

conventional methods of attachment that a utility uses in its own operations, such as boxing and bracketing. Unlike requiring a pole owner to replace a pole with a taller pole, these techniques take advantage of usable physical space on the existing pole.

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

16. The Commission finds that its reading of the ambiguous term “insufficient capacity” is a reasonable middle ground. Some utilities have argued that a pole has insufficient capacity—and thus access may be denied under section 224(f)(2)—if *any* make-ready work is needed. At the other extreme, the statute might be read to require a utility to completely replace a pole—an interpretation that some commenters oppose. The Commission sees no reason to adopt either of those extreme positions. Within those extremes is a range of practices, such as line rearrangement, overlashing, boxing, and bracketing that exploit the capacity of existing infrastructure in some way. Although commenters are divided regarding whether a pole has insufficient capacity if techniques such as boxing and bracketing are necessary to accommodate a new attachment, the Commission finds more persuasive the position that a pole does not have insufficient capacity if a new attachment can be added to the existing pole using conventional attachment techniques. Utilization of existing infrastructure, rather than replacing it, is a fundamental principal underlying the Act. As discussed above, the Commission finds that the Commission’s interpretation still ensures that “insufficient capacity” is given some meaning, while also, to the greatest extent possible, helping spur competition and promoting the deployment of communications technologies, consistent with the broad “pro competitive” purposes of the 1996 Act, as well as the more specific direction of section 706 of the 1996 Act that the Commission promote the deployment of advanced services “by utilizing, in a manner consistent with

the public interest, convenience, and necessity, \* \* \* measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.”

Accordingly, the Commission concludes that, where a pole can accommodate new attachments through boxing, bracketing, or similar attachment techniques, there is not “insufficient capacity” within the meaning of section 224(f)(2)

#### Timely Access to Pole Attachments

17. The Commission also holds that access to poles, including the preparation of poles for attachment, commonly termed “make-ready,” must be timely in order to constitute just and reasonable access. Section 224 of the Act requires utilities to provide cable television systems and any telecommunications carrier with nondiscriminatory access to any poles, ducts, conduits, and rights-of-way owned or controlled by it, and instructs the Commission to ensure that the terms and conditions for pole attachments are just and reasonable. The Commission previously has recognized the importance of timeliness in the context of specific aspects of the pole attachment process. The National Broadband Plan likewise recognized the importance of timely access to poles. The Commission thus holds that, pursuant to section 224 of the Act, the duty to proceed in a timely manner applies to the entirety of the pole attachment process. Make-ready or other pole access delays not warranted by the circumstances thus are unjust and unreasonable under section 224.

18. Section 224 also provides for the adoption of rules to carry out its provisions, and the Commission seeks comment in the Further NPRM regarding a proposed comprehensive timeline for each step of the pole access process. The Commission clarifies, however, that utilities must perform make-ready promptly and efficiently, consistent with evaluation of capacity, safety, reliability, and generally applicable engineering practices, whether or not a specific rule applies to an aspect of the make-ready process.

#### Procedural Matters

##### *Paperwork Reduction Act*

19. This document does not contain new information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not contain any proposed information collection burden for small business

concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4).

##### *Ex Parte Procedures*

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

##### Ordering Clauses

21. Accordingly, *it is ordered* that pursuant to sections 1, 4(i), 4(j), 224, 251(b)(4), and 303 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i)–(j), 224, 251(b)(4), 303, this Order in WC Docket No. 07–245 *is adopted*.

22. *It is further ordered* that, pursuant to §§ 1.4(b)(1) and 1.103(a) of the Commission’s rules, 47 CFR 1.4(b)(1), 1.103(a), this Order *shall be effective* September 2, 2010.

Federal Communications Commission.

**Bulah P. Wheeler,**

*Deputy Manager.*

[FR Doc. 2010–18904 Filed 8–2–10; 8:45 am]

BILLING CODE 6712–01–P

---

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 101

[WT Docket No. 09–114; RM–11417; FCC 10–109]

#### **Amendment of the Commission’s Rules to Accommodate 30 Megahertz Channels in the 6525–6875 MHz Band; and to Provide for Conditional Authorization on Additional Channels in the 21.8–22.0 GHz and 23.0–23.2 GHz Band**

##### *Correction*

In rule document 2010–17205 beginning on page 41767 in the issue of Monday, July 19, 2010, make the following corrections:

**§101.147 [Corrected]**

On page 41771, in §101.147, in the third column, the tables are corrected to read as set forth below:

\* \* \* \* \*  
(s) \* \* \*

Transmit (receive) (MHz)	Receive (transmit) (MHz)
(3) 10 MHz bandwidth channels:	
* * * * *	* * * * *
22025 <sup>2</sup> .....	23225 <sup>2</sup>
* * * * *	* * * * *
22075 <sup>2</sup> .....	23275 <sup>2</sup>
* * * * *	* * * * *

Transmit (receive) (MHz)	Receive (transmit) (MHz)
(7) 50 MHz bandwidth channels:	
* * * * *	* * * * *
22025 <sup>2</sup> .....	23225 <sup>2</sup>
22075 <sup>2</sup> .....	23275 <sup>2</sup>
* * * * *	* * * * *

<sup>2</sup> These frequencies may be assigned to low power systems, as defined in paragraph (8) of this section.

\* \* \* \* \*

[FR Doc. C1-2010-17205 Filed 8-2-10; 8:45 am]  
BILLING CODE 1505-01-D

**DEPARTMENT OF THE INTERIOR**

**Fish and Wildlife Service**

**50 CFR Part 17**

[Docket No. FWS-R9-IA-2008-0118]  
[MO 92210-0-0010-B6]

RIN 1018-AW40

**Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for Five Penguin Species**

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Final rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), determine threatened status for five penguins: The yellow-eyed penguin (*Megadyptes antipodes*), white-flippered penguin (*Eudyptula minor albosignata*), Fiordland crested penguin (*Eudyptes pachyrhynchus*), Humboldt penguin

(*Spheniscus humboldti*), and erect-crested penguin (*Eudyptes sclateri*) under the Endangered Species Act of 1973, as amended (Act).

**DATES:** This rule becomes effective September 2, 2010.

**ADDRESSES:** This final rule is available on the Internet at <http://www.regulations.gov>. Comments and materials received, as well as supporting documentation used in the preparation of this rule, will be available for public inspection, by appointment, during normal business hours at the U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, Suite 420, Arlington, VA 22203.

**FOR FURTHER INFORMATION CONTACT:** Janine Van Norman, Chief, Branch of Foreign Species, Endangered Species Program, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Room 420, Arlington, VA 22203; telephone 703-358-2171; facsimile 703-358-1735. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800-877-8339.

**SUPPLEMENTARY INFORMATION:**

**Background**

On December 18, 2008, we published a proposed rule (73 FR 77303) to list the yellow-eyed penguin (*Megadyptes antipodes*), white-flippered penguin (*Eudyptula minor albosignata*), Fiordland crested penguin (*Eudyptes pachyrhynchus*), Humboldt penguin (*Spheniscus humboldti*), and erect-crested penguin (*Eudyptes sclateri*) under the Endangered Species Act of 1973, as amended (Act; 16 U.S.C. 1531 *et seq.*). That document also served as the 12-month finding on a petition to list these species, which are 5 of 12 penguin species included in the petition. We opened the public comment period on the proposed rule for 60 days, ending February 17, 2009, to allow all interested parties an opportunity to comment on the proposed rule. On March 9, 2010, the Center for Biological Diversity (CBD) filed a complaint (CV-10-992, N.D. Cal) for failure to issue a final listing determination within 12 months of the proposal to list the species. In a court-approved settlement agreement, the Service agreed to submit a final rule to the **Federal Register** by July 30, 2010.

**Previous Federal Action**

For a detailed history of previous Federal actions involving these five penguin species, please see the Service's proposed listing rule, which published in the **Federal Register** on December 18, 2008 (73 FR 77303).

**Summary of Comments and Recommendations**

In the proposed rule published on December 18, 2008 (73 FR 77303), we requested that all interested parties submit information that might contribute to development of a final rule. We also contacted appropriate scientific experts and organizations and invited them to comment on the proposed listings. We received 13 comments: 4 from members of the public, and 9 from peer reviewers.

We reviewed all comments received from the public and peer reviewers for substantive issues and new information regarding the proposed listing of these five species, and we have addressed those comments below. Overall, the commenters and peer reviewers supported the proposed listings. One comment from the public included substantive information; other comments simply supported the proposed listing without providing scientific or commercial data.

**Peer Review**

In accordance with our policy published on July 1, 1994 (59 FR 34270), we requested expert opinions from 14 knowledgeable peer reviewers with scientific expertise that included familiarity with the species, the geographic region in which the species occur, and conservation biology principles. We received responses from nine of the peer reviewers. They generally agreed that the description of the biology and habitat for each species was accurate and based on the best available information. They provided some new or additional information on the biology and habitat of some of these penguin species and their threats, and we incorporated that information into the rulemaking as appropriate. In some cases, it has been indicated in the citations by "personal communication," which could indicate either an email or telephone conversation, while in other cases the research citation is provided.

*Peer Reviewer Comments*

**(1) Comment:** Several peer reviewers provided new data and information regarding the biology, ecology, life history, population estimates, and threat factors affecting these penguin species, and requested that we incorporate the new data and information into this final rule and consider it in making our listing determination. With respect to potential threats, one peer reviewer raised the issue of flipper banding of the yellow-eyed penguin. Several peer reviewers provided clarifying information on predation with respect