Edition, sections NR 660.01, 660.02, 660.07, 660.10, 660.11, 660.20–660.23, 660.30–660.33, 660.40, 660.41, 661.01–661.04, 661.06–661.11, 661.20–661.24, 661.30–661.33, 661.35 and 661.38 and chapter NR 661 Appendix I, II, III, VII and VIII, sections NR 662.010–662.012, 662.020, 662.022, 662.023, 662.027, 662.030–662.034, 662.040–662.043, 662.050–662.058, 662.060, 662.070, 662.080–662.087, 662.089, 662.190–662.194, 662.220, 663.10–663.13, 663.20–663.22, 663.30, 663.31, 664.0001, 664.0003, 664.0004, 664.0010–664.0019, 664.0025, 664.0030–664.0035, 664.0037, 664.0050–664.0056, 664.0070–664.0077, 664.0090–664.0101, 664.0110–664.0120, 664.0140–664.0148, 664.0151, 664.0170–664.0179, 664.0190–664.0200, 664.0220–664.0223, 664.0226–664.0232, 664.0250–664.0259, 664.0270, 664.0300–664.0304, 664.0309, 664.0310, 664.0312–664.0317, 664.0340–664.0345, 664.0347, 664.0351, 664.0550–664.0555, 664.0570–664.0575, 664.0600–664.0603, 664.1030–664.1036, 664.1050–664.1065, 664.1080–664.1090, 664.1100–664.1102 and 664.1200–664.1202, chapter NR 664 Appendix I, IV, V and IX, sections NR 665.0001, 665.0004, 665.0010–665.0019, 665.0030–665.0035, 665.0037, 665.0050–665.0056, 665.0070–665.0077 (excluding 665.0071(1)(b)6), 665.0090–665.0094, 665.0110–665.0121, 665.0140–665.0148, 665.0170–665.0174, 665.0176–665.0178, 665.0190–665.0200, 665.0202, 665.0220–665.0226, 665.0228–665.0231, 665.0250–665.0260, 665.0270, 665.0300–665.0304, 665.0309, 665.0310, 665.0312–665.0316, 665.0340, 665.0341, 665.0345, 665.0347, 665.0351, 665.0352, 665.0370, 665.0373, 665.0375, 665.0377, 665.0381–665.0383, 665.0400–665.0406, 665.0430, 665.0440–665.0445, 665.1030–665.1035, 665.1050–665.1064, 665.1080–665.1090, 665.1100–665.1102 and 665.1200–665.1202, chapter NR 665 Appendix I, III, IV, V and VI, sections NR 666.020–666.023, 666.070, 666.080, 666.100–666.112, 666.200–666.206, 666.210, 666.220, 666.225, 666.230, 666.235, 666.240, 666.245, 666.250, 666.255, 666.260, 666.305, 666.310, 666.315, 666.320, 666.325, 666.330, 666.335, 666.340, 666.345, 666.350, 666.355, 666.360, chapter NR 666 Appendix I– IX and XI –XIII, sections NR 668.01–668.07, 668.09, 668.14, 668.30–668.46 and 668.48–668.50, chapter NR 668 Appendix III, IV, VI–IX and XI, sections NR 670.001, 670.002, 670.004, 670.005, 670.010–670.019, 670.021–670.033, 670.040–670.043, 670.050, 670.051, 670.061, 670.062, 670.065, 670.066, 670.068, 670.070–670.073, 670.079, 670.235, 670.401, 670.403–670.406, 670.408–670.412, 670.415, 670.417, and 670.431–670.433, chapter NR 670 Appendix I, sections NR 673.01–673.05, 673.09–673.20, 673.30–673.40, 673.50–673.56, 673.60–673.62, 673.70, 673.80, 673.81, 679.01, 679.10–679.12, 679.20–679.24, 679.30–679.32, 679.40–679.47, 679.50–679.67, 679.70–679.75, and 679.80–679.82.

Copies of the Wisconsin regulations that are incorporated by reference can be obtained from: Legislative Reference Bureau, One East Main Street, Suite 200, Madison, Wisconsin 53701–2037.

[FR Doc. 2011–11157 Filed 5–6–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 1042

Control of Emissions From New and In-Use Marine Compression-Ignition Engines and Vessels; CFR Correction

Correction

In rule correction document C1–2011–8794 appearing on page 25246 in the issue of Wednesday, May 4, 2011, make the following correction:

§ 1042.901 [Corrected]

On page 25246, in the second column, in the twenty-third through twenty-fifth lines, the equation should read:

Percent of value = [(Value after modification) − (Value before modification)] × 100% ÷ (Value after modification)

[FR Doc. C2–2011–8794 Filed 5–6–11; 8:45 am]

BILLING CODE 1505–01–D

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 1

[WC Docket No. 07–245, GN Docket No. 09–51; FCC 11–50]

A National Broadband Plan for Our Future

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Commission revises its pole attachment rules to promote competition and to reduce the potentially excessive costs of deploying telecommunications, cable, and broadband networks. The Commission also revises the telecommunications rate formula for pole attachments consistent with the statutory framework, reinterprets the Communications Act of 1934, as amended, to allow incumbent LECs to file complaints before the Commission if they believe a pole attachment rate, term, or condition is unjust and unreasonable, and confirms wireless providers are entitled to the same rate as other telecommunications carriers. In addition, the Commission resolves multiple petitions for reconsideration and addresses various points regarding the nondiscriminatory use of attachment techniques.

DATES: Effective June 8, 2011, except for §§ 1.1420, 1.1422 and 1.1424, which contain information collection requirements that have not been approved by the Office of Management and Budget. The Commission will publish a document in the **Federal Register** announcing the effective date for those sections.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554. In addition to filing comments with the Office of the Secretary, a copy of any comments on the Paperwork Reduction Act information collection requirements contained herein should be submitted to Judith B. Herman, Federal Communications Commission, Room 1–B441, 445 12th Street, SW., Washington, DC 20554, or via the Internet to *PRA@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: Jonathan Reel, Wireline Competition Bureau, Competition Policy Division, 202–418–1580. For additional information concerning the Paperwork Reduction Act information collection requirements contained in this document, send an e-mail to *PRA@fcc.gov* or contact Judith B. Herman at 202–418–0214.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Report and Order and Order on Reconsideration* (Order), FCC 11–50, adopted and released on April 7, 2011. The full text of the Order is available for inspection and copying during regular business hours in the FCC Reference Center, 445 Twelfth Street, SW., Room CY–A257, Portals II, Washington, DC 20554, and may also be purchased from the Commission's copy contractor, BCPI, Inc., Portals II, 445 Twelfth Street, SW., Room CY–B402, Washington, DC 20554. Customers may contact BCPI, Inc. via their Web site, *http://www.bcpi.com,* or call 1–800–378–3160. This document is available in alternative formats (computer diskette, large print, audio record, and braille). Persons with disabilities who need documents in these formats may contact the FCC by e-mail: *FCC504@fcc.gov* or phone: 202–418–0530 or TTY: 202–418–0432.

Synopsis of Report and Order and Order on Reconsideration

1. In 1978, Congress added section 224 to the Communications Act of 1934, as amended (Communications Act or Act) thereby directing the Commission to ensure that the rates, terms, and conditions for pole attachments by cable television systems are just and reasonable. Section 224 provides that the Commission will regulate pole attachments except where such matters are regulated by a state. Section 224 also withholds from the Commission jurisdiction to regulate attachments

where the utility is a railroad, cooperatively organized, or owned by a government entity.

2. The Telecommunications Act of 1996 (1996 Act) expanded the definition of pole attachments to include attachments by providers of telecommunications service, and granted both cable systems and telecommunications carriers an affirmative right of nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by a utility. However, the 1996 Act permits utilities to deny access where there is insufficient capacity and for reasons of safety, reliability or generally applicable engineering purposes. Besides establishing a right of access, the 1996 Act set forth section 224(e) — a rate methodology for "attachments used by telecommunications carriers to provide telecommunications services" — in addition to the existing methodology in section 224(d) for attachments "used by a cable television system solely to provide cable service."

3. The Commission implemented the new section 224 access requirements in the *Local Competition Order* (47 FR 47283, Sept. 6, 1996, FCC 96–333, rel. Aug. 8, 1996). At that time, the Commission concluded that it would determine the reasonableness of a particular condition of access on a case-by-case basis. Finding that no single set of rules could take into account all attachment issues, the Commission specifically declined to adopt the National Electrical Safety Code (NESC) in lieu of access rules. The Commission also recognized that utilities typically develop individual standards and incorporate them into pole attachment agreements, and that, in some cases, Federal, state, or local laws also impose relevant restrictions. The *Local Competition Order* acknowledged concerns that utilities might deny access unreasonably, but, rather than adopt a set of substantive engineering standards, the Commission decided that procedures for requiring utilities to justify the conditions they placed on access would best safeguard attachers' rights. The Commission did adopt five rules of general applicability and several broad policy guidelines in the *Local Competition Order.* The Commission also stated that it would monitor the effect of the case-specific approach, and would propose specific rules at a later date if conditions warranted.

4. In the *1998 Implementation Order* (63 FR 12013, Mar. 12, 1998, FCC 98–20, rel. Feb. 6, 1998), the Commission adopted rules implementing the 1996 Act's new pole attachment rate formula for telecommunications carriers. The Commission also concluded that cable television systems offering both cable and Internet access service should continue to pay the cable rate. The Commission further held that wireless carriers had a statutory right of nondiscriminatory access to poles. Although the latter two determinations were challenged, both were ultimately upheld by the Supreme Court. In particular, the Court held that section 224 gives the Commission broad authority to adopt just and reasonable rates. The Court also deferred to the Commission's conclusion that wireless carriers are entitled by section 224 to attach facilities to poles.

5. On November 20, 2007, the Commission issued the *Pole Attachment NPRM* (73 FR 6879, Feb. 6, 2008, FCC 07–187, rel. Nov. 20, 2007) in recognition of the importance of pole attachments to the deployment of communications networks, in part in response to petitions for rulemaking from USTelecom and Fibertech Networks. USTelecom argued that incumbent LECs, as providers of telecommunications service, are entitled to just and reasonable pole attachment rates, terms, and conditions of attachment even though, under section 224, they are not included in the term "telecommunications carriers" and therefore have no statutory right of access. Fibertech petitioned the Commission to initiate a rulemaking to set access standards for pole attachments, including standards for timely performance of make-ready work, use of boxing and extension arms, and use of qualified third-party contract workers, among other concerns. The *Pole Attachment NPRM* sought comment on the concerns raised by USTelecom and Fibertech, as well as the application of the telecommunications rate to wireless pole attachments and other pole access concerns.

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

7. On May 20, 2010, the Commission issued the *Pole Attachment Order and FNPRM.* In the *2010 Order* (75 FR 45494, Aug. 3, 2010, FCC 10–84, rel. May 20, 2010), the Commission took initial steps to clarify the rules governing pole attachments and to streamline the pole attachment process. The Commission clarified the statutory right of communications providers to use the same space- and cost-saving techniques that pole owners use, such as placing attachments on both sides of a pole (boxing), and established that providers have a statutory right to timely access to poles. In the *FNPRM* (75 FR 41338, July 15, 2010, FCC 10–84, rel. May 20, 2010), the Commission sought comment on a variety of measures to speed access to poles. The Commission proposed a comprehensive timeline for all wired pole attachment requests and sought comment on possible adjustments to that timeline. The Commission sought comment on whether to adopt a separate timeline for wireless attachments. The Commission proposed to permit attachers to use independent contractors to perform surveys and make-ready work if the pole owner missed its deadlines, subject to certain conditions. The Commission further proposed that utilities may deny access by contractors to work among the electric lines. In addition, the Commission proposed a staggered payment system for make-ready work; proposed requiring a schedule of make-ready charges; proposed requiring joint pole owners to designate a single managing utility; and sought comment on improving the collection and availability of data.

8. The Commission also sought comment on whether current rules governing pole attachment complaints create appropriate incentives for parties to settle or resolve disputes informally, and whether appropriate remedies are available when parties pursue formal complaints. The *FNPRM* sought comment on ways to reduce the existing disparities in pole rental rates and proposed to address those disparities by reinterpreting the telecom rate formula and by considering the issues surrounding possible regulation of pole attachments by incumbent local exchange carriers (LECs).

9. On September 2, 2010, various electric utilities and cable providers filed petitions seeking clarification or reconsideration of parts of the *2010 Order* concerning the nondiscriminatory use of attachment techniques. The petitions ask the Commission to clarify, among other things, whether a utility must allow attachers to use the same attachment techniques that it uses for itself in the electric space, and whether a pole owner is free to impose new boxing and extension arm requirements going forward.

10. The Commission has held workshops addressing pole attachment issues. On September 28, 2010 the Wireline Competition Bureau convened a workshop to "learn from the experiences and insights of state regulators regarding the Commission's proposed pole attachment regulations." On February 9, 2011, the Commission held a Broadband Acceleration Conference that brought together leaders from Federal, state, and local governments; broadband providers; telecommunications carriers; tower companies; equipment suppliers; and utility companies to identify opportunities to reduce regulatory and other barriers to broadband build-out. At this conference, the Commission announced its Broadband Acceleration Initiative: an agenda for work inside the Commission, with our partners in Tribal, state, and local government, and with the private sector to reduce barriers to broadband deployment.

Improved Access to Utility Poles

11. We take several steps to improve access to utility poles. Our rules are generally consistent with proposals in the *FNPRM,* but also reflect a close examination of the record developed in this proceeding. We adopt a four-stage timeline that provides a maximum of 148 days for attachers to access the communications space on utility poles. For wireless attachments above the communications space, we adopt a modified form of the timeline. The timeline begins to run after the requester submits a complete application. We also establish that a utility may stop the clock for emergencies pursuant to a "good and sufficient cause" standard. We adopt rules that allow attachers to use independent contractors pre-authorized by the utilities to complete survey and make-ready work in the communications space, subject to a number of protections and conditions, if the pole owner does not meet the prescribed timelines. In particular, electric utilities have ultimate decision-making authority regarding the contractor's work with respect to section 224(f)(2) denial-of-access issues.

12. We allow a utility to limit on a per-state basis the size of a pole attachment request that is subject to the timeline, and allow extra time for large orders. Specifically, we apply the basic timeline to requests of up to 300 pole attachments per state or attachments to 0.5 percent of the utility's in-state poles, whichever is less. For larger requests of up to 3,000 pole attachments per state or 5 percent of the utility's in-state poles, whichever is less, additional time is provided for survey and make-ready. Utilities may treat multiple in-state requests from a single attacher during a 30-day period as one request. Our rules further provide that any denial of a request to attach must cite with specificity the particular safety, reliability, engineering, or other valid concern that is the basis for denial. We clarify that blanket prohibitions on pole top access are not permitted. And, as noted elsewhere in the Order, we encourage a high degree of pre-planning and coordination between attachers and pole owners, to begin as early in the process as possible.

13. We decline to adopt several proposals set forth in the *FNPRM* or that commenters recommend, and explain those decisions. For example, we determine that the timeline will provide adequate incentives for joint owners of poles to coordinate, and thus do not require joint owners to name a single management entity. We also conclude that several subsections of section 224 provide the Commission with sufficient authority to adopt a timeline and other access rules.

A. Timeline for Section 224 Access.

14. For most attachments, the total time from submission of the request through completion of make-ready should take between 105 and 148 days, depending on how long the parties take to prepare and accept an estimate. Attachers may hire contractors authorized by the utility to complete make-ready either on the 133rd or 148th day, depending on whether an owner timely notifies the attacher that it intends to move existing facilities and conduct make-ready if existing attachers have failed to move their attachments. Although we establish this timeline as a maximum, we recognize that the necessary work can often proceed more rapidly, especially at the estimate and acceptance stages, or for relatively routine requests. It would not be reasonable behavior for a utility to take longer to fulfill any requests simply because a timeline with maximum timeframes is being adopted. Likewise, for large orders, we allow 15 more days for the survey and 45 more days to complete make-ready.

15. *Stage 1—Survey:* 45 days. We require a utility to respond within 45 days of receipt of a complete application to attach facilities on the utility's poles—for both wireline and wireless attachments either in or above the communications space. This required response is specified in our current 45-day response rule, which provides that, where a utility denies an attachment request, it must provide a written explanation of its denial that is specific; include all supporting evidence and information; and explain how the evidence and information relate to reasons of lack of capacity, safety, reliability, or engineering standards. The 45-day period also accords with the "survey" period in some state models and a proposal in the record. Indeed, the *FNPRM* stated that "[the 45-day response] rule is functionally identical to a requirement for a survey and engineering analysis when applied to wired facilities, and is generally understood by utilities as such." No commenter disagrees, and most utilities regularly meet this deadline. According to a Utilities Telecom Council survey of its members, utilities meet the 45-day requirement 81 percent of the time. More than half of the missed deadlines are caused by either the size of the project or errors in the application. Our new rules address both of these problems: under the rules we adopt today the timeline does not start until a completed application is submitted, and there is flexibility for larger orders. Thus, we expect that utilities acting diligently and in good faith will be able to conduct surveys within the prescribed 45-day period. Owners are given an additional 15 days for large orders.

16. To constitute a "request for access" necessary to trigger the timeline, a requester must submit a complete application that provides the utility with the information necessary under its procedures to begin to survey the poles. We find that pole owners must timely notify attachers of errors in an application, and may not stop the clock to correct errors in an application once it is accepted as complete, as surveys that are not interrupted are more conducive to dependable timeframes. Furthermore, the timing of any such notification of deficiencies in an application must be reasonable. If the request involves attachment of facilities that are unfamiliar to the utility, engineering specifications must be established prior to submission of the application. If an application is submitted for which such engineering specifications have not been established, the pole owner must respond in a manner that is reasonable and timely under the circumstances, but in any event within 45 days. We leave the specific processes for establishing such engineering specifications to individual utilities, so long as they are reasonable and timely.

17. *Stages 2 and 3—Estimate and Acceptance:* Where a request for access is not denied, a utility must present to a requesting entity an estimate of charges to perform all necessary make-

ready work within 14 days of providing its Stage 1 response—or within 14 days after the requesting entity delivers its own survey to the pole owner, as it may do if the pole owner fails to meet the timeline's Stage 1 deadline. The requesting entity may consider the estimate for 14 days after receiving it before the utility may withdraw the offer. Both offer and acceptance may be made sooner than the maximum 14 days. Estimates will not expire automatically after 14 days, but rather must be actively withdrawn by the utility. If an estimate is withdrawn by the utility, the prospective attacher must resubmit its application for attachment.

18. *Stage 4—Make-Ready:* Upon receipt of payment from the attacher, we require a utility to notify immediately and in writing all known entities with existing attachments that may be affected by the planned make-ready. The notice shall: (1) Specify where and what make-ready will be performed; (2) set a date for completion of make-ready no later than 60 days after notification (or 105 days after notification in the case of larger orders) for attachments in the communications space, or no later than 90 days after notification (or 135 days after notification in the case of larger orders) for wireless attachments above the communications space; (3) state that any entity with an existing attachment may add to or modify the attachment before the date set for completion of make-ready; (4) state that the utility may assert its right to 15 additional days to complete make-ready and that, for attachment in the communications space, the requesting entity may complete the specified make-ready itself if make-ready is not completed by the date set by the utility (or, if the utility has asserted its 15-day right of control, by the date 15 days after that completion date); and (5) state the name, telephone number, and e-mail address of a person to contact for more information about the make-ready procedure. Under normal circumstances, performance of make-ready will complete the elements of the timeline that precede actual attachment.

19. For wireless attachments above the communications space on a pole, we include an extra 30 days for make-ready for two reasons. First, these attachments generally are located in, near or above the electric space, which can raise significant safety concerns. Second, the record reflects that, at present, there is less experience with application of state timelines to attachments at the pole top, and in those circumstances, it is appropriate to err on the side of caution. Also, we follow state models that allow additional days for make-ready for large orders within a single state.

20. *Completion by Owner:* If make-ready is not completed by the date specified in the utility's notice to entities with existing attachments, a utility, prior to the expiration of the 60-day notice period (or 105-day notice period in the case of larger orders), may notify the requesting attacher in writing that it intends to assert its right to complete all remaining work within 15 days. In such cases, the utility will have an additional 15 days to complete make-ready. If make-ready remains unfinished at the end of the 15-day extension, the attacher may assume control of make-ready at that point (Day 148 of the timeline, or Day 193 in the case of larger orders). Thus, we permit a pole owner to assert its right to 15 days to complete make-ready in lieu of adopting an automatic fifth stage for "multi-party coordination" as proposed in the *FNPRM.* For attachments in the communications space, if the utility does not timely assert its right to 15 extra days to perform make-ready, control of the project transfers to the new attacher immediately at the end of the 60-day period (or 105-day period in the case of larger orders), and the attacher may use a contractor to complete make-ready.

21. *Scope of the Timeline.* The timeline we adopted—which is modeled after the timeline that has been in use in Utah—applies to all requests by telecommunications carriers (including wireless) and cable operators for attachment in the communications space on a pole. The timeline begins when an application is complete, such that the utility has been provided with the information necessary under its procedures to begin to survey the requested pole(s), including developed engineering specifications for the particular equipment to be attached. A modified form of the timeline applies to wireless attachments by telecommunications carriers and cable operators that are made above the communications space. The timeline does not apply to section 224 ducts, conduits, or rights-of-way. We affirm that completion of an initial pole attachment agreement or "master agreement" is not a prerequisite to starting the clock on a completed application, which may have multiple attachment requests within it. Applications that are outside the scope of the timeline remain subject to the general requirement that the pole owner provide a specific written response within 45 days.

22. *Remedy: Utility-Approved Contractors.* Requesters need a way to obtain access to poles if a utility does not meet the deadlines we impose. We adopt the proposal in the *FNPRM* and hold that, if a utility does not meet the deadline to complete a survey or make-ready established in the timeline, an attacher may hire contractors to complete the work in the communications space. We require each utility to make available a reasonably sufficient list of contractors that it authorizes to perform surveys or make-ready on its poles, and require that the attacher must use contractors from this list. We also seek to ensure that safety and network integrity are preserved at all costs. Thus, we require attachers that hire contractors to perform survey and make-ready work to provide a utility with an opportunity for a utility representative to accompany and consult with the attacher and its contractor prior to commencement of any make-ready work by the contractor. Consulting electric utilities are entitled to make final determinations in case of disputes over capacity, safety, reliability, and generally applicable engineering purposes.

23. *Limit on Order Size.* Based on the record before us and successful state models, we adopt limits on the size of attachment requests that are subject to the timelines we adopt today. The limits on size of attachment requests apply both to attachments in the communications space and the longer timeline for wireless attachments above the communications space. Specifically, we apply the timeline to orders up to the lesser of 0.5 percent of the utility's total poles within a state or 300 poles within a state during any 30-day period. For larger orders—up to the lesser of 5 percent of a utility's total poles in a state or 3,000 poles within a state—we add 15 days to the timeline's survey period and 45 days to the timeline's make-ready period, for a total of 60 days. For in-state orders greater than 3,000 poles, we require parties to negotiate in good faith regarding the timeframe for completing the job. An attacher always has the ability to submit requests of up to 3,000 poles in any 30-day period, so an attacher could start a 9,000 pole order within a single state through the timeline over three successive months.

24. *Stopping the Clock.* Emergencies and certain events during the make-ready phase that are beyond a utility's control may legitimately interrupt pole attachment projects, and the *FNPRM* sought comment on how best to reconcile the timeline with this reality. We adopt a "good and sufficient cause" standard under which a utility may toll the timeline for no longer than necessary where conditions render it

infeasible to complete the make-ready work within the prescribed timeframe. A utility must exercise its judgment in invoking a clock stoppage in the context of its general duty to provide timely and nondiscriminatory access, and an attacher may challenge a utility's failure to either meet its deadline or surrender control of make-ready if a clock stoppage is not justified by good and sufficient cause.

B. Wireless

25. *Specificity of Denials.* We clarify that, regardless of whether a utility has a master agreement with a wireless carrier, the specificity requirement of § 1.1403(b) of the Commission's rules applies to all denials of requests for access. The Commission's rules require that, when a utility denies a request for access, it must state with specificity its reasons for doing so. Section 1.1403(b) of the Commission's rules requires that denials of access be confirmed in writing within 45 days of the request. The utility also "shall be *specific,* shall include all relevant evidence and information supporting its denial, and shall explain how such evidence and information relate to a denial of access for reasons of lack of capacity, safety, reliability or engineering standards." In the *FNPRM,* the Commission proposed that, where a utility has no master agreement with a carrier for wireless attachments requested, the utility may satisfy the requirement to respond with a written explanation of its concerns with regard to capacity, safety, reliability, or engineering standards.

26. *Pole Tops.* We clarify that section 224 allows wireless attachers to access the space above what has traditionally been referred to as "communications space" on a pole. On previous occasions, the Commission has declined to establish a presumption that this space may be reserved for utility use only, and has stated that the only recognized limits to access for antenna placement are those contained in the statute. Yet wireless attachers assert that pole top access is persistently challenged by pole owners, who often impose blanket prohibitions on attaching to some or all pole tops. Blanket prohibitions are not permitted under the Commission's rules. We reject the assertions of some utilities that our rule regarding pole tops will create a "*de facto* presumption in favor of pole top attachments" or otherwise "restrict an electric utility's right to deny access for reasons of safety and reliability." Instead, we clarify that a wireless carrier's right to attach to pole tops is the same as it is to attach to any other part of a pole. Utilities may deny access "where there is insufficient capacity, and for reasons of safety, reliability, and generally applicable engineering purposes." The record in this proceeding is replete with examples of various types of pole top attachments that have been successfully accommodated, both for wireless attachers and for the utilities themselves.

C. Use of Contractors for Attachment

27. As proposed in the *FNPRM,* we resolve an ambiguity in the Commission's rules regarding the use of contractors to attach facilities "in the proximity of electric lines" after make-ready has been completed and attachment permits issued. Specifically, we clarify that "proximity of electric lines" in this context includes work that extends into the safety space that separates the communications space from the electric space, but does not include work among the power lines. While an attacher may use a contractor to attach a wireless antenna above the communications space and associated safety space, we find that an attacher may only use a contractor that has the proper qualifications and that the utility has approved to perform such work. Utilities are not required to keep a separate list of contractors for this purpose, but must be reasonable in approving or disapproving contractors. Accordingly, the standard for attachment by a contractor in the communications space remains that of the "same qualifications" as the utility, but any attachment in the electric space must be at the higher utility-approved standard.

D. Joint Ownership

28. In the *FNPRM,* we proposed to require owners to consolidate authority in one managing utility when more than one utility owns a pole and to make the identity of this managing utility publicly available. We decline to adopt the proposed rules relating to joint ownership, but we clarify and emphasize that we expect joint owners to coordinate and cooperate with each other and with requesting attachers consistent with pole owners' duty to provide just and reasonable access.

E. Legal Authority

29. We conclude that section 224 authorizes the Commission to promulgate the access rules we adopted, including the timeline and its self-effectuating remedy for failure to meet the timeline in the communications space. Through section 224(b)(1), Congress explicitly delegated authority to the Commission to "regulate the rates, terms, and conditions for pole attachments," as well as to develop procedures necessary for resolving complaints arising under the Commission's substantive regulations, and to fashion appropriate remedies. In addition, section 224(b)(2) directs the Commission to make rules to carry out the provisions of this section. Congress also gave more specific substantive guidance for access to poles in section 224(f): "just and reasonable" access must also be "nondiscriminatory."

Improving the Enforcement Process

30. *Revising Pole Attachment Dispute Resolution Procedures.* In the *FNPRM,* we sought comment on whether the Commission should modify its existing procedural rules governing pole attachment complaints. Several commenters expressed the view that new procedures and processes are not needed or that existing procedures can be improved to address any problems. Similarly, there was little discussion of, or support for, the formation of specialized forums to address enforcement issues. A number of commenters, however, maintained that the Commission should do more to encourage parties to resolve their disputes themselves prior to filing a complaint with the Commission.

31. We agree that parties ought to make every effort to settle their disputes informally before instituting formal processes at the Commission. Section 1.1404(k) of the Commission's rules requires a complainant to "include a brief summary of all steps taken to resolve the problem before filing," and, if no such steps were taken, to "state the reason(s) why it believed such steps were fruitless." In our view, however, that rule does not adequately ensure that the parties will engage in serious efforts to resolve disputes prior to the initiation of litigation. We believe a requirement similar to that imposed by the California Public Utility Commission, requiring "executive-level" discussions, should be incorporated into the Commission's rules. We therefore revise Commission rule § 1.1404(k) to require that there be "executive-level discussions" (*i.e.,* discussions among individuals who have sufficient authority to make binding decisions on behalf of the company they represent), preferably face-to-face, prior to the filing of a complaint at the Commission. We will consider in any enforcement proceedings whether such coordination has taken place.

32. In addition, a number of commenters expressed concern about the length of time it takes for the Commission to resolve pole attachment complaints. We believe that the new

processes adopted elsewhere in the Order will have the effect of expediting the pole access process. And, to the extent that access disputes remain a problem, we will make every effort to resolve them expeditiously. We do not believe that other substantial changes, such as new procedures or specialized forums, are justified at this time.

33. *Efficient Informal Dispute Resolution Process.* The *FNPRM* sought comment on whether the Commission should attempt to encourage "local dispute resolution," and several commenters endorsed the notion. We agree, and believe that it is desirable for parties to include dispute resolution procedures in their pole attachment agreements. Any refusal to enter into an agreement because it contains a dispute resolution provision would be considered unreasonable. We suggest that issues to be addressed specifically in a dispute resolution provision might include the requirement of executive-level settlement negotiations, and reliance on a forum other than the Commission (*e.g.,* an arbitrator or expert panel) to resolve disputes. We also note that the Commission's pre-complaint mediation process has had marked success in helping parties resolve pole attachment disputes, and we encourage parties to utilize that process.

34. This Order also concludes, as proposed in the *FNPRM,* that the portion of the Commission's rules § 1.1404(m) that provides that potential attachers who are denied access to a pole, duct, or conduit must file a complaint "within 30 days of such denial" should be eliminated. We believe the 30-day rule no longer serves a useful purpose, and is actually counterproductive at times. Any concern about stale complaints is addressed by our modifications of the Commission's rules § 1.1410, which state that remedies must be "consistent with the applicable statute of limitations." We therefore eliminate the portion of the Commission's rules § 1.1404(m) requiring that denial of access complaints be filed within 30 days.

35. *Remedies.* The *FNPRM* proposed to amend § 1.1410 of the Commission's pole attachment complaint rules to enumerate the remedies available to an attacher that proves a utility has unlawfully delayed or denied access to its poles, simply codifying the existing authority and practice, and we accordingly adopt the rule change as proposed. The *FNPRM* also proposed to amend the Commission's rules § 1.1410 to specify that compensatory damages may be awarded where an unlawful denial or delay of access is established, or a rate, term, or condition is found to be unjust and unreasonable. After reviewing voluminous and sharply divided comments on this question, we decline, at this time, to amend the Commission's rules § 1.1410 to allow compensatory damages. Given all of the rules designed to improve and expedite pole access that we adopt herein, we anticipate that attachers will experience far fewer difficulties than they have to date.

36. We also adopt the proposed modification of the Commission's rules § 1.1410(c), which permits a monetary award in the form of a "refund or payment," measured "from the date that the complaint, as acceptable, was filed, plus interest." We believe that this modification, which will allow monetary recovery in a pole attachment action to extend back as far as the applicable statute of limitations, will make injured attachers whole, and will be consistent with the way that claims for monetary recovery are generally treated under the law. It will also remove the perceived impediment to pre-complaint negotiations between the parties to resolve disputes about rates, terms and conditions of attachment. We reject the contention that the proposed rule change creates an incentive for attaching entities to attempt to maximize their monetary recovery by waiting until shortly before the statute of limitations has expired to bring a dispute over rates to the Commission.

37. *Unauthorized Attachments.* In modifying our rules regarding penalties for unauthorized attachments, we acknowledge the wide range of opinions among commenters regarding the scope of the problem posed by unauthorized attachments. Although the record is insufficient for us to make specific findings regarding the scope and severity of non-compliance, there appears to be a well-founded concern that the current unauthorized attachment regime (*i.e.,* the *Mile Hi* case), which involves payment amounting to no more than back rent, provides little incentive for attachers to follow authorization processes, and that competitive pressure to bring services to market overwhelms any deterrent effect. That said, we take seriously the arguments by attachers that utilities may deem attachments to be unauthorized because of poor record keeping or changes in pole ownership, rather than because of the attacher's failure to follow proper protocol. Consequently, the policy we enunciate today applies on a prospective basis only—*i.e.,* to new agreements, or amendments to existing agreements, executed after the effective date of this Order.

38. To address the concerns implicated by unauthorized attachments, we explicitly abandon the *Mile Hi* limitation on penalties and instead create a safe harbor for more substantial penalties. Specifically, going forward, we will consider contract-based penalties for unauthorized attachments to be presumptively reasonable if they do not exceed those implemented by the Oregon PUC. Oregon has established a multifaceted system that contains, among others, the following provisions:

- An unauthorized attachment fee of $500 per pole for pole occupants without a contract (*i.e.,* when there is no pole attachment agreement between the parties);
- An unauthorized attachment fee of five times the current annual rental fee per pole if the pole occupant does not have a permit and the violation is self-reported or discovered through a joint inspection, with an additional sanction of $100 per pole if the violation is found by the pole owner in an inspection in which the pole occupant has declined to participate.
- A requirement that the pole owner provide specific notice of a violation (including pole number and location) before seeking relief against a pole occupant.
- An opportunity for attachers to avoid sanctions by submitting plans of correction within 60 calendar days of receipt of notification of a violation or by correcting the violation and providing notice of the correction to the owner within 180 calendar days of receipt of notification of the violation.
- A mutual obligation of pole owners and pole occupants to correct immediately violations that pose imminent danger to life or property. If a party corrects another party's violation, the party responsible for the violation must reimburse the correcting party for the actual cost of corrections.
- The opportunity for resolution of factual disputes via settlement conferences before an alternative dispute resolution forum.

39. In a case where an attacher makes unauthorized attachments to a pole at a time when the attacher has no pole attachment agreement with the utility, but later enters into such an agreement, we find that it would be reasonable for the utility to apply the unauthorized attachment provisions in that agreement to attachments that were made before the agreement was executed, as well as to any unauthorized attachments made following execution. If an attacher who has made unauthorized attachments without any contract with the utility refuses to enter into a pole attachment

agreement, the utility may seek other remedies including, for example, an action in state court for trespass.

40. We do not adopt the Oregon system as Federal law, but rather continue to favor agreements negotiated between utilities and attaching entities. We simply conclude that we have examined Oregon's rules and find them to be reasonable, and that we would expect to find reasonable any unauthorized attachment provisions contained in agreements that do not exceed the Oregon penalties. As noted above, however, the Oregon sanctions are part of a larger system that also affords protections to attachers that operate in good faith. Consequently, we anticipate that, like the Oregon system, a reasonable pole attachment agreement also will contain provisions that provide notice to attachers, a fair opportunity to remedy violations, and a reasonable process for resolving factual disputes that may arise.

41. *The* "*Sign and Sue*" *Rule.* Our review of the comments responding to the *FNPRM*'s proposal to revise the Commission's long-standing "sign and sue" rule, which allows an attacher to challenge the lawfulness of terms in an executed pole attachment agreement that the attacher claims it was coerced to accept in order to gain access to utility poles, persuades us that the Commission should not amend § 1.1404(d) of the Commission's rules to add a notice requirement to the "sign and sue" rule. Such a requirement poses a significant risk of unduly delaying the negotiation process and adding unnecessary complexity to the adjudication of pole attachment disputes before the Commission. Moreover, we find that a number of the intended benefits of the proposed notice provision will be realized through the amendment to the Commission's rules § 1.1404(k), requiring executive-level discussions between the parties.

Pole Rental Rates

42. In the *FNPRM,* the Commission sought to limit the distortions present in the current pole rental rates "to increase the availability of, and competition for, advanced services to anchor institutions and as middle-mile inputs to wireless services and other broadband services," some of which potentially could be classified as telecommunications services. Accordingly, the Commission sought comment on alternative approaches for reinterpreting the telecom rate formula within the existing statutory framework, including a specific Commission proposal based on elements proposed by TW Telecom (TWTC). This approach was consistent with the National Broadband Plan's recommendation to establish rates "as low and close to uniform as possible" based on evidence that the uncertainty regarding the applicable rate "may be deterring broadband providers that pay lower pole rates from extending their networks or adding capabilities (such as high-capacity links to wireless towers)." This uncertainty results from the risk that, by offering services that potentially could be classified as "telecommunications services," a higher telecom rental rate might then be applied to the broadband provider's entire network.

A. The New Telecom Pole Rental Rate

43. The Commission adopts a modified form of the *FNPRM's* proposal as the new telecom rate. The new telecom rate generally will recover the same portion of pole costs as the current cable rate, is fully compensatory, and is grounded in sound economic policies. Accordingly, the new rate will minimize the difference in rental rates paid for attachments that are used to provide voice, data, and video services, and thus will help remove market distortions that affect attachers' deployment decisions. Removing these barriers to telecommunications and cable deployment will enable consumers to benefit through increased competition, affordability, and availability of advanced communications services, including broadband.

44. The Order reinterprets the telecommunications rate formula for pole attachments consistent with its authority and the existing statutory framework. The Commission identifies a range of possible rates consistent with section 224(e), from the current application of the telecom rate formula based on fully allocated costs at the upper end, to an alternative application of the telecom rate formula based on cost causation principles that results in a rate closer to incremental costs at the lower end. Within that range, Commission seeks to balance the goals of promoting broadband and other communications services with the historical role that pole rental rates have played in supporting the investment in pole infrastructure, and thus define the ambiguous statutory term "cost of providing space" on that basis.

45. *Upper-Bound Rate.* To begin identifying the range of reasonable rates that could result from the telecom rate formula, we first identify the present telecom rate as a reasonable upper bound. The Commission's current telecom rate formula is based on a fully allocated cost methodology, which recovers costs that the pole owner incurs regardless of the presence of attachments. It includes a full range of costs, some of which do not directly relate to or vary with the presence of pole attachments.

46. *Lower-Bound Rate.* As the Commission observed in the *FNPRM,* "a rate that covers the pole owners' incremental cost associated with attachment would, in principle, provide a reasonable lower limit." However, the section 224(e) formulas allocate the relevant costs in such a way that simply defining "cost" as equal to incremental cost, as TWTC initially proposed, would result in pole rental rates *below* incremental cost.

47. Thus, to identify a lower-bound rate that is consistent with this statutory framework—and enables costs to be allocated based on the prescribed cost-apportionment formulas—the Commission relies on the basic principles of cost causation that would underlie a marginal cost rate without defining "cost" as equivalent to marginal or incremental cost *per se.* Under cost causation principles, if a customer is causally responsible for the incurrence of a cost, then that customer—the cost causer—pays a rate that covers this cost. This is consistent with the Commission's existing approach in the make-ready context, where a pole owner recovers the entire associated capital costs through make-ready fees.

48. For purposes of identifying a lower bound for the telecom pole rental rate, we exclude capital costs from the definition of "cost of providing space." As an initial matter, we note that if capital costs arise from the make-ready process, existing rules are designed to require attachers to bear the entire amount of those costs. With respect to other capital costs, the record demonstrates that the attacher is not the "cost causer" of these costs. In the case here of applying cost-causation principles to identify the lower-bound telecom rate, the record includes findings by economists and analysts that capital costs are justifiably excluded from the lower-bound rate because the attachers cause none or no more than a *de minimis* amount of these costs, other than those that are recovered up front through the make-ready fees.

49. By contrast, we continue to include certain operating expenses—namely maintenance and administrative expenses—in the definition of "cost" for purposes of the lower bound telecom rate formula. This is generally consistent with cost causation principles because it is likely that an attacher is causally responsible for some of the ongoing maintenance and administrative expenses relating to use

of the pole. Although the attacher might not be the cost causer with respect to all the operating costs that would be included in the lower bound telecom rate, Congress' intention was that the Commission not "embark upon a large-scale ratemaking proceeding in each case brought before it, or by general order" to establish pole rental rates.

50. *Determining the New Just and Reasonable Telecom Rate.* From within the range of possible interpretations of the term "cost" for purposes of section 224(e), the Commission adopts a particular definition of cost, and therefore a particular rate as the appropriate just and reasonable telecom rate. The definition of cost we select is based on a balancing of policy goals. We seek to ensure that the Commission's policies promote the availability of broadband services and efficient competition for those services. We also recognize, however, that pole rental rates historically have helped support the investment utilities make in their pole infrastructure, and acknowledge utilities' policy concerns about shifting that burden to utility ratepayers.

51. We agree with commenters who explain that today, the telecom rate is sufficiently high that it hinders important statutory objectives. For example, commenters explain that reducing the telecom rate would improve the business case for providing advanced services, because it will reduce the expected incremental cash outflows of providing such services, thereby increasing the likelihood that the present value of the expected incremental cash inflows will exceed the present value of the expected incremental cash outflows. In addition to reducing barriers to the provision of new services, reducing the telecom rate can expand opportunities for communications network investment. We thus conclude that lowering the telecom rates will better enable providers to compete on a level playing field, will eliminate distortions in end-user choices between technologies, and lead to provider behavior being driven more by underlying economic costs than arbitrary price differentials. We also find persuasive the views of consumer advocates in this respect. Notably, "NASUCA members are interested in keeping the costs of pole attachments down, so as to keep the costs of the[se] services * * * down. But NASUCA members also * * * are interested in ensuring that pole attachment rates appropriately compensate the owners of the poles, so that other services are not required to subsidize the attachments." Balancing these concerns, NASUCA recommends that the cable rate "should be used for all pole attachments."

52. We also observe that pole owners have the opportunity to recover through make-ready fees all of the capital costs actually caused by third-party attachers. As a result, the pole owner need not bear any significant risk of unrecovered pole investment undertaken to accommodate a third-party attacher. Thus, permitting recovery of 100 percent of apportioned, fully allocated costs through the pole rental rate seems unwarranted under the statute and could undermine furtherance of important statutory objectives.

53. Although we do not permit utilities to recover 100 percent of apportioned, fully allocated costs through the new telecom rate, we find it appropriate to allow the pole owner to charge a monthly pole rental rate that reflects some contribution to capital costs, aside from those recovered through make-ready fees. For example, regulated pole attachment rates historically have included such a contribution, and we are concerned that adopting a telecom rate that no longer permits utilities to recover such capital costs would unduly burden their ratepayers. We are also mindful of the possible adverse impact of other pole attachment reforms. For one, our regulation of rates for attachments by incumbent LECs could reduce the amount of costs that utilities are able to recover from other sources. Moreover, in conjunction with the pole access reforms adopted in this Order, we are mindful of Congress' expectation that the priority afforded an attacher's access to poles would relate to its sharing in the costs of that infrastructure. We balance these considerations by adopting, in most cases, the following definition of "cost" for purposes of section 224(e): (a) In urban areas, 66 percent of the fully allocated costs used for purposes of the pre-existing telecom rate; and (b) in non-urban areas, 44 percent of the fully allocated costs used for purposes of the pre-existing telecom rate. Defining cost in terms of a percentage of the fully allocated costs previously used for purposes of the telecom rate is a readily administrable approach, and consistent with Congress' direction that the Commission's pole attachment rate regulations be "simple and expeditious" to implement. Further, the specific percentages we select provide a reduction in the telecom rate, and will, in general, approximate the cable rate, advancing the Commission's policies.

54. We adopt a different definition of cost in non-urban areas—namely, 44 percent of fully allocated costs—to address the fact that there typically are fewer attachers on poles in non-urban areas, as reflected by the Commission's presumptions. Given the operation of section 224(e), using the same definition of cost in both types of areas would increase the burden pole attachment rates pose for providers of broadband and other communications services in non-urban areas, as compared to urban areas. Such an outcome would be problematic given the increased challenges already faced in non-urban areas, where cost characteristics can be different and where the availability of, and competition for, broadband services tends to be less today than in urban areas. By defining cost in non-urban areas as 44 percent of the fully allocated costs we largely mitigate that concern, particularly under the Commission's presumptions.

55. We observe that these definitions of cost, when applied pursuant to the cost apportionment formula in section 224(e), generally will recover a portion of the pole costs that is equal to the portion of costs recovered in the cable rate. We conclude that the pole owner will have appropriate incentives to invest in poles and provide attachments to third-party attachers, carrying forward under our new approach to the telecom rate. Moreover, this approach will significantly reduce the marketplace distortions and barriers to the availability of new broadband facilities and services that arose from disparate rates.

56. The Commission's calculations show that the costs for urban and non-urban areas typically will be within the higher- and lower-bound range permissible under section 224(e), and in those circumstances, we adopt that definition of cost for establishing the just and reasonable telecom rate. However, if scenarios arise where the costs identified above would be *lower* than the 100 percent of administrative and operating expenses that serves as a lower bound for the zone of reasonableness, we adopt the higher definition of cost in those circumstances. In sum, the applicable cost for purposes of section 224(e) will be the costs identified above or 100 percent of administrative and operating expenses, whichever is higher.

57. We also reaffirm that wireless carriers are entitled to the benefits and protection of section 224, including the right to the telecom rate under section 224(e). Specifically, in the *1998 Implementation Order,* the Commission explained that it has authority under section 224(e)(1) to prescribe rules governing wireless attachments used by telecommunications carriers to provide

telecommunications services. The Commission also stated that Congress did not intend to distinguish between wired and wireless attachments and that there was no basis to limit the definition of telecommunications carriers under the statute only to wireline providers. The Commission noted that, despite the "potential difficulties in applying the Commission's rules to wireless pole attachments, as opponents of attachment rights have argued," it did not see any need for separate rules. Instead, it explained that "[w]hen an attachment requires more than the presumptive one-foot of usable space on the pole," the presumption can be rebutted. Accordingly, wireless attachments are entitled to the telecom rate formula, and where parties are unable to reach agreement through good faith negotiations, they may bring a complaint before the Commission.

58. We also address the role of the new telecom rate in the context of commingled services. Some cable operators express concern that pole owners will seek to impose rates higher than both the cable rate and the new telecom rate where cable operators or telecommunications carriers also provide services, such as VoIP, that have not been classified. We agree that this outcome would be contrary to our policy goals of reducing the disparity in pole rental rates among providers of competing services and of minimizing disputes. Consequently, we make clear that the use of pole attachments by providers of telecommunications services or cable operators to provide commingled services does not remove them from the pole attachment rate regulation framework under section 224. Rather, we will not consider rates for pole attachments by telecommunications carriers or cable operators providing commingled services to be "just and reasonable" if they exceed the new telecom rate. This action does not disturb prior Commission decisions addressing particular scenarios regarding commingled services.

59. We believe that section 224(e) provides the Commission sufficient latitude to adopt our definition of costs underlying the new telecom rate. In particular, section 224(e)(2) and (3) describe how "[a] utility shall apportion the cost of providing space" on a pole—whether usable or unusable—but does not define the term "cost." We therefore find the term "the cost of providing space" to be ambiguous." Our new telecom rate reflects a reasonable interpretation of the ambiguous statutory language, and we conclude that Congress gave the Commission authority to interpret section 224(e), including the ambiguous phrases "cost of providing space * * * other than the usable space" in section 224(e)(2) and "cost of providing usable space" in section 224(e)(3).

60. We are not persuaded by electric utilities that argue section 224(e) must be read in a manner that mandates use of a fully allocated cost methodology based on legislative history. Primarily, they cite to language in the legislative history of the House bill endorsing a fully allocated cost methodology and other discussions in the legislative history attempting to link the benefits attachers receive from pole attachments to pole rental rates. We are not persuaded that these arguments compel an interpretation of section 224(e) that is contrary to the Commission's approach.

61. We also are not persuaded by claims of utilities that the new telecom rate will not enable them to recover their costs. The new telecom rate is compensatory and is designed so that utilities will not be cross-subsidizing attachers, as it ensures that utilities will recover more than the incremental cost of making attachments. The record provides no evidence indicating that there is any category or type of costs that are caused by the attacher that are not recovered through the new telecom rate.

B. Incumbent LEC Pole Attachments

62. In the 2010 *FNPRM,* the Commission asked parties to refresh the record on the issues raised in the 2007 *Pole Attachment NPRM* "both in light of the specific telecom rate proposals, as well as the factual findings of the National Broadband Plan." In addition, the Commission sought comment "on the relationship between the pole rental rates paid by incumbent LECs and any other rights and responsibilities they have by virtue of their pole access agreements with utilities," such as joint use agreements, and whether any remedies otherwise were available to incumbent LECs absent the ability to file complaints with the Commission. The *FNPRM* also sought comment on proposals under which incumbent LECs' regulated rate would be an existing rate, whether the cable rate, the pre-existing telecom rate, or any new rate adopted in this proceeding, or an alternative rate, as well as how to balance the rate paid with the other terms and conditions in incumbent LECs' pole attachment agreements with other utilities.

63. Based on the record in this proceeding, we find it appropriate to revisit our interpretation of section 224 with respect to rates, terms and conditions for pole attachments by incumbent LECs. We allow incumbent LECs to file complaints with the Commission challenging the rates, terms and conditions of pole attachment agreements with other utilities.

64. *Statutory Analysis.* In implementing section 224, as amended by the 1996 Act, the Commission interpreted the exclusion of incumbent LECs from the term "telecommunications carrier" to mean that section 224 does not apply to attachment rates paid by incumbent LECs. Although these decisions did not consider alternative interpretations of incumbent LECs' rights under section 224 in detail, the Commission's interpretation appears to have been based in part on incumbent LECs' status as pole owners and thus "utilities" under section 224, and in part on the view that "Congress' intent" was to "promote competition by ensuring the availability of access to new telecommunications entrants."

65. We find it appropriate to change the Commission's prior interpretation of section 224(b) with respect to incumbent LECs given the evidence in the record regarding current market realities. Over time, aggregate incumbent LEC pole ownership has diminished relative to that of electric utilities. Thus, incumbent LECs often may not be in an equivalent bargaining position with electric utilities in pole attachment negotiations in some cases. Further, although we agree with the Commission's prior assessment that "Congress' intent" in section 224—and the 1996 Act more broadly—was to "promote competition," we believe this intent was not limited to entities that were "new telecommunications entrants" at the time of the 1996 Act.

66. In reviewing the Commission's prior interpretation of section 224, we note that even incumbent LECs acknowledge that they are excluded from the section 224 definition of "telecommunications carrier," and generally concede that they thus have no statutory right to nondiscriminatory pole access under section 224(f)(1). That is, they agree that because section 224(f)(1) requires utilities to provide nondiscriminatory access to "telecommunications carriers," which exclude incumbent LECs, they have no statutory right of nondiscriminatory access to poles, ducts, conduits or rights-of-way under this provision of the Act. We agree. They also contend, however, that sections 224(b)(1) and 224(a)(4) provide an independent right to reasonable rates, terms and conditions for any pole attachment by a

provider of telecommunications service, and that the statute thus mandates the Commission to apply the "just and reasonable" standard to pole attachments for all such providers, including incumbent LECs.

67. We are persuaded to revisit our prior conclusion, and instead adopt a new interpretation of section 224(b). Specifically, we find that the Commission has authority to ensure that incumbent LECs' attachments to other utilities' poles are pursuant to rates, terms and conditions that are just and reasonable. For one, this reflects the marketplace evidence discussed above. This also reflects the fact that actions to reduce input costs, such as pole rental rates, can expand opportunities for investment, especially in combination with other actions, which is particularly important given the up to 24 million Americans that do not have access to broadband today. Incumbent LECs identify five specific categories of consumer benefits arising from ensuring just and reasonable rates for incumbent LECs' attachments to other utilities' poles: (1) Reduced demand on the universal service fund arising from reduced incumbent LEC costs; (2) automatic flow-through of cost reductions to the regulated rates of rate-of-return incumbent LECs; (3) use of cost savings to improve service and/or lower prices for broadband services in areas with competition; (4) increased broadband deployment in areas where incumbent LECs currently do not provide broadband due to the improved business case; and (5) a source of capital for expansion. We expect these promised consumer benefits to occur, and we encourage incumbent LECs to provide data to the Commission on an ongoing basis demonstrating the extent to which these benefits are being realized. We would be concerned if these consumer benefits were not realized. We will continue to monitor the outcomes of the Order, and in the absence of evidence that expected benefits are being realized, we may, among other things, revisit our approach to this issue.

68. We conclude that neither the language or structure of section 224 precludes our finding that incumbent LECs are entitled to pole attachment rates, terms and conditions that are just and reasonable pursuant to section 224(b)(1). The Commission's authority to regulate the rates, terms and conditions of pole attachments by incumbent LECs derives principally from section 224(b) of the Act. In particular, section 224(b)(1) provides that the Commission "shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions." The statute defines the term "pole attachment," in turn, as "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility."

69. Although section 224(a)(5) cites section 3 of the Communications Act as a starting point for defining "telecommunications carrier," by excluding incumbent LECs, it deviates from that baseline, resulting in a definition that is unique to section 224. In addition, where Congress did not intend for the Commission to regulate rates, terms and conditions in a particular respect, it stated this clearly. Section 224's departure from the definition in section 3, coupled with the fact that Congress could have expressly excluded attachments by incumbent LECs from the Commission's jurisdiction over rates, terms and conditions under section 224(b)(1), persuade us to interpret "provider of telecommunications service" as distinct from "telecommunications carrier" for purposes of section 224.

70. Interpreting these terms as distinct leads us to conclude that the definition of "pole attachment" includes pole attachments of incumbent LECs. Moreover, because section 224(b) requires the Commission to "regulate the rates, terms, and conditions for *pole attachments,*" under our revised reading the Commission has a statutory obligation to regulate the attachments of incumbent LECs.

71. *Guidance Regarding Commission Review of Incumbent LEC Pole Attachment Complaints.* Having found that section 224(b) enables the Commission to ensure that pole attachments by incumbent LECs are accorded just and reasonable rates, terms and conditions, we recognize the need to exercise that authority in a manner that accounts for the potential differences between incumbent LECs and telecommunications carrier or cable operator attachers. As we observed in the *FNPRM,* the issues related to rates for pole attachments by incumbent LECs raise complex questions, both with respect to potential remedies for incumbent LECs and the details of the complaint process itself. These complexities can arise because, for example, incumbent LECs also own many poles and historically have obtained access to other utilities' poles within their incumbent LEC service territory through "joint use" or other agreements. We therefore decline at this time to adopt comprehensive rules governing incumbent LECs' pole attachments, finding it more appropriate to proceed on a case-by-case basis. We do, however, provide certain guidance below regarding the Commission's approach to incumbent LEC pole attachment complaints.

72. We also note that outside of the carrier's incumbent LEC service territory, it would be subject to the pole attachment regulations applicable to a telecommunications carrier. In addition, we decline to apply our new interpretation of section 224 retroactively, and make clear that incumbent LECs only can get refunds of amounts paid subsequent to the effective date of this Order.

73. *Evidence of Bargaining Power.* We recognize that not all incumbent LECs are similarly situated in terms of their bargaining position relative to other pole owners. For example, although there has been a general trend of reduced pole ownership by incumbent LECs' relative to other utilities, there is evidence that circumstances can vary considerably from location to location. Where parties are in a position to achieve just and reasonable rates, terms and conditions through negotiation, we believe it generally is appropriate to defer to such negotiations. Thus, in evaluating incumbent LEC pole attachment complaints, the Commission will consider the incumbent LEC's evidence that it is in an inferior bargaining position to the utility against which it has filed the complaint.

74. *Existing vs. New Agreements.* The record reveals that incumbent LECs frequently have access to pole attachments pursuant to joint use agreements today. Although some incumbent LECs express concerns about existing joint use agreements, these long-standing agreements generally were entered into at a time when incumbent LECs concede they were in a more balanced negotiating position with electric utilities, at least based on relative pole ownership. As explained above, we question the need to second guess the negotiated resolution of arrangements entered into by parties with relatively equivalent bargaining power. Consistent with the foregoing, the Commission is unlikely to find the rates, terms and conditions in existing joint use agreements unjust or unreasonable. The record also indicates, however, that both incumbent LECs and other utilities have the ability to terminate existing agreements and seek new arrangements, and that, at times, each type of entity has sought to do so.

To the extent that an incumbent LEC can demonstrate that it genuinely lacks the ability to terminate an existing agreement and obtain a new arrangement, the Commission can consider that as appropriate in a complaint proceeding. The Commission will review complaints regarding agreements between incumbent LECs and other utilities entered into following the adoption of this Order based on the totality of those agreements, consistent with the additional guidance we offer below. In addition, to the extent that an incumbent LEC can show that it was compelled to sign a new pole attachment agreement with rates, terms, or conditions that it contends are unjust or unreasonable simply to maintain pole access as a result of a utility's unequal bargaining power, we note that the "sign and sue" rule will apply here in a manner similar to its application in the context of pole attachment agreements between pole owners and either cable operators or telecommunications carriers.

75. *Reference to Other Agreements.* As discussed above, the historical joint use agreements between incumbent LECs and other utilities implicate rights and responsibilities that differ from those in typical pole lease agreements between utilities and telecommunications carriers or cable operators. Under any new agreements, to the extent that the incumbent LEC demonstrates that it is obtaining pole attachments on terms and conditions that leave them comparably situated to telecommunications carriers or cable operators, we believe it will be appropriate to use the rate of the comparable attacher as the "just and reasonable" rate for purposes of section 224(b). As discussed above, just and reasonable pole attachments rates for incumbent LECs are not bound by the formulas in sections 224(d) or (e). Where incumbent LECs are attaching to other utilities' poles on terms and conditions that are comparable to those that apply to a telecommunications carrier or a cable operator—which generally will be paying a rate equal or similar to the cable rate under our rules—competitive neutrality counsels in favor of affording incumbent LECs the same rate as the comparable provider (whether the telecommunications carrier or the cable operator). In this regard, an incumbent LEC might demonstrate that it obtains access to poles on terms and conditions that are the same as a telecommunications carrier or cable operator. Likewise, an incumbent LEC may seek the same *term* or *condition* that applies to a telecommunications carrier or cable operator upon a showing that it otherwise is comparably situated to that provider.

76. Even if the terms and conditions of access are not the same, however, incumbent LECs may seek to demonstrate that the arrangement at issue does not provide a material advantage to incumbent LECs relative to cable operators or telecommunications carriers. To facilitate this analysis, we modify our pole attachment complaint rules to require that incumbent LECs provide, in a complaint proceeding, any agreements between the defendant utility and a third party attacher with whom the incumbent LEC claims it is similarly situated (or that the other utility do so if necessary).

77. By contrast, if a new pole attachment agreement between an incumbent LEC and a pole owner includes provisions that materially advantage the incumbent LEC *vis a vis* a telecommunications carrier or cable operator, we believe that a different rate should apply. Just as considerations of competitive neutrality counsel in favor of similar treatment of similarly situated providers, so too should differently situated providers be treated differently. In particular, we find it reasonable to look to the pre-existing, high-end telecom rate as a reference point in complaint proceedings involving a pole owner and an incumbent LEC attacher that is not similarly situated, or has failed to show that it is similarly situated to a cable or telecommunications attacher. As a higher rate than the regulated rate available to telecommunications carriers and cable operators, it helps account for particular arrangements that provide net advantages to incumbent LECs relative to cable operators or telecommunications carriers. We find it prudent to identify a specific rate to be used as a reference point in these circumstances because it will enable better informed pole attachment negotiations between incumbent LECs and electric utilities. We also believe it will reduce the number of disputes for which Commission resolution is required by providing parties clearer expectations regarding the potential outcomes of formal complaints, thus narrowing the scope of the conflict. For example, we would be skeptical of a complaint by an incumbent LEC seeking a proportionately lower rate to attach to an electric utility's poles than the rate the incumbent LEC is charging the electric utility to attach to its poles. We believe that a just and reasonable rate in such circumstances would be the same proportionate rate charged the electric utility, given the incumbent LEC's relative usage of the pole (such as the same rate per foot of occupied space). Further, we find it more administrable to look to the existing, high-end telecom rate, which historically has been used in the marketplace, than to attempt to develop in this Order an entirely new rate for this context.

78. We also recognize that incumbent LECs generally are pole owners themselves and, like electric utilities, have agreements governing access to their poles. As appropriate, in evaluating an incumbent LEC's complaint, the Commission may also consider the rates, terms and conditions that the incumbent LEC offers to the electric utility or other attachers for access to the incumbent LEC's poles, including whether they are more or less favorable than the rates, terms and conditions the incumbent LEC is seeking. Further, evidence that a term or condition was contained in the parties' prior joint use agreement will carry significant weight in the Commission's assessment of whether a refusal to agree to a substantially different term or condition regarding the same subject in a new agreement is unreasonable.

79. *Other Fora for Dispute Resolution.* Some electric utilities and other commenters have observed that certain state commissions might provide a forum for resolving incumbent LEC-electric utility pole attachment disputes. We do not preclude parties from electing to pursue complaints before state commissions, rather than before the Commission. Section 224 ensures incumbent LECs of appropriate Commission oversight of their pole attachments, however, and we therefore do not require incumbent LECs to pursue relief in state fora before filing a complaint with the Commission.

Clarification and Reconsideration of the *2010 Order*

80. *Prospective Policies.* We clarify that a utility may not simply prohibit an attacher from using boxing, bracketing, or any other attachment technique on a going forward basis where the utility, at the time of an attacher's request, employs such techniques itself. As Fibertech points out, even a policy that is equally applied prospectively is discriminatory in the sense that it disadvantages new attachers. Thus, the relevant standards for purposes of determining a utility's "existing practices" are those that a utility applies at the time of an attacher's request to use a particular attachment technique—not the standards that a utility wishes to apply going forward. A utility may,

however, choose to reduce or eliminate altogether the use of a particular method of attachment used on its poles, including boxing or bracketing, which would alter the range of circumstances in which it is obligated to allow future attachers to use the same techniques.

81. *Joint Ownership.* We also clarify that, where a pole is jointly owned and the owners have adopted different standards regarding the use of boxing, bracketing, or other attachment techniques, the joint owners may apply the more restrictive standards. For instance, if an electric utility and an incumbent LEC jointly own a pole but have divergent standards regarding the use of boxing, they may refuse to allow an attacher to box in a situation where boxing would be allowed by one utility's standards but not the other's. We disagree with Fibertech that permitting application of the more restrictive standard will allow joint pole owners to "double team" attachers by demanding compliance with one set of standards initially and then a different set later. In order to avoid a claim that their terms and conditions for access are unjust, unreasonable or discriminatory, joint pole owners should settle on and apply a single set of standards—not different sets at different times.

82. *Similar Circumstances and the Electric Space.* At the Coalition's request, we clarify that an electric utility's use of a particular attachment technique for facilities in the electric space does not obligate the utility to allow the same technique to be used by attachers in the communications space. We likewise clarify, in response to the Florida IOUs' request, that the existence of boxing and bracketing configurations in the electric space do not trigger an attacher's right to use boxing and bracketing in the communications space. The *2010 Order* specified that attachers are entitled to use the same techniques that the utility itself uses in similar circumstances, and we agree with the petitioners that the above situations do not involve similar circumstances. For instance, boxing and bracketing in the communications space can limit the use of climbing as a means of maintenance and repair, and also complicate pole change out.

83. We disagree with the petitioners, however, that the nondiscrimination requirement in section 224(f)(1) applies only to the extent that a pole owner has allowed itself or others to use an attachment technique in the communications space of a pole. As explained in further detail below, the Act does not limit a utility's nondiscrimination obligations to activities that take place in the communications space. Thus, while an electric utility's use of an attachment technique in the electric space might not obligate it to permit use of such technique in the communications space, its use of an attachment technique (like boxing and bracketing) in the electric space may, in fact, obligate it to allow use of that technique in the electric space. The salient issue is whether the attacher's use of a particular technique is consistent with the utility's, not whether its use is consistent with the utility's in the communication space.

84. *Insufficient Capacity and the Electric Space.* We deny the Florida IOUs' request to find that a pole has "insufficient capacity" if an electric utility must rearrange its electric facilities to accommodate a new attacher. As explained in the *2010 Order,* a pole does not have insufficient capacity where a request for attachment could be accommodated using traditional methods of attachment. Rearrangement of facilities on a pole is one of these methods, and nothing in the statute suggests that, for purposes of gauging capacity, rearrangement of facilities in the electric space should be treated differently from rearrangement of facilities in the communications space. Thus, where rearrangement of a pole's facilities—whether in the communications space or the electric space—can accommodate an attachment, there is not "insufficient capacity" under section 224(f)(2).

85. *Space-and Cost-Saving.* The Florida IOUs argue that section 224(f)(2) allows an electric utility to deny use of a particular attachment technique when the utility itself has not used or authorized that technique as a means of saving both space and cost. We disagree that section 224(f)(2) is so limited. We find that the Florida IOUs' restrictive interpretation has no basis in the text of section 224 and would enable a utility to refuse an attacher use of a particular attachment technique in situations where the utility itself uses the technique or authorizes its use by third parties. If a utility uses bracketing as a means of saving cost (but not space) in a particular type of situation, for instance, it must allow attachers also to use bracketing. But under the Florida IOUs' formulation, the utility would have no duty to do so.

Congressional Review Act

86. The Commission will send a copy of this Report and Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

Paperwork Reduction Act of 1995 Analysis

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

Final Regulation Flexibility Analysis

88. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was included in the *2010 Order and FNPRM* in WC Docket No. 07–245 and GN Docket No. 09–51. The Commission sought written public comment on the proposals in these dockets, including comment on the IRFA. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

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

89. In this *Report and Order and Order on Reconsideration* (Order), FCC 11–50, adopted and released on April 7, 2011, the Commission revises its pole attachment rules to promote competition and to reduce the potentially excessive costs of deploying telecommunications, cable, and broadband networks. The Commission has historically relied primarily on private negotiations and case-specific adjudications to ensure just and reasonable rates, terms, and conditions, but its experience during the past 15 years has demonstrated the need to provide more guidance. Accordingly, the Commission establishes a four-stage timeline for wireline and wireless access to poles; provides attachers with a self-effectuating contractor remedy in the communications space; improves its enforcement rules; reinterprets the telecommunications rate formula within the existing statutory framework; and addresses rates, terms, and conditions for pole attachments by incumbent LECs. The Commission also resolves multiple petitions for reconsideration and addresses various points regarding the nondiscriminatory use of attachment techniques.

B. Summary of the Significant Issues Raised by the Public Comments in Response to the IRFA and Summary of the Assessment of the Agency of Such Issues

90. One commenter discussed the IRFA from the FNPRM. A group of

associations representing rural telephone companies argued specifically that the Commission should adopt the lowest telecom rate for broadband connections, adopt an incumbent LEC dispute resolution process, and cap pole attachment orders at 100 poles. We squarely address these concerns by revising the section 224(e) rental rate for pole attachments used by telecommunications carriers to provide telecommunications services; permitting incumbent LECs to file complaints with the Commission to ensure reasonable rates, terms, and conditions of pole attachments; and adopting the lesser of a numerical or a percentage-based cap on pole orders.

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

91. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules and policies, if adopted. The RFA generally defines the term "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 which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.

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

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

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

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

96. *Incumbent Local Exchange Carriers (ILECs).* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 1,311 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,311 carriers, an estimated 1,024 have 1,500 or fewer employees and 287 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our proposed action.

97. *Competitive Local Exchange Carriers (CLECs), Competitive Access Providers (CAPs), "Shared-Tenant Service Providers," and "Other Local Service Providers."* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 1005 carriers have reported that they are engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 1005 carriers, an estimated 918 have 1,500 or fewer employees and 87 have more than 1,500 employees. In addition, 16 carriers have reported that they are "Shared-Tenant Service Providers," and all 16 are estimated to have 1,500 or fewer employees. In addition, 89 carriers have reported that they are "Other Local Service Providers." Of the 89, all have 1,500 or fewer employees. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, "Shared-Tenant Service Providers," and "Other Local Service Providers" are small entities that may be affected by our proposed action.

98. *Interexchange Carriers (IXCs).* Neither the Commission nor the SBA has developed a small business size standard specifically for providers of interexchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 300 carriers have reported that they are engaged in the provision of interexchange service. Of these, an estimated 268 have 1,500 or fewer employees and 32 have more than 1,500 employees. Consequently, the Commission estimates that the majority of IXCs are small entities that may be affected by our proposed action.

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

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

101. The second category of All Other Telecommunications comprises, *inter alia,* "establishments primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications

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

102. *Wireless Telecommunications Carriers (except Satellite).* Since 2007, the Census Bureau has placed wireless firms within this new, broad, economic census category. Prior to that time, such firms were within the now-superseded categories of "Paging" and "Cellular and Other Wireless Telecommunications." Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees. Because Census Bureau data are not yet available for the new category, we will estimate small business prevalence using the prior categories and associated data. For the category of Paging, data for 2002 show that there were 807 firms that operated for the entire year. Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more. For the category of Cellular and Other Wireless Telecommunications, data for 2002 show that there were 1,397 firms that operated for the entire year. Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more. Thus, we estimate that the majority of wireless firms are small.

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

104. In addition, in the *Paging Second Report and Order,* the Commission adopted a size standard for "small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. A small business is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. The SBA has approved this definition. An initial auction of Metropolitan Economic Area (MEA) licenses was conducted in the year 2000. Of the 2,499 licenses auctioned, 985 were sold. Fifty-seven companies claiming small business status won 440 licenses. A subsequent auction of MEA and Economic Area (EA) licenses was held in the year 2001. Of the 15,514 licenses auctioned, 5,323 were sold. One hundred thirty-two companies claiming small business status purchased 3,724 licenses. A third auction, consisting of 8,874 licenses in each of 175 EAs and 1,328 licenses in all but three of the 51 MEAs, was held in 2003. Seventy-seven bidders claiming small or very small business status won 2,093 licenses.

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

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

107. *Broadband Personal Communications Service.* The broadband personal communications services (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission has created a small business size standard for Blocks C and F as an entity that has average gross revenues of less than $40 million in the three previous calendar years. For Block F, an additional small business size standard for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years. These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA. No small businesses within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 "small" and "very small" business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F. In 1999, the Commission reauctioned 155 C, D, E, and F Block licenses; there were 113 small business winning bidders.

108. In 2001, the Commission completed the auction of 422 C and F Broadband PCS licenses in Auction 35. Of the 35 winning bidders in this auction, 29 qualified as "small" or "very small" businesses. Subsequent events, concerning Auction 35, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant. In 2005, the Commission completed an auction of 188 C block licenses and 21 F block licenses in Auction 58. There were 24 winning bidders for 217 licenses. Of the 24 winning bidders, 16 claimed small business status and won 156 licenses. In 2007, the Commission completed an auction of 33 licenses in the A, C, and F Blocks in Auction 71. Of the 14 winning bidders, six were designated entities. In 2008, the Commission completed an auction of 20 Broadband PCS licenses in the C, D, E and F block licenses in Auction 78.

109. *Advanced Wireless Services.* In 2008, the Commission conducted the auction of Advanced Wireless Services (AWS) licenses. This auction, which as designated as Auction 78, offered 35 licenses in the AWS 1710–1755 MHz and 2110–2155 MHz bands (AWS–1). The AWS–1 licenses were licenses for which there were no winning bids in Auction 66. That same year, the Commission completed Auction 78. A

bidder with attributed average annual gross revenues that exceeded $15 million and did not exceed $40 million for the preceding three years (small business) received a 15 percent discount on its winning bid. A bidder with attributed average annual gross revenues that did not exceed $15 million for the preceding three years (very small business) received a 25 percent discount on its winning bid. A bidder that had combined total assets of less than $500 million and combined gross revenues of less than $125 million in each of the last two years qualified for entrepreneur status. Four winning bidders that identified themselves as very small businesses won 17 licenses. Three of the winning bidders that identified themselves as a small business won five licenses. Additionally, one other winning bidder that qualified for entrepreneur status won 2 licenses.

110. *Narrowband Personal Communications Services.* In 1994, the Commission conducted an auction for Narrowband PCS licenses. A second auction was also conducted later in 1994. For purposes of the first two Narrowband PCS auctions, "small businesses" were entities with average gross revenues for the prior three calendar years of $40 million or less. Through these auctions, the Commission awarded a total of 41 licenses, 11 of which were obtained by four small businesses. To ensure meaningful participation by small business entities in future auctions, the Commission adopted a two-tiered small business size standard in the Narrowband PCS Second Report and Order. A "small business" is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $40 million. A "very small business" is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $15 million. The SBA has approved these small business size standards. A third auction was conducted in 2001. Here, five bidders won 317 (Metropolitan Trading Areas and nationwide) licenses. Three of these claimed status as a small or very small entity and won 311 licenses.

111. *Cellular Radiotelephone Service.* Auction 77 was held to resolve one group of mutually exclusive applications for Cellular Radiotelephone Service licenses for unserved areas in New Mexico. Bidding credits for designated entities were not available in Auction 77. In 2008, the Commission completed the closed auction of one unserved service area in the Cellular Radiotelephone Service, designated as Auction 77. Auction 77 concluded with one provisionally winning bid for the unserved area totaling $25,002.

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

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

114. *Fixed Microwave Services.* Fixed microwave services include common carrier, private operational-fixed, and broadcast auxiliary radio services. At present, there are approximately 22,015 common carrier fixed licensees and 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. The Commission has not created a size standard for a small business specifically with respect to fixed microwave services. For purposes of this analysis, the Commission uses the SBA small business size standard for the category Wireless Telecommunications Carriers (except Satellite), which is 1,500 or fewer employees. The Commission does not have data specifying the number of these licensees that have no more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of fixed microwave service licensees that would qualify as small business concerns under the SBA's small business size standard. Consequently, the Commission estimates that there are 22,015 or fewer common carrier fixed licensees and 61,670 or fewer private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services that may be small and may be affected by the rules and policies proposed herein. We note, however, that the common carrier microwave fixed licensee category includes some large entities.

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

116. *Rural Radiotelephone Service.* The Commission has not adopted a size standard for small businesses specific to the Rural Radiotelephone Service. A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio System (BETRS). In the present context, we will use the SBA's small business size standard applicable to Wireless Telecommunications Carriers (except Satellite), *i.e.,* an entity employing no more than 1,500 persons. There are approximately 1,000 licensees in the Rural Radiotelephone Service, and the Commission estimates that there are 1,000 or fewer small entity licensees in the Rural Radiotelephone Service that may be affected by the rules and policies proposed herein.

117. *Broadband Radio Service and Educational Broadband Service.* Broadband Radio Service systems, previously referred to as Multipoint

Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS) systems, and "wireless cable," transmit video programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service (BRS) and Educational Broadband Service (EBS) (previously referred to as the Instructional Television Fixed Service (ITFS)). In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than $40 million in the previous three calendar years. The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent BRS licensees that are considered small entities. After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 BRS licensees that are defined as small businesses under either the SBA or the Commission's rules. In 2009, the Commission conducted Auction 86, the sale of 78 licenses in the BRS areas. The Commission offered three levels of bidding credits: (i) A bidder with attributed average annual gross revenues that exceed $15 million and do not exceed $40 million for the preceding three years (small business) will receive a 15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed $3 million and do not exceed $15 million for the preceding three years (very small business) will receive a 25 percent discount on its winning bid; and (iii) a bidder with attributed average annual gross revenues that do not exceed $3 million for the preceding three years (entrepreneur) will receive a 35 percent discount on its winning bid. Auction 86 concluded in 2009 with the sale of 61 licenses. Of the ten winning bidders, two bidders that claimed small business status won 4 licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses.

118. In addition, the SBA's Cable Television Distribution Services small business size standard is applicable to EBS. There are presently 2,032 EBS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities. Thus, we estimate that at least 1,932 licensees are small businesses. Since 2007, Cable Television Distribution Services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies." The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. To gauge small business prevalence for these cable services we must, however, use current census data that are based on the previous category of Cable and Other Program Distribution and its associated size standard; that size standard was: all such firms having $13.5 million or less in annual receipts. According to Census Bureau data for 2002, there were a total of 1,191 firms in this previous category that operated for the entire year. Of this total, 1,087 firms had annual receipts of under $10 million, and 43 firms had receipts of $10 million or more but less than $25 million. Thus, the majority of these firms can be considered small.

119. *Cable Television Distribution Services.* Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies." The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. To gauge small business prevalence for these cable services we must, however, use current census data that are based on the previous category of Cable and Other Program Distribution and its associated size standard; that size standard was: all such firms having $13.5 million or less in annual receipts. According to Census Bureau data for 2002, there were a total of 1,191 firms in this previous category that operated for the entire year. Of this total, 1,087 firms had annual receipts of under $10 million, and 43 firms had receipts of $10 million or more but less than $25 million. Thus, the majority of these firms can be considered small.

120. *Cable Companies and Systems.* The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers, nationwide. Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard. In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers. Industry data indicate that, of 6,635 systems nationwide, 5,802 systems have fewer than 10,000 subscribers, and an additional 302 systems have 10,000–19,999 subscribers. Thus, under this second size standard, most cable systems are small.

121. *Cable System Operators.* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000." The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate. Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard. We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million, and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

122. *Open Video Systems.* The open video system (OVS) framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming

services by local exchange carriers. The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services, OVS falls within the SBA small business size standard covering cable services, which is "Wired Telecommunications Carriers." The SBA has developed a small business size standard for this category, which is: All such firms having 1,500 or fewer employees. To gauge small business prevalence for such services we must, however, use current census data that are based on the previous category of Cable and Other Program Distribution and its associated size standard; that size standard was: all such firms having $13.5 million or less in annual receipts. According to Census Bureau data for 2002, there were a total of 1,191 firms in this previous category that operated for the entire year. Of this total, 1,087 firms had annual receipts of under $10 million, and 43 firms had receipts of $10 million or more but less than $25 million. Thus, the majority of cable firms can be considered small. In addition, we note that the Commission has certified some OVS operators, with some now providing service. Broadband service providers (BSPs) are currently the only significant holders of OVS certifications or local OVS franchises. The Commission does not have financial or employment information regarding the entities authorized to provide OVS, some of which may not yet be operational. Thus, again, at least some of the OVS operators may qualify as small entities.

123. *Cable Television Relay Service.* This service includes transmitters generally used to relay cable programming within cable television system distribution systems. This cable service is defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies." The SBA has developed a small business size standard for this category, which is: All such firms having 1,500 or fewer employees. To gauge small business prevalence for cable services we must, however, use current census data that are based on the previous category of Cable and Other Program Distribution and its associated size standard; that size standard was: all such firms having $13.5 million or less in annual receipts. According to Census Bureau data for 2002, there were a total of 1,191 firms in this previous category that operated for the entire year. Of this total, 1,087 firms had annual receipts of under $10 million, and 43 firms had receipts of $10 million or more but less than $25 million. Thus, the majority of these firms can be considered small.

124. *Multichannel Video Distribution and Data Service.* MVDDS is a terrestrial fixed microwave service operating in the 12.2–12.7 GHz band. The Commission adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits. It defined a very small business as an entity with average annual gross revenues not exceeding $3 million for the preceding three years; a small business as an entity with average annual gross revenues not exceeding $15 million for the preceding three years; and an entrepreneur as an entity with average annual gross revenues not exceeding $40 million for the preceding three years. These definitions were approved by the SBA. On January 27, 2004, the Commission completed an auction of 214 MVDDS licenses (Auction No. 53). In this auction, ten winning bidders won a total of 192 MVDDS licenses. Eight of the ten winning bidders claimed small business status and won 144 of the licenses. The Commission also held an auction of MVDDS licenses on December 7, 2005 (Auction 63). Of the three winning bidders who won 22 licenses, two winning bidders, winning 21 of the licenses, claimed small business status.

125. *Internet Service Providers.* The 2007 Economic Census places these firms, whose services might include voice over Internet protocol (VoIP), in either of two categories, depending on whether the service is provided over the provider's own telecommunications connections (*e.g.* cable and DSL, ISPs), or over client-supplied telecommunications connections (*e.g.* dial-up ISPs). The former are within the category of Wired Telecommunications Carriers, which has an SBA small business size standard of 1,500 or fewer employees. The latter are within the category of All Other Telecommunications, which has a size standard of annual receipts of $25 million or less. The most current Census Bureau data for all such firms, however, are the 2002 data for the previous census category called Internet Service Providers. That category had a small business size standard of $21 million or less in annual receipts, which was revised in late 2005 to $23 million. The 2002 data show that there were 2,529 such firms that operated for the entire year. Of those, 2,437 firms had annual receipts of under $10 million, and an additional 47 firms had receipts of between $10 million and $24,999,999. Consequently, we estimate that the majority of ISP firms are small entities.

126. *Electric Power Generation, Transmission and Distribution.* The Census Bureau defines this category as follows: "This industry group comprises establishments primarily engaged in generating, transmitting, and/or distributing electric power. Establishments in this industry group may perform one or more of the following activities: (1) Operate generation facilities that produce electric energy; (2) operate transmission systems that convey the electricity from the generation facility to the distribution system; and (3) operate distribution systems that convey electric power received from the generation facility or the transmission system to the final consumer." This category includes Electric Power Distribution, Hydroelectric Power Generation, Fossil Fuel Power Generation, Nuclear Electric Power Generation, and Other Electric Power Generation. The SBA has developed a small business size standard for firms in this category: "A firm is small if, including its affiliates, it is primarily engaged in the generation, transmission, and/or distribution of electric energy for sale and its total electric output for the preceding fiscal year did not exceed 4 million megawatt hours." According to Census Bureau data for 2002, there were 1,644 firms in this category that operated for the entire year. Census data do not track electric output and we have not determined how many of these firms fit the SBA size standard for small, with no more than 4 million megawatt hours of electric output. Consequently, we estimate that 1,644 or fewer firms may be considered small under the SBA small business size standard.

127. *Natural Gas Distribution.* This economic census category comprises: "(1) Establishments primarily engaged in operating gas distribution systems (*e.g.,* mains, meters); (2) establishments known as gas marketers that buy gas from the well and sell it to a distribution system; (3) establishments known as gas brokers or agents that arrange the sale of gas over gas distribution systems operated by others; and (4) establishments primarily engaged in transmitting and distributing gas to final consumers." The SBA has developed a

small business size standard for this industry, which is: All such firms having 500 or fewer employees. According to Census Bureau data for 2002, there were 468 firms in this category that operated for the entire year. Of this total, 424 firms had employment of fewer than 500 employees, and 18 firms had employment of 500 to 999 employees. Thus, the majority of firms in this category can be considered small.

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

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

129. The timeline for access to poles that we adopt today will marginally affect recordkeeping and compliance requirements for utilities and attachers. We anticipate that utilities and attachers will modify their recordkeeping regarding the performance of make-ready work, including timeliness, safety, and capacity, in order to show compliance with the timeline in the case of a dispute. The notification rule requires the inclusion of certain information in make-ready notifications sent to other attachers. We also anticipate that the rule regarding the publication of qualified third-party contract workers will involve more recordkeeping for utilities that must maintain and make available the list to prospective attachers. However, we expect the costs of complying with these rules to be minimal, since they do not measurably differ from the requirements in place before the adoption of this Order.

130. The changes we adopt today in the enforcement process, specifically for pole attachment complaints, similarly do not produce significant differences in recordkeeping and compliance requirements from the requirements in place before the adoption of this Order. For example, although our decision to permit recovery of a monetary award to extend as far back as the appropriate statute of limitations allows, rather than beginning the award period with the filing of the complaint, may increase the period of time over which a complainant must produce data to support its monetary claim, we have not adopted any requirements of data collection or filing *per se.*

131. We expect the costs of complying with the new rules affecting attachment rates to be minimal, since any of these compliance costs do not significantly differ from requirements in place before the adoption of this Order.

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

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

133. The specific timeline and additional rules adopted in this Order provide a predictable, timely process for parties to seek and obtain pole attachments, while maintaining a utility's interest in preserving safety, reliability, and sound engineering. We do not adopt different requirements for small entities because we expect the economic impact on small entities to be minimal. Since we cap the number of poles subject to the timeline based on the lesser of a numerical cap or a percentage of poles owned by a utility in a state, small entities do not undergo any disproportionate hardship. The 100 pole order cap proposed by NTCA *et al.* does not achieve the same benefit for small entities because it is not specifically tailored to the size of the entity. Also, it is unlikely that the timeline will result in any significant recordkeeping burdens for small entities since prudent utilities and attachers already keep records regarding make-ready work and pole capacity and we do not impose any additional information collection requirements. Similarly, identifying the contractors that utilities themselves already use to prospective attachers should not require an additional resource burden. Finally, the Commission does not have authority to regulate (and the proposed rules, thus, do not apply to) small utilities that are municipally or cooperatively owned.

134. Further, in this Order, the Commission revises the section 224(e) rental rate for pole attachments used by telecommunications carriers to provide telecommunications services. This new telecom rate generally will recover the same portion of pole costs as the current cable rate. The new formula will minimize the difference in rental rates paid for attachments that are used to provide voice, data, and video services, and thus will help remove market distortions that pose barriers to deployment of new services by small cable and telecommunications providers. The Commission also revisits its prior interpretation of the statute and allows incumbent LECs to file pole attachment complaints before the Commission if they are unable to negotiate just and reasonable rates, terms, and conditions with other pole owners. Thus, we believe that the rules adopted in this Order to ensure that pole attachment rates are just and reasonable will have a positive economic benefit on small entities in areas that fall under the Commission's regulatory jurisdiction, rather than an adverse impact.

135. Specifically, NTCA *et al.* asserts that small rural incumbent LECs are concerned about unreasonably high rates and "face difficulties in negotiating and, in some cases, litigating contractual terms for pole attachments." NCTA *et al.* also asserts that "[t]he Commission's current pole attachment rules effectively deny rural ILECs a remedy against unreasonable pole attachment provisions which has a significant economic impact on a substantial number of small ILECs." NTCA requested that the Commission adopt a "remedy mechanism by which [rural ILECs] can present claims of unjust or unreasonable pole attachment rates, terms and conditions imposed by utilities"—and stated that such a provision "would reduce the economic impact on small rural communications providers." The Commission, in fact, adopts such a rule in this Order—allowing incumbent LECs to file pole attachment complaints. Further, the Commission provides guidance regarding its approach to evaluating those complaints and what the appropriate rate may be.

136. Also in this Order, the Commission responds to small cable operator concerns about "possible increases in rates for comingled Internet and video services," as noted by the U.S. Small Business Administration. Addressing the role of the new telecom rate in the context of commingled

services, the Commission recognized concerns by some cable operators that pole owners may seek to impose rates higher than both the cable rate and the new telecom rate where cable operators or telecommunications carriers also provide services, such as VoIP, that have not been classified. The Commission stated that this outcome would be contrary to its policy goals here in which it adopts a lower and more uniform attachment rate to reduce the disparity in pole rental rates among providers of competing services to minimize disputes resulting from the disparity between cable and pre-existing higher telecom rates. This disparity has acted to deter investment and network expansion for new services by cable providers because of the risk that some of those services could potentially be classified as "telecommunications services"—triggering disputes and litigation as to whether the higher telecom rate should be applied over their entire pole attachment network. The Commission also makes clear that the use of pole attachments by telecommunications carriers or cable operators to provide commingled services does not remove them from the pole rate regulation framework, and that rates generally will not be considered just and reasonable if they exceed the new telecom rate.

137. In addition, the new rate for attachments used by telecommunications carriers will have a positive economic impact on small competitive LECs. It will minimize competitive disadvantages that these carriers faced by having to pay higher rates for these key inputs to communications services. The Order also confirms that wireless carriers are entitled to the same rate under the statute as other telecommunications carriers. Specifically, the Commission explains that wireless carriers are entitled to the benefits and protection of section 224, including the right to the telecom rate under section 224(e), in response to reports by the wireless industry of cases where wireless providers were not afforded the regulated rate and instead had been charged higher rates that were unreasonable.

F. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

138. None.

Ordering Clauses

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, and section 706 of the Telecommunications Act of 1996, as amended, 47 U.S.C. 151, 154(i), 154(j), 224, 251(b)(4), 303(r), 1302, this Report and Order and Order on Reconsideration *is adopted.*

It is further ordered that part 1 of the Commission's rules *is amended* as set forth in Appendix A.

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 Report and Order and Order on Reconsideration *shall become effective* June 8, 2011. The information collection requirements contained in the Report and Order will become effective following OMB approval.

It is further ordered that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this Report and Order and Order on Reconsideration, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 1

Administrative practices and procedure, Cable television, Communications common carriers, Communications equipment, Telecommunications, Telephone, Television.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 1 to read as follows:

PART 1—PRACTICE AND PROCEDURE

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

Authority: 15 U.S.C. 79 *et seq.;* 47 U.S.C. 151, 154(i), 154(j), 155, 160, 201, 225, and 303.

Subpart J—Pole Attachment Complaint Procedures

■ 2. Revise § 1.1401 to read as follows:

§ 1.1401 Purpose.

The rules and regulations contained in subpart J of this part provide complaint and enforcement procedures to ensure that telecommunications carriers and cable system operators have nondiscriminatory access to utility poles, ducts, conduits, and rights-of-way on rates, terms, and conditions that are just and reasonable. They also provide complaint and enforcement procedures for incumbent local exchange carriers (as defined in 47 U.S.C. 251(h)) to ensure that the rates, terms, and conditions of their access to pole attachments are just and reasonable.

■ 3. Section 1.1402 is amended by revising paragraphs (d) and (e) to read as follows:

§ 1.1402 Definitions.

* * * * *

(d) The term *complaint* means a filing by a cable television system operator, a cable television system association, a utility, an association of utilities, a telecommunications carrier, or an association of telecommunications carriers alleging that it has been denied access to a utility pole, duct, conduit, or right-of-way in violation of this subpart and/or that a rate, term, or condition for a pole attachment is not just and reasonable. It also means a filing by an incumbent local exchange carrier (as defined in 47 U.S.C. 251(h)) or an association of incumbent local exchange carriers alleging that a rate, term, or condition for a pole attachment is not just and reasonable.

(e) The term *complainant* means a cable television system operator, a cable television system association, a utility, an association of utilities, a telecommunications carrier, an association of telecommunications carriers, an incumbent local exchange carrier (as defined in 47 U.S.C. 251(h)) or an association of incumbent local exchange carriers who files a complaint.

* * * * *

■ 4. Section 1.1404 is amended by revising paragraphs (g)(1)(ix), (k) and (m) to read as follows:

§ 1.1404 Complaint.

* * * * *

(g) * * *

(1) * * *

(ix) The annual carrying charges attributable to the cost of owning a pole. The utility shall submit these charges separately for each of the following categories: Depreciation, rate of return, taxes, maintenance, and administrative. These charges may be expressed as a percentage of the net pole investment. With its pleading, the utility shall file a copy of the latest decision of the state regulatory body or state court that determines the treatment of accumulated deferred taxes if it is at issue in the proceeding and shall note the section that specifically determines the treatment and amount of accumulated deferred taxes.

* * * * *

(k) The complaint shall include a certification that the complainant has,

in good faith, engaged or attempted to engage in executive-level discussions with the respondent to resolve the pole attachment dispute. Executive-level discussions are discussions among representatives of the parties who have sufficient authority to make binding decisions on behalf of the company they represent regarding the subject matter of the discussions. Such certification shall include a statement that, prior to the filing of the complaint, the complainant mailed a certified letter to the respondent outlining the allegations that form the basis of the complaint it anticipated filing with the Commission, inviting a response within a reasonable period of time, and offering to hold executive-level discussions regarding the dispute. A refusal by a respondent to engage in the discussions contemplated by this rule shall constitute an unreasonable practice under section 224 of the Act.

* * * * *

(m) In a case where a cable television system operator or telecommunications carrier as defined in 47 U.S.C. 224(a)(5) claims that it has been denied access to a pole, duct, conduit or right-of-way despite a request made pursuant to section 47 U.S.C. 224(f), the complaint shall include the data and information necessary to support the claim, including:

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

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

(3) The remedy sought by the complainant;

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

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

■ 5. Section 1.1409 is amended by revising paragraph (e)(2) to read as follows:

§ 1.1409 Commission consideration of the complaint.

* * * * *

(e) * * *

(2) With respect to attachments to poles by any telecommunications carrier or cable operator providing telecommunications services, the maximum just and reasonable rate shall be the higher of the rate yielded by paragraphs (e)(2)(i) or (e)(2)(ii) of this section.

(i) The following formula applies to the extent that it yields a rate higher than that yielded by the applicable formula in paragraph 1.1409(e)(2)(ii) of this section:

Rate = Space Factor × Cost

Where Cost

in Urbanized Service Areas = 0.66 × (Net Cost of a Bare Pole × Carrying Charge Rate)

in Non-Urbanized Service Areas = 0.44 × (Net Cost of a Bare Pole × Carrying Charge Rate).

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

(ii) The following formula applies to the extent that it yields a rate higher than that yielded by the applicable formula in paragraph 1.1409(e)(2)(i) of this section:

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

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

* * * * *

■ 6. Section 1.1410 is amended by revising paragraphs (a) and (b) to read as follows:

§ 1.1410 Remedies.

* * * * *

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

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

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

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

(b) If the Commission determines that access to a pole, duct, conduit, or right-

of-way has been unlawfully denied or delayed, it may order that access be permitted within a specified time frame and in accordance with specified rates, terms, and conditions.

* * * * *

■ 7. Add § 1.1420 to subpart J to read as follows:

§ 1.1420 Timeline for access to utility poles.

(a) The term "attachment" means any attachment by a cable television system or provider of telecommunications service to a pole owned or controlled by a utility.

(b) All time limits in this subsection are to be calculated according to § 1.4.

(c) *Survey.* A utility shall respond as described in § 1.1403(b) to a cable operator or telecommunications carrier within 45 days of receipt of a complete application to attach facilities to its utility poles (or within 60 days, in the case of larger orders as described in paragraph (g) of this section). This response may be a notification that the utility has completed a survey of poles for which access has been requested. A complete application is an application that provides the utility with the information necessary under its procedures to begin to survey the poles.

(d) *Estimate.* Where a request for access is not denied, a utility shall present to a cable operator or telecommunications carrier an estimate of charges to perform all necessary make-ready work within 14 days of providing the response required by § 1.1420(c), or in the case where a prospective attacher's contractor has performed a survey, within 14 days of receipt by the utility of such survey.

(1) A utility may withdraw an outstanding estimate of charges to perform make-ready work beginning 14 days after the estimate is presented.

(2) A cable operator or telecommunications carrier may accept a valid estimate and make payment anytime after receipt of an estimate but before the estimate is withdrawn.

(e) *Make-ready.* Upon receipt of payment specified in paragraph (d)(2) of this section, a utility shall notify immediately and in writing all known entities with existing attachments that may be affected by the make-ready.

(1) For attachments in the communications space, the notice shall:

(i) Specify where and what make-ready will be performed.

(ii) Set a date for completion of make-ready that is no later than 60 days after notification is sent (or 105 days in the case of larger orders, as described in paragraph (g) of this section).

(iii) State that any entity with an existing attachment may modify the attachment consistent with the specified make-ready before the date set for completion.

(iv) State that the utility may assert its right to 15 additional days to complete make-ready.

(v) State that if make-ready is not completed by the completion date set by the utility (or, if the utility has asserted its 15-day right of control, 15 days later), the cable operator or telecommunications carrier requesting access may complete the specified make-ready.

(vi) State the name, telephone number, and e-mail address of a person to contact for more information about the make-ready procedure.

(2) For wireless attachments above the communications space, the notice shall:

(i) Specify where and what make-ready will be performed.

(ii) Set a date for completion of make-ready that is no later than 90 days after notification is sent (or 135 days in the case of larger orders, as described in paragraph (g) of this section).

(iii) State that any entity with an existing attachment may modify the attachment consistent with the specified make-ready before the date set for completion.

(iv) State that the utility may assert its right to 15 additional days to complete make-ready.

(v) State the name, telephone number, and e-mail address of a person to contact for more information about the make-ready procedure.

(f) For wireless attachments above the communications space, a utility shall ensure that make-ready is completed by the date set by the utility in paragraph (e)(2)(ii) of this section (or, if the utility has asserted its 15-day right of control, 15 days later).

(g) For the purposes of compliance with the time periods in this section:

(1) A utility shall apply the timeline described in paragraphs (c) through (e) of this section to all requests for pole attachment up to the lesser of 300 poles or 0.5 percent of the utility's poles in a state.

(2) A utility may add 15 days to the survey period described in paragraph (c) of this section to larger orders up to the lesser of 3000 poles or 5 percent of the utility's poles in a state.

(3) A utility may add 45 days to the make-ready periods described in paragraph (e) of this section to larger orders up to the lesser of 3000 poles or 5 percent of the utility's poles in a state.

(4) A utility shall negotiate in good faith the timing of all requests for pole attachment larger than the lesser of 3000 poles or 5 percent of the utility's poles in a state.

(5) A utility may treat multiple requests from a single cable operator or telecommunications carrier as one request when the requests are filed within 30 days of one another.

(h) A utility may deviate from the time limits specified in this section:

(1) Before offering an estimate of charges if the parties have no agreement specifying the rates, terms, and conditions of attachment.

(2) During performance of make-ready for good and sufficient cause that renders it infeasible for the utility to complete the make-ready work within the prescribed time frame. A utility that so deviates shall immediately notify, in writing, the cable operator or telecommunications carrier requesting attachment and other affected entities with existing attachments, and shall include the reason for and date and duration of the deviation. The utility shall deviate from the time limits specified in this section for a period no longer than necessary and shall resume make-ready performance without discrimination when it returns to routine operations.

(i) If a utility fails to respond as specified in paragraph (c) of this section, a cable operator or telecommunications carrier requesting attachment in the communications space may, as specified in § 1.1422, hire a contractor to complete a survey. If make-ready is not complete by the date specified in paragraph (e)(1)(ii) of this section, a cable operator or telecommunications carrier requesting attachment in the communications space may hire a contractor to complete the make-ready:

(1) Immediately, if the utility has failed to assert its right to perform remaining make-ready work by notifying the requesting attacher that it will do so; or

(2) After 15 days if the utility has asserted its right to perform make-ready by the date specified in paragraph (e)(1)(ii) of this section and has failed to complete make-ready.

■ 8. Add § 1.1422 to subpart J to read as follows:

§ 1.1422 Contractors for survey and make-ready.

(a) A utility shall make available and keep up-to-date a reasonably sufficient list of contractors it authorizes to perform surveys and make-ready in the communications space on its utility poles in cases where the utility has failed to meet deadlines specified in § 1.1420.

(b) If a cable operator or telecommunications carrier hires a contractor for purposes specified in § 1.1420, it shall choose from among a utility's list of authorized contractors.

(c) A cable operator or telecommunications carrier that hires a contractor for survey or make-ready work shall provide a utility with a reasonable opportunity for a utility representative to accompany and consult with the authorized contractor and the cable operator or telecommunications carrier.

(d) The consulting representative of an electric utility may make final determinations, on a nondiscriminatory basis, where there is insufficient capacity and for reasons of safety, reliability, and generally applicable engineering purposes.

■ 9. Add § 1.1424 to subpart J to read as follows:

§ 1.1424 Complaints by incumbent local exchange carriers.

Complaints by an incumbent local exchange carrier (as defined in 47 U.S.C. 251(h)) or an association of incumbent local exchange carriers alleging that a rate, term, or condition for a pole attachment is not just and reasonable shall follow the same complaint procedures specified for other pole attachment complaints in this part, as relevant. In complaint proceedings where an incumbent local exchange carrier (or an association of incumbent local exchange carriers) claims that it is similarly situated to an attacher that is a telecommunications carrier (as defined in 47 U.S.C. 251(a)(5)) or a cable television system for purposes of obtaining comparable rates, terms or conditions, the incumbent local exchange carrier shall bear the burden of demonstrating that it is similarly situated by reference to any relevant evidence, including pole attachment agreements. If a respondent declines or refuses to provide a complainant with access to agreements or other information upon reasonable request, the complainant may seek to obtain such access through discovery. Confidential information contained in any documents produced may be subject to the terms of an appropriate protective order.

[FR Doc. 2011–11137 Filed 5–6–11; 8:45 am]

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 64

[CG Docket No. 10–210; FCC 11–56]

Relay Services for Deaf-Blind Individuals

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Commission adopts rules to establish the National Deaf-Blind Equipment Distribution Program (NDBEDP) pilot program in accordance with the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA). The CVAA adds a new section to the Communications Act of 1934, as amended (the Act). This new section of the Act requires the Commission to establish rules that define as eligible for support those programs approved by the Commission for the distribution of specialized customer premises equipment (CPE) to low-income individuals who are deaf-blind. For these purposes, this new section of the Act authorizes $10 million annually from the Interstate Telecommunications Relay Service (TRS) Fund. The equipment distributed under the NDBEDP pilot program will make telecommunications service, Internet access service, and advanced communications, including interexchange services and advanced telecommunications and information services, accessible to individuals who are deaf-blind.

DATES: Effective June 8, 2011, except for 47 CFR 64.610(b), (e)(1)(ii), (viii), and (ix), (f), and (g), which contain information collection requirements subject to the Paperwork Reduction Act (PRA) that have not been approved by the Office of Management and Budget (OMB). The Commission will publish a document in the **Federal Register** announcing the effective date of these requirements. Written comments by the public on the new information collections are due July 8, 2011.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554. In addition to filing comments with the Secretary, a copy of any comments on the information collection requirements contained herein should be submitted to Cathy Williams, Federal Communications Commission via e-mail at *PRA@fcc.gov* and *Cathy.Williams@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: Rosaline Crawford, Consumer and Governmental Affairs Bureau, Disability Rights Office, at (202) 418–2075 or e-mail *Rosaline.Crawford@fcc.gov.*

For additional information concerning the PRA information collection requirements contained in this document, contact Cathy Williams, Federal Communications Commission, at (202) 418–2918, or via e-mail *Cathy.Williams@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's National Deaf-Blind Equipment Distribution Program (NDBEDP) Report and Order (*Order*), document FCC 11–56, adopted April 4, 2011, and released April 6, 2011, in CG Docket No. 10–210.

The full text of document FCC 11–56 and copies of any subsequently filed documents in this matter will be available for public inspection and copying via ECFS, and during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. They may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, *telephone:* (800) 378–3160, fax: (202) 488–5563, or *Internet: www.bcpiweb.com.* Document FCC 11–56 can also be downloaded in Word or Portable Document Format (PDF) at *http://www.fcc.gov/cgb/dro/headlines.html* and at *http://www.fcc.gov/cgb/dro/cvaa.html.*

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

Final Paperwork Reduction Act of 1995 Analysis

This document contains new and modified information collection requirements. 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 document FCC 11–56 as required by the PRA of 1995, Public Law 104–13. In addition, the Commission notes that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, the Commission previously sought specific comment on how the Commission might "further reduce the information collection burden for small business concerns with