Public Utilities (''MDPU''), allows for determining the cost per foot of one duct and then dividing by two instead of actually measuring the duct space occupied. The MDPU finds, and we agree, that this method is reasonable because an attacher's use of a duct does not preclude the use of the other half of the duct so the attacher should not have to pay for the entire duct. In situations where the formula is inappropriate because it has been demonstrated that there are more than two users in the conduit or that one particular attachment occupies the entire duct, so as to preclude another from using the duct, our half-duct presumption can be rebutted. If a new entity is installing an attachment in a previously unoccupied duct, we believe that such entity should be encouraged to place inner-duct prior to placing its wires in the duct.

d. *Conduit Pole Attachment Formula*. 38. We believe that a formula encompassing statutory directives of how utilities should be compensated for the use of conduit adds certainty and clarity to negotiations as well as assists the Commission when it addresses complaints. We conclude that the addition of the conduit unusable and conduit usable space factors, developed to implement Section 224(e)(2) and Section 224(e)(3), is consistent with a just, reasonable, and nondiscriminatory pole attachment rate for telecommunications carriers in conduit. We adopt the following formula to be used to determine the maximum just and reasonable pole attachment rate for telecommunications carriers in a conduit system, effective February 8, 2001, encompasses the elements enumerated in the law:

$$\text{Maximum Conduit Rate Per Net Linear Foot} = \text{Conduit Unusable Space Factor} + \text{Conduit Usable Space Factor}$$

D. Rights-of-Way

39. The information submitted in this proceeding is not sufficient to enable us to adopt detailed standards that would govern all right-of-way situations. We thus believe it prudent for the Commission to gain experience through case-by-case adjudication to determine whether additional ''guiding principles'' or presumptions are necessary or appropriate. Therefore, we will address complaints about just, reasonable, and nondiscriminatory pole attachments to a utility's right-of-way on a case-by-case basis.

V. Cost Elements of the Formula for Poles and Conduit

40. In regulating pole attachment rates, the Commission has implemented a cost methodology premised on historical or embedded costs. These are costs that a firm has incurred in the past for providing a good or service and are recorded for accounting purposes as past operating expenses and depreciation. Many parties in this proceeding, as well as in the *Pole Attachment Fee Notice* proceeding, advocate extension of historical costs, while a number of parties advocate that the Commission adopt a forward-looking economic cost-pricing (''FLEC'') methodology for pole attachments. Forward-looking cost methodologies seek to consider the costs that an entity would incur if it were to construct facilities now to provide the good or service at issue.

41. We did not raise the issue of forward looking costs in the *Notice* in this proceeding. While we do not prejudge the arguments raised by the commenters, we decline to address at this time proposals to shift to a forward

looking cost methodology. Accordingly, we will continue the use of historical costs in our pole attachment rate methodology, specifically as it is applied to telecommunications carriers and cable operators providing telecommunications services.

VI. Implementation and Effective Date of Rules

42. We conclude that the statutory language is explicit in requiring that any increase in the rates for pole attachments shall be phased-in over five years in equal annual increments beginning on the effective date of such regulations. We clarify that the statutory language ''beginning on the effective date of such regulations'' refers to February 8, 2001, or five years after the enactment of the 1996 Act. We affirm that the five-year phase-in is to apply to rate increases only and that the amount of the increase or the difference between the Section 224(d) rate and the 224(e) rate shall be applied annually until the full amount of the increase is absorbed within five years of February 8, 2001. Rate reductions are not subject to the phase-in and are to be implemented immediately.

Final Regulatory Flexibility Analysis

43. As required by the Regulatory Flexibility Act (''RFA''), an Initial Regulatory Flexibility Analysis (''IRFA'') was incorporated in the *Notice*. The Commission sought written public comment on the proposals in the *Notice* including comment on the IRFA. The comments received are discussed below. This present Final Regulatory Flexibility Analysis (''FRFA'') conforms to the RFA.

A. Need for, and Objectives of, the Order

44. Section 703 of the 1996 Act requires the Commission to prescribe regulations to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services. The objectives of the rules adopted herein are, consistent with the 1996 Act, to promote competition and the expansion of telecommunications services and to reduce barriers to entry into the telecommunications market by ensuring that charges for pole attachments are just, reasonable and nondiscriminatory.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

45. No comments submitted in response to the *Notice* were specifically identified by the commenters as being in response to the IRFA contained in the *Notice*. Small Cable Business Association (''SCBA'') filed comments in response to the IRFA contained in the *Pole Attachment Fee Notice*, and, to the extent they are relevant to the issues in this proceeding, we incorporate them herein by reference. SCBA claims in its IRFA comments that, because of the statutory exclusion of cooperatives from the definition of utility, Section 224 does not minimize market entry barriers for small cable operators. According to SCBA, the IRFA in the *Pole Attachment Fee Notice* fails to consider this issue.

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

46. The RFA generally defines a ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term small business concern under the Small Business Act. A ''small business concern'' is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (''SBA''). For many of the entities described below, the SBA has defined small business categories through Standard Industrial Classification (''SIC'') codes.

a. Utilities

47. Many of the decisions and rules adopted herein may have a significant effect on a substantial number of utility companies. Section 224 defines a ''utility'' as ''any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications. Such term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State.'' The SBA has provided the Commission with a list of utility firms which may be affected by this rulemaking. Based upon the SBA's list, the Commission concludes that all of the following types of utility firms may be affected by the Commission's implementation of Section 224.

(*1) Electric Utilities (SIC 4911, 4931 & 4939). 48. Electric Services (SIC 4911).* The SBA has developed a definition for small electric utility firms. The Census Bureau reports that a total of 1379 electric utilities were in operation for at least one year at the end of 1992. According to SBA, a small electric utility is an entity whose gross revenues did not exceed five million dollars in 1992. The Census Bureau reports that 447 of the 1379 firms listed had total revenues below five million dollars.

49. *Electric and Other Services Combined (SIC 4931).* The SBA has classified this entity as a utility whose business is less than 95% electric in combination with some other type of service. The Census Bureau reports that a total of 135 such firms were in operation for at least one year at the end of 1992. The SBA's definition of a small electric and other services combined utility is a firm whose gross revenues did not exceed five million dollars in 1992. The Census Bureau reported that 45 of the 135 firms listed had total revenues below five million dollars.

50. *Combination Utilities, Not Elsewhere Classified (SIC 4939).* The SBA defines this utility as providing a combination of electric, gas, and other services which are not otherwise classified. The Census Bureau reports that a total of 79 such utilities were in operation for at least one year at the end of 1992. According to SBA's definition, a small combination utility is a firm whose gross revenues did not exceed five million dollars in 1992. The Census Bureau reported that 63 of the 79 firms listed had total revenues below five million dollars.

(*2*) *Gas Production and Distribution (SIC 4922, 4923, 4924, 4925 & 4932). 51. Natural Gas Transmission (SIC 4922).* The SBA's definition of a natural gas transmitter is an entity that is engaged in the transmission and storage of natural gas. The Census Bureau reports that a total of 144 such firms were in operation for at least one year at the end of 1992. According to SBA's definition, a small natural gas transmitter is an entity whose gross revenues did not exceed five million dollars in 1992. The Census Bureau reported that 70 of the 144 firms listed had total revenues below five million dollars.

52. *Natural Gas Transmission and Distribution (SIC 4923).* The SBA has classified this entity as a utility that transmits and distributes natural gas for sale. The Census Bureau reports that a total of 126 such entities were in operation for at least one year at the end of 1992. The SBA's definition of a small natural gas transmitter and distributor is a firm whose gross revenues did not exceed five million dollars. The Census Bureau reported that 43 of the 126 firms listed had total revenues below five million dollars.

53. *Natural Gas Distribution (SIC 4924).* The SBA defines a natural gas distributor as an entity that distributes natural gas for sale. The Census Bureau

reports that a total of 478 such firms were in operation for at least one year at the end of 1992. According to the SBA, a small natural gas distributor is an entity whose gross revenues did not exceed five million dollars in 1992. The Census Bureau reported that 267 of the 478 firms listed had total revenues below five million dollars.

54. *Mixed, Manufactured, or Liquefied Petroleum Gas Production and/or Distribution (SIC 4925).* The SBA has classified this entity as a utility that engages in the manufacturing and/or distribution of the sale of gas. These mixtures may include natural gas. The Census Bureau reports that a total of 43 such firms were in operation for at least one year at the end of 1992. The SBA's definition of a small mixed, manufactured or liquefied petroleum gas producer or distributor is a firm whose gross revenues did not exceed five million dollars in 1992. The Census Bureau reported that 31 of the 43 firms listed had total revenues below five million dollars.

55. *Gas and Other Services Combined (SIC 4932).* The SBA has classified this entity as a gas company whose business is less than 95% gas, in combination with other services. The Census Bureau reports that a total of 43 such firms were in operation for at least one year at the end of 1992. According to the SBA, a small gas and other services combined utility is a firm whose gross revenues did not exceed five million dollars in 1992. The Census Bureau reported that 24 of the 43 firms listed had total revenues below five million dollars.

(*3) Water Supply (SIC 4941).* 56. The SBA defines a water utility as a firm who distributes and sells water for domestic, commercial and industrial use. The Census Bureau reports that a total of 3,169 water utilities were in operation for at least one year at the end of 1992. According to SBA's definition, a small water utility is a firm whose gross revenues did not exceed five million dollars in 1992. The Census Bureau reported that 3065 of the 3169 firms listed had total revenues below five million dollars.

(*4*) *Sanitary Systems (SIC 4952, 4953 & 4959). 57. Sewerage Systems (SIC 4952).* The SBA defines a sewage firm as a utility whose business is the collection and disposal of waste using sewage systems. The Census Bureau reports that a total of 410 such firms were in operation for at least one year at the end of 1992. According to SBA's definition, a small sewerage system is a firm whose gross revenues did not exceed five million dollars. The Census Bureau reported that 369 of the 410 firms listed had total revenues below five million dollars.

58. *Refuse Systems (SIC 4953).* The SBA defines a firm in the business of refuse as an establishment whose business is the collection and disposal of refuse ''by processing or destruction or in the operation of incinerators, waste treatment plants, landfills, or other sites for disposal of such materials.'' The Census Bureau reports that a total of 2287 such firms were in operation for at least one year at the end of 1992. According to SBA's definition, a small refuse system is a firm whose gross revenues did not exceed six million dollars. The Census Bureau reported that 1908 of the 2287 firms listed had total revenues below six million dollars.

59. *Sanitary Services, Not Elsewhere Classified (SIC 4959).* The SBA defines these firms as engaged in sanitary services. The Census Bureau reports that a total of 1214 such firms were in operation for at least one year at the end of 1992. According to SBA's definition, a small sanitary service firms gross revenues did not exceed five million dollars. The Census Bureau reported that 1173 of the 1214 firms listed had total revenues below five million dollars.

(*5) Steam and Air Conditioning Supply (SIC 4961).* 60. The SBA defines a steam and air conditioning supply utility as a firm who produces and/or sells steam and heated or cooled air. The Census Bureau reports that a total of 55 such firms were in operation for at least one year at the end of 1992. According to SBA's definition, a steam and air conditioning supply utility is a firm whose gross revenues did not exceed nine million dollars. The Census Bureau reported that 30 of the 55 firms listed had total revenues below nine million dollars.

(*6*) *Irrigation Systems (SIC 4971).* 61. The SBA defines irrigation systems as firms who operate water supply systems for the purpose of irrigation. The Census Bureau reports that a total of 297 firms were in operation for at least one year at the end of 1992. According to SBA's definition, a small irrigation service is a firm whose gross revenues did not exceed five million dollars. The Census Bureau reported that 286 of the 297 firms listed had total revenues below five million dollars.

b. *Telephone Companies (SIC 4813).* 62. Many of the decisions and rules adopted herein may have a significant effect on a substantial number of small telephone companies. The SBA has defined a small business for SIC code 4813 (Telephone Communications, except Radiotelephone) to be a small entity when it has no more than 1500 employees. The Census Bureau reports that, at the end of 1992, there were 3497 firms engaged in providing telephone services, as defined therein, for at least one year. This number contains a variety of different categories of carriers, including local exchange carriers (''LECs''), interexchange carriers (''IXCs''), competitive access providers (''CAPs''), cellular carriers, mobile service carriers, operator service providers, pay telephone operators, personal communications service (''PCS'') providers, covered SMR providers and resellers. Some of those 3497 telephone service firms may not qualify as small entities or small incumbent LECs because they are not ''independently owned and operated.'' We therefore conclude that fewer than 3497 telephone service firms are small entity telephone service firms or small incumbent LECs that may be affected by this *Order*. Below, we estimate the potential number of small entity telephone service firms or small incumbent LEC's that may be affected by the rules adopted herein in this service category.

(*1*) *Wireline Carriers and Service Providers.* 63. The SBA has developed a definition of small entities for telephone communications companies other than radiotelephone (wireless) companies. The Census Bureau reports that, there were 2321 such telephone companies in operation for at least one year at the end of 1992. According to SBA's definition, a small business telephone company other than a radiotelephone company is one employing no more than 1500 persons. Of the 2321 non-radiotelephone companies listed by the Census Bureau, 2295 were reported to have fewer than 1000 employees. Thus, at least 2295 non-radiotelephone companies that might qualify as small entities or small incumbent LECs, or small entities based on these employment statistics. Although some of these carriers are likely not independently owned and operated, we are unable at this time to estimate with greater precision the number of wireline carriers and service providers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 2295 small entity telephone communications companies other than radiotelephone companies that may be affected by the decisions or rules adopted in this *Order*.

(*2*) *Local Exchange Carriers.* 64. Neither the Commission nor SBA has developed a definition of small providers of local exchange services. The closest applicable definition under SBA rules is for telephone

communications companies other than radiotelephone (wireless) companies (SIC 4813). The most reliable source of information regarding the number of LECs nationwide appears to be the data that the Commission publishes annually in its *Telecommunications Industry Revenue* report, regarding the Telecommunications Relay Service (''TRS''). According to *''TRS Worksheet''* data released in November 1997, there are 1371 companies reporting that they categorize themselves as LECs. Although some of these carriers are likely not independently owned and operated, or have more than 1500 employees, we are unable at this time to estimate with greater precision the number of LECs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 1371 small incumbent LECs that may be affected by the rules adopted herein.

(*3*) *Interexchange Carriers.* 65. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of interexchange services. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies (SIC 4813). The most reliable source of information regarding the number of IXCs nationwide of which we are aware appears to be the data that we collect annually in connection with TRS. According to our most recent data, 143 companies reported that they were engaged in the provision of interexchange services. Although some of these carriers are likely not independently owned and operated, or have more than 1500 employees, we are unable at this time to estimate with greater precision the number of IXCs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 143 small entity IXCs that may be affected by the decisions and rules adopted in this *Order.*

(*4*) *Competitive Access Providers.* 66. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of competitive access services. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies (SIC 4813). The most reliable source of information regarding the number of CAPs nationwide of which we are aware appears to be the data that we collect annually in connection with the *TRS Worksheet.* According to our most recent data, 109 companies reported that they were engaged in the provision of competitive access services. Although some of these carriers are likely not independently owned and operated, or have more than 1500 employees, we are unable at this time to estimate with greater precision the number of CAPs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 109 small entity CAPs that may be affected by the decisions and rules adopted herein.

(*5*) *Cellular Service Carriers.* 67. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of cellular services. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies (SIC 4812). The most reliable source of information regarding the number of cellular service carriers nationwide of which we are aware appears to be the data that we collect annually in connection with the *TRS Worksheet.* The *TRS Worksheet* places cellular licensees and Personal Communications Service (''PCS'') licensees in one group. According to the most recent data, there are 804 carriers reporting that they categorize themselves as either PCS or cellular carriers. Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1500 employees, we are unable at this time to estimate with greater precision the number of cellular service carriers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 804 small entity cellular service carriers that may be affected by the decisions and rules adopted in this *Order.*

(*6*) *Mobile Service Carriers.* 68. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to mobile service carriers, such as paging companies. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies (SIC 4813). The most reliable source of information regarding the number of mobile service carriers nationwide of which we are aware appears to be the data that we collect annually in connection with the *TRS Worksheet.* According to our most recent data, 172 companies reported that they were engaged in the provision of mobile services. Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1500 employees, we are unable at this time to estimate with greater precision the number of mobile service carriers that would qualify under SBA's definition. Consequently, we estimate that there are fewer than 172 small entity mobile service carriers that may be affected by the decisions and rules adopted in this *Order.*

(*7*) *Broadband Personal Communications Services (''PCS'') Licensees.* 69. The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission has defined ''small entity'' for Blocks C and F as an entity that has average gross revenues of less than $40 million in the three previous calendar years. For Block F, an additional classification for ''very small business'' was added and is defined as an entity that, together with their affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years. These regulations defining ''small entity'' in the context of broadband PCS auctions has been approved by the SBA. No small businesses within the SBA-approved definition bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auction. A total of 93 small and very small business bidders won approximately 40% of the 1479 licenses for Blocks D, E, and F. However, licenses for blocks C through F have not been awarded fully, therefore there are few, if any, small businesses currently providing PCS services. Based on this information, we conclude that the number of broadband PCS licensees will include the 90 winning C Block bidders and the 93 qualifying bidders in the D, E, and F blocks, for a total of 183 small PCS providers as defined by the SBA and the Commission's auction rules. We note that the *TRS Worksheet* data track PCS licensees in the reporting category ''Cellular or Personal Communications Service Carrier.'' As noted *supra* in the paragraph regarding cellular carriers, according to the most recent data, there are 804 carriers reporting that they place themselves in this category.

(*8*) *Specialized Mobile Radio (''SMR'') Licensees.* 70. Pursuant to 47 CFR 90.814(b)(1) and 90.912(b)(1), the Commission has defined small entity in auctions for geographic area 800 MHz and 900 MHz SMR licenses as a firm that had average annual gross revenues of less than $15 million in the three previous calendar years. This definition of a small entity in the context of 800 MHz and 900 MHz SMR has been approved by the SBA. The rules adopted in this *Order* may apply to SMR providers in the 800 MHz and 900 MHz bands that either hold geographic area

licenses or have obtained extended implementation authorizations. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of less than $15 million. We assume, for purposes of this FRFA, that all of the extended implementation authorizations may be held by small entities which may be affected by the decisions and rules adopted in this *Order.* We note that the *TRS Worksheet* data track SMR licensees in the reporting category ''Paging and Other Mobile Carriers.'' According to the most recent data, there are 172 carriers, including SMR carriers, reporting that they place themselves in this category.

71. The Commission recently held auctions for geographic area licenses in the 900 MHz SMR band. There were 60 winning bidders that qualified as small entities in the 900 MHz auction. Based on this information, we conclude that the number of 900 MHz geographic area SMR licensees affected by the rules adopted in this *Order* includes these 60 small entities. The Commission also recently held auctions for the 525 licenses for the upper 200 channels in the 800 MHz SMR band. There were 10 winning bidders that qualified as small entities in that auction. Based on this information, we conclude that the number of geographic area SMR licensees that may be affected by the rules adopted in this *Order* also includes these 10 small entities. However, the Commission has not yet determined how many licenses will be awarded for the lower 230 channels in the 800 MHz geographic area SMR auction. There is no basis, moreover, on which to estimate how many small entities will win these licenses. Given that nearly all radiotelephone companies have fewer than 1000 employees and that no reliable estimate of the number of prospective 800 MHz licensees for the lower 230 channels can be made, we assume, for purposes of this FRFA, that all of the licenses may be awarded to small entities that may be affected by the decisions and rules adopted in this *Order.*

(*9*) *Resellers.* 72. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to resellers. The closest applicable definition under SBA rules is for all telephone communications companies (SIC 4812 and 4813). The most reliable source of information regarding the number of resellers nationwide of which we are aware appears to be the data that we collect annually in connection with the *TRS Worksheet.* According to our most recent data, 339 companies reported that they were engaged in the resale of telephone services. Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1500 employees, we are unable at this time to estimate with greater precision the number of resellers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 339 small entity resellers that may be affected by the decisions and rules adopted in this *Order.*

c. Wireless (Radiotelephone) Carriers (SIC 4812)

73. Although wireless carriers have not historically affixed their equipment to utility poles, pursuant to the terms of the 1996 Act, such entities are entitled to do so with rates consistent with the Commission's rules discussed herein. SBA has developed a definition of small entities for radiotelephone (wireless) companies. The Census Bureau reports that there were 1176 such companies in operation for at least one year at the end of 1992. According to SBA's definition, a small business radiotelephone company is one employing no more than 1500 persons. The Census Bureau also reported that 1164 of those radiotelephone companies had fewer than 1000 employees. Thus, even if all of the remaining 12 companies had more than 1500 employees, there would still be 1164 radiotelephone companies that might qualify as small entities if they are independently owned and operated. Although some of these carriers are likely not independently owned and operated, we are unable at this time to estimate with greater precision the number of radiotelephone carriers and service providers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 1164 small entity radiotelephone companies that may be affected by the rules adopted herein.

d. Cable System Operators (SIC 4841)

74. The SBA has developed a definition of small entities for cable and other pay television services, which includes all such companies generating less than $11 million in revenue annually. This definition includes cable systems operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems and subscription television services. According to the Census Bureau, there were 1423 such cable and other pay television services generating less than $11 million in revenue.

75. The Commission has developed its own definition of a small cable system operator for the purposes of rate regulation. Under the Commission's rules, a ''small cable company,'' is one serving fewer than 400,000 subscribers nationwide. Based on our most recent information, we estimate that there were 1439 cable systems that qualified as small cable system operators at the end of 1995. Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable systems. Consequently, we estimate that there are fewer than 1439 small entity cable system operators that may be affected by the decisions and rules adopted in this *Order.*

76. The Communications Act also contains a definition of a small cable system operator, which is ''a cable operator that, directly or through an affiliate, serves in the aggregate fewer than one percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000.'' The Commission has determined that there are 61,700,000 subscribers in the United States. Therefore, we found that an operator serving fewer than 617,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed $250 million in the aggregate. Based on available data, we find that the number of cable systems serving 617,000 subscribers or less totals 1450. Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed $250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable systems under the definition in the Communications Act.

e. Municipalities

77. The term ''small governmental jurisdiction'' is defined as ''governments of * * * districts, with a population of less than 50,000.'' There are 85,006 governmental entities in the United States. This number includes such entities as states, counties, cities, utility districts and school districts. We note that Section 224 specifically excludes any utility which is cooperatively organized, or any person owned by the Federal Government or any State. For this reason, we believe that Section 224 will have minimal if any affect upon

small municipalities. Further, there are 18 states and the District of Columbia that regulate pole attachments pursuant to Section 224(c)(1). Of the 85,006 governmental entities, 38,978 are counties, cities and towns. The remainder are primarily utility districts, school districts, and states. Of the 38,978 counties, cities and towns, 37,566 or 96%, have populations of fewer than 50,000.

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

78. The rules adopted in this *Order* will require a change in certain recordkeeping requirements. A utility pole owner will now have to maintain specific records relating to the number of attachers for purposes of determining and updating its presumptive average number of attachers for computing the unusable space calculation for the telecommunications carrier rate formula. The utility pole owner may also require the services of an accountant to determine the new telecommunications rate. In addition, our rules adopted herein will require cable operators to notify the pole owner(s) if and when the cable operator begins providing telecommunications services. We sought comment in the *Notice* on whether small entities may be required to hire additional staff and expend additional time and money to comply with the proposals set forth in the *Notice*. In addition, we sought comment as to whether there will be a disproportionate burden placed on small entities in complying with the proposals set forth in this *Order*.

79. We did not receive any comments asserting that small entities will be required to hire additional staff and expend additional time and money to determine the appropriate rate for telecommunications carriers under our new rules. SCBA was the only commenter to claim that there will be a disproportionate burden placed on small entities. SCBA claims that small cable systems will be particularly hurt by the statutory exemption of cooperatives from the definition of utility because small cable systems often operate in rural areas and therefore necessarily attach their plant to rural telephone and electric cooperatives. We note that SBCA does not appear to be claiming that our rules will disproportionately burden small cable systems, but that where our rules do not apply, small cable system operators will be disproportionately harmed. Because the exemption for cooperatives was set forth by Congress clearly in Section 224(a)(1), the Commission is unable to address SBCA's concerns in this regard. We conclude that our rules will not disproportionately burden small entities.

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

80. The 1996 Act requires the Commission to adopt a telecommunications carrier methodology within two years of the enactment of the 1996 Act. We sought comment in the Notice on various alternative ways of implementing the statutory requirements and any other potential impact of these proposals on small business entities. We sought comment on the implementation of a methodology to ensure just, reasonable and nondiscriminatory pole attachment and conduit rates for telecommunications carriers. We also sought comment on how to develop a rights-of-way rate methodology for telecommunications carriers.

81. In accordance with the RFA, the Commission has endeavored to minimize significant impact on small entities. With regard to our pole attachments complaint process, we rejected a proposal that we establish an amount in controversy as a minimum threshold for filing a complaint because, among other things, it might preclude small entities from obtaining relief from unjust, unreasonable or discriminatory pole attachment rates. We also rejected as too burdensome the suggestion that cable operators be required to certify annually as to whether they are providing telecommunications services. To minimize the burden on utility pole owners, including those that qualify as small entities, and to promote certainty and efficiency in determining the pole attachment rate for telecommunications carriers, we have maintained our formula presumptions, including our one-foot presumption of usable space. We also determined that, as an alternative to requiring utility pole owners to conduct potentially expensive pole-by-pole inventories for the number of attachers on each pole, we would require pole owners to develop, through information it possesses, a presumptive average number of attachers, based on location (i.e., urban, rural and urbanized).

82. Report to Congress: The Commission will send a copy of the *Order*, including this FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, *see* 5 U.S.C. § 801(a)(1)(A).

IX. Ordering clauses

83. *It is Ordered* that, pursuant to Sections 1, 4(i) and 224 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and 224, the Commission's rules are hereby amended.

84. *It is further Ordered* that § 1.1402 of the Commission's rules will become effective April 13, 1998, and that §§ 1.1403, 1.1404, 1.1409, 1.1417 and 1.1418 of the Commission's rules will become effective July 30, 1998, unless the Commission publishes a notice before that date stating that the Office of Management and Budget (''OMB'') has not approved the information collection requirements contained in the rules.

85. *It is further Ordered* that the Commission's Office of Public Affairs, Reference Operations Division, *shall send* a copy of this *Report and Order*, including the Final Regulatory Flexibility Analyses, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 1

Practice and procedure.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

Rules Changes

For the reasons stated in the preamble, the Federal Communications Commission amends 47 CFR Part 1 as set forth below:

PART 1—PRACTICE AND PROCEDURE

1. The authority citation for part 1 continues to read as follows:

Authority: 47 U.S.C. 151, 154, 303, and 309(j) unless otherwise noted.

2. Section 1.1402 is amended by revising paragraph (c) and by adding new paragraphs (i), (j), (k), (l) and (m) to read as follows:

§ 1.1402 Definitions.

* * * * *

(c) With respect to poles, the term usable space 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. With respect to conduit, the term usable space means space within a conduit system which is available, or which could, with reasonable effort and expense, be made available, for the purpose of installing wires, cable and associated equipment for telecommunications services.

* * * * *

(i) The term conduit means a pipe placed in the ground in which cables and/or wires may be installed.

(j) The term conduit system means structures that provide physical protection for cable and/or wires that allow new cables to be added along a route.

(k) The term duct means a single enclosed raceway for conductors, cable and/or wire.

(l) With respect to poles, 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. With respect to conduit, the term unusable space means space involved in the construction of a conduit system, without which there would be no usable space, and maintenance ducts reserved for the benefit of all conduit users.

(m) The term attaching entity includes cable operators, telecommunications carriers, incumbent local exchange carriers, utilities and governmental entities providing cable or telecommunications services.

3. Section 1.1403 is amended by revising the section heading and adding new paragraph (e) to read as follows:

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

* * * * *

(e) Cable operators must notify pole owners upon offering telecommunications services.

4. Section 1.1404 is by amended by redesignating paragraphs (g)(12), (h), (i), (j) and (k) as (g)(13), (k), (l), (m) and (n), and adding new paragraphs (g)(12), (h), (i) and (j) to read as follows:

§ 1.1404 Complaint.

* * * * *

(g) * * *

(12) The average amount of unusable space per pole for those poles used for pole attachments (a 24 foot presumption may be used in lieu of actual measurement, but the presumption may be rebutted); and

* * * * *

(h) With respect to attachments within a duct or conduit system, where it is claimed that either a rate is unjust or unreasonable, or a term or condition is unjust or unreasonable and examination of such term or condition requires review of the associated rate, the complaint shall provide data and information in support of said claim. The data and information shall include, where applicable, equivalent information as specified in paragraph (g) of this section.

(i) With respect to rights-of-way, where it is claimed that either a rate is unjust or unreasonable, or a term or condition is unjust or unreasonable and examination of such term or condition requires review of the associated rate, the complaint shall provide data and information in support of said claim. The data and information shall include, where applicable, equivalent information as specified in paragraph (g) of this section.

(j) If any of the information and data required in paragraphs (g), (h) and (i) of this section is not provided to the cable television operator or telecommunications carrier by the utility upon reasonable request, the cable television operator or telecommunications carrier shall include a statement indicating the steps taken to obtain the information from the utility, including the dates of all requests. No complaint filed by a cable television operator or telecommunications carrier shall be dismissed where the utility has failed to provide the information required under paragraphs (g), (h) or (i) of this section, as applicable, after such reasonable request. A utility must supply a cable television operator or telecommunications carrier the information required in paragraph (g), (h) or (i) of this section, as applicable, along with the supporting pages from its FERC Form 1, FCC Form M, or other report to a regulatory body, within 30 days of the request by the cable television operator or telecommunications carrier. The cable television operator or telecommunications carrier, in turn, shall submit these pages with its complaint. If the utility did not supply these pages to the cable television operator or telecommunications carrier in response to the information request, the utility shall supply this information in its response to the complaint.

* * * * *

5. Section 1.1409 is amended by revising paragraph (e) and adding a new paragraph (f) to read as follows:

Sec. 1.1409 Commission consideration of the complaint.

* * * * *

(e) When parties fail to resolve a dispute regarding charges for pole attachments and the Commission's complaint procedures under Section 1.1404 are invoked, the Commission will apply the following formulas for determining a maximum just and reasonable rate:

(1) The following formula shall apply to attachments by cable operators providing cable services. This formula shall also apply to attachments by any telecommunications carrier (to the extent such carrier is not a party to a pole attachment agreement) or cable operator providing telecommunications services until February 8, 2001:

$$\text{Maximum Rate} = \frac{\text{Space Occupied by Attachment}}{\text{Total Usable Space}} \times \text{Net Cost of Bare Pole} \times \text{Carrying Charge Rate}$$

(2) Subject to paragraph (f) the following formula shall apply to pole attachments on a pole by any telecommunications carrier (to the extent such carrier is not a party to a pole attachment agreement) or cable operator providing telecommunications services beginning on February 8, 2001:

Maximum Pole Rate = Unusable Space Factor + Usable Space Factor

For purposes of this formula, the unusable space factor, as defined under Section 1.1417(b), and the usable space factor, as defined under Section 1.1418(b), shall apply per pole.

(3) Subject to paragraph (f) the following formula shall apply to pole attachments within a conduit system beginning on February 8, 2001:

Maximum Conduit Rate = Conduit Unusable Space Factor + Conduit Usable Space Factor

For purposes of this formula, the conduit unusable space factor, as defined under Section 1.1417(c), and the conduit usable space factor, as defined under Section 1.1418(c), shall apply to each linear foot occupied.

(f) Paragraphs (e)(2) and (e)(3) of this section shall become effective February 8, 2001 (i.e., five years after the effective date of the Telecommunications Act of 1996). Any increase in the rates for pole attachments that result from the adoption of such regulations shall be phased in over a period of five years beginning on the effective date of such regulations in equal annual increments. The five-year phase-in is to apply to rate increases only. Rate reductions are to be

implemented immediately. The determination of any rate increase shall be based on data currently available at the time of the calculation of the rate increase.

6. Section 1.1417 is added to read as follows:

§ 1.1417 Allocation of Unusable Space Costs.

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

(b) With respect to poles, the following formula shall be used to establish the allocation of unusable space costs on a pole for telecommunications carriers and cable operators providing telecommunications services:

$$\text{Pole Unusable Space Factor} = \frac{2}{3} \times \frac{\text{Unusable Space}}{\text{Pole Height}} \times \frac{\text{Net Cost of Bare Pole}}{\text{Number of Attachers}} \times \text{Carrying Charge Rate}$$

All attaching entities shall be counted as separate attaching entities for purposes of apportioning the costs of unusable space.

(c) With respect to conduit, the following formula shall be used to establish the allocation of unusable space costs for telecommunications carriers and cable operators providing telecommunications services within a conduit:

$$\text{Conduit Unusable Space Factor} = \frac{2}{3} \times \frac{\text{Net Linear Cost of Unusable Conduit Space}}{\text{Number of Attachers}} \times \text{Carrying Charge Rate}$$

All attaching entities with lines occupying any portion of a conduit system shall be counted as separate attaching entities for purposes of apportioning the costs of unusable space.

(d) Each utility shall establish a presumptive average number of attachers for each of its rural, urban, and urbanized service areas (as defined by the Bureau of Census of the Department of Commerce).

(1) Each utility shall, upon request, provide all attaching entities and all entities seeking access the methodology and information upon which the utilities presumptive average number of attachers is based.

(2) Each utility is required to exercise good faith in establishing and updating its presumptive average number of attachers.

(3) The presumptive average number of attachers may be challenged by an attaching entity by submitting information demonstrating why the utility's presumptive average is incorrect. The attaching entity should also submit what it believes should be the presumptive average and the methodology used. Where a complete inspection is impractical, a statistically sound survey may be submitted.

(4) Upon successful challenge of the existing presumptive average number of attachers, the resulting data determined shall be used by the utility as the presumptive number of attachers within the rate formula.

7. Section 1.1418 is added to read as follows:

§ 1.1418 Allocation of Usable Space Costs.

(a) A utility shall apportion the amount of usable space among all entities according to the percentage of usable space required by each entity.

(b) With respect to poles, the following formula shall be used to establish the allocation of usable space costs on a pole for telecommunications carriers and cable operators providing telecommunications services:

$$\text{Pole Usable Space Factor} = \frac{\text{Space Occupied by Attachment}}{\text{Total Usable Space}} \times \frac{\text{Total Usable Space}}{\text{Pole Height}} \times \text{Net Cost of Bare Pole} \times \text{Carrying Charge Rate}$$

The presumptive 13.5 feet of usable space may be used in lieu of the actual measurement of the total amount of usable space. The presumptive 37.5 feet of pole height may be used in lieu of the actual measurement of each pole. The presumptive one foot of space occupied by attachment is applicable to both cable operators and telecommunications carriers.

(c) With respect to conduit, the following formula shall be used to establish the allocation of usable space costs within a conduit system:

$$\text{Conduit Usable Space Factor} = \frac{1}{2} \times \frac{1 \text{ Duct}}{\text{Average Number of Ducts less adjustments for maintenance ducts}} \times \text{Linear Cost of Usable Conduit Space} \times \text{Carrying Charge Rate}$$

With respect to conduit, an attacher is presumed to occupy one half-duct of usable space.

[FR Doc. 98–5402 Filed 3–11–98; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 971208297–8054–02; I.D. 112097A]

Fisheries of the Exclusive Economic Zone Off Alaska; Gulf of Alaska; Final 1998 Harvest Specifications for Groundfish

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final 1998 harvest specifications for groundfish and associated management measures.

SUMMARY: NMFS announces final 1998 harvest specifications for Gulf of Alaska (GOA) groundfish and associated management measures. This action is necessary to establish harvest limits and associated management measures for groundfish during the 1998 fishing year. These measures are intended to carry out management objectives contained in the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP).

DATES: The final 1998 harvest specifications are effective at noon on March 9, 1998 through 2400 hrs, Alaska local time (A.l.t.), December 31, 1998.

ADDRESSES: Copies of the Environmental Assessment (EA) for 1998 Groundfish Total Allowable Catch (TAC) Specifications, dated January 1998, may be obtained from the NMFS, Alaska Region, Sustainable Fisheries Division, P.O. Box 21668, Juneau, AK 99802–1668, Attn: Lori Gravel, or by calling 907–586–7228. The Final Stock Assessment and Fishery Evaluation Report (SAFE report), dated November 1997, is available from the North Pacific Fishery Management Council, 605 W. 4th Avenue, Suite 306, Anchorage, AK 99501–2252, or by calling 907–271–2809.

FOR FURTHER INFORMATION CONTACT: Thomas Pearson, 907–486–6919.

SUPPLEMENTARY INFORMATION:

Background

Groundfish fisheries in the exclusive economic zone of the GOA are managed by NMFS according to the FMP. The FMP was prepared by the North Pacific Fishery Management Council (Council) under the authority of the Magnuson-Stevens Fishery Conservation and Management Act. The FMP is implemented by regulations at 50 CFR part 679. General regulations that also pertain to the U.S. fisheries appear at 50 CFR part 600.

NMFS announces the following for the 1998 fishing year: (1) Specifications of TAC amounts for each groundfish species category in the GOA, and reserves; (2) apportionments of reserves; (3) allocations of the sablefish TAC to vessels using hook-and-line and trawl gear; (4) apportionments of pollock TAC among regulatory areas, seasons, and allocations for processing between inshore and offshore components; (5) allocations for processing of Pacific cod TAC between inshore and offshore components; (6) Pacific halibut prohibited species catch (PSC) limits; and (7) fishery and seasonal apportionments of the Pacific halibut PSC limits. A discussion of each of these measures follows.

The process of determining TACs for groundfish species in the GOA is established in regulations implementing the FMP. Pursuant to § 679.20(a)(2), the sum of the TACs for all species must fall within the combined optimum yield (OY) range of 116,000–800,000 metric tons (mt) established for these species at § 679.20(a)(1)(ii).

The Council met from September 22 through 29, 1997, and developed recommendations for proposed 1998 TAC specifications for each species category of groundfish on the basis of the best available scientific information. The Council also recommended other management measures pertaining to the 1998 fishing year. Under § 679.20(c)(1)(ii), the proposed GOA groundfish specifications and specifications for prohibited species bycatch allowances for the groundfish fishery of the GOA were published in the **Federal Register** on December 15, 1997 (62 FR 65644). Comments were invited through January 14, 1998. Interim TAC and PSC amounts equal to one-fourth of the proposed amounts were published in the **Federal Register** on December 15, 1997 (62 FR 65622). The final 1998 initial groundfish harvest specifications and prohibited species bycatch allowances implemented under this action supersede the interim 1998 specifications.

The Council met December 9 through 12, 1997, to review the best available scientific information concerning groundfish stocks, and to consider public testimony regarding 1998 groundfish fisheries. The best available scientific information is contained in the current SAFE report, which includes the most recent information concerning the status of groundfish stocks based on the most recent catch data, survey data, and biomass projections using different modeling approaches or assumptions. The SAFE report was prepared by the GOA Plan Team and presented to the Council and the Council's Scientific and Statistical Committee (SSC) and Advisory Panel (AP) at the December 1997 Council meeting.

For establishment of the acceptable biological catches (ABCs) and TACs, the Council considered information in the SAFE report, recommendations from its SSC and AP, as well as public testimony. The SSC adopted the overfishing level (OFL) recommendations from the Plan Team, which were provided in the SAFE report, for all groundfish species categories. The SSC also adopted the ABC recommendations from the Plan Team, which were provided in the SAFE report, for all of the groundfish species categories, except pollock in the GOA.

The SSC did not adopt the Plan Team's recommendation of ABC for pollock in the GOA. The Plan Team's recommendation was to exclude pollock harvested in the State of Alaska (State) managed pollock fishery in Prince William Sound (PWS) from the ABC specified for the GOA. The SSC did not concur, and believed that insufficient information exists to conclude that pollock in PWS constituted a stock separate from the GOA. The SSC recommended that the State's guideline harvest level (GHL) of 1,800 mt in the PWS pollock fishery be deducted from the total GOA ABC of 131,800 mt, reducing the ABC to 130,000 mt, and that the 130,000 mt ABC be apportioned among GOA regulatory areas based on the biomass distribution throughout the GOA. The Council accepted the SSC's recommendation.

The GOA Plan Team, the SSC, and the Council recommended that total removals of Pacific cod from the GOA not exceed the ABC recommendations for those areas. The Council recommended that the TACs be adjusted downward from the ABCs by amounts that were equal to the state's anticipated GHLs. At its February 9–12 meeting, the Alaska Board of Fisheries set GHLs for the state-managed Pacific cod fishery at 1997 rates in all areas for the 1998 fishing year. Therefore, in order to utilize more fully the Pacific cod resource in the GOA, NMFS is adjusting the Council's recommended Pacific cod TACs upwards in the Central and