

that unusable portions of a pole exist to make other parts of the pole usable.<sup>350</sup>

109. USTA argues that although unusable conduit space differs from unusable pole space in the way it is created, it is possible to allocate the costs of unusable space.<sup>351</sup> According to USTA, space in a conduit is unusable because it either is reserved for maintenance or has deteriorated.<sup>352</sup> The record demonstrates that in some conduit systems not all of the ducts are used; one duct may simply be unoccupied or another may be reserved for maintenance.<sup>353</sup> We conclude that if a maintenance duct is reserved for the benefit of all conduit occupants, such reservation renders that duct unusable and the costs of that space should be allocated to those who benefit from it. To the degree space in a conduit is reserved for a maintenance or emergency circumstances, but not generally used, it should be considered unusable space and its costs allocated appropriately as entities using the conduit benefit by the space.

110. Commenters representative of all industries suggest that no unusable space exists in a conduit system.<sup>354</sup> We disagree. There appear to be two aspects to the unusable space within conduit systems. First, there is that space involved in the construction of the system, without which there would be no usable space.<sup>355</sup> Second, there is that space within the system which may be unusable after the system is constructed. We agree with Carolina Power, et al., that the costs for the construction of the system, which allow the creation of the usable space, should be part of the unusable space allocated among attaching entities.<sup>356</sup> We also agree with USTA<sup>357</sup> to the extent that maintenance ducts reserved for the benefit and use of all attaching entities should be considered unusable.<sup>358</sup>

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<sup>350</sup>Carolina Power, et al., Comments at 16; *see also* American Electric, et al., Comments at 53.

<sup>351</sup>*See* USTA Comments at 4-5.

<sup>352</sup>USTA Comments at 4-5.

<sup>353</sup>*See, e.g.*, Bell Atlantic Comments at 8; GTE Comments at 14; Carolina Power, et al., Reply at 6; Edison Electric/UTC Reply at 28.

<sup>354</sup>Ameritech Comments at 14; AT&T Comments at 16 (even ducts reserved for maintenance and/or emergency purposes are used at times and therefore serve an ongoing purpose); Bell Atlantic Comments at 8; Comcast, et al., Comments at 22-23; Edison Electric/UTC Comments at 29. *But see* Carolina Power, et al., Comments at 16; ICG Communications Comments at 53-54; USTA Comments at 4-5.

<sup>355</sup>This space would include the level down to which one must go in order to lay the system, much like one must go up on a pole to reach the usable space there. The costs associated with creating this portion of space may generally include trenching, excavation, supporting structures, concrete, and backfilling.

<sup>356</sup>Carolina Power, et al., Reply at 6-10.

<sup>357</sup>USTA Comments at 4-5.

<sup>358</sup>As we explained in the *Pole Attachment Fee Notice* at para 45:

[i]f a utility reserves one duct for maintenance, and if the attacher has the right to utilize that reserved space in the event of a cable break or benefits in any way from the reservation of that space, that reserved duct would be considered unusable space. In that event, it is necessary to include an 'adjustment for reserved

111. With regard to space in a conduit that is deteriorated, the record is less clear. If a duct has deteriorated beyond usability, USTA believes it should be counted in the unusable space category and therefore included in allocation of costs for unusable space to attachers.<sup>359</sup> We disagree. We are reluctant to require that the costs of space that can not be used by, and provide no benefit to, an existing attaching entity should be allocated beyond the utility conduit owner. In contrast, unusable space on a pole is largely attributed to safety and engineering concerns, adherence to which benefits the pole owner and attaching entities. Space in a conduit that has deteriorated serves no benefit to the existing rate-paying attaching entities. Deteriorated duct creates space that has been rendered unused by the utility. If such space could, with reasonable effort and expense, be made available, the space is usable and not unusable.

c. Half-Duct Presumption for Determining Usable Conduit Space

112. Certain telecommunications carriers support the proposed half-duct methodology for determining a conduit rate for usable space.<sup>360</sup> Bell Atlantic and GTE agree with the simplicity and efficiency of our proposed formula, while SBC supports its applicability to telecommunications carriers as well as cable operators because it is based on "actual figures and presumptions that attempt to approximate actual figures."<sup>361</sup> GTE estimates that the average conduit consists of four ducts. GTE further indicates that consideration of the variations in duct diameter ". . . would unduly complicate the formula with even more non-public data, resulting in additional pole attachment disputes."<sup>362</sup> SBC states that the half-duct methodology will adjust easily to telecommunications carriers that may use copper facilities that occupy an entire duct.<sup>363</sup>

113. Other telecommunications carriers and some cable operators oppose the use of the half-duct methodology asserting that it creates too large a presumption of usable space, resulting in rates that could result in an unreasonably high pole attachment rate.<sup>364</sup> Sprint, on the other hand, opposes the methodology, indicating that due to the likelihood of damaging existing cables, it does not allow another

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ducts' element in the formula to reduce the average number of ducts in the denominator of the occupied space component of the formula. The adjustment for reserved ducts element would be the number of reserved ducts that all attachers have the right to use in the event of a cable break or that they otherwise receive benefit from in any other way. If the attacher has no right to use that space or receives no benefit from that duct, we propose that the denominator should not be reduced.

<sup>359</sup>See USTA Comments at 4-5.

<sup>360</sup>Bell Atlantic Comments at 8; GTE Comments at 14; KMC Telecom Comments at 8; SBC Comments at 30.

<sup>361</sup>SBC Comments at 31 (emphasis in original).

<sup>362</sup>GTE Comments at 14.

<sup>363</sup>SBC Comments at 30-31.

<sup>364</sup>AT&T Comments at 22, Reply at 18-19 & 25; ICG Communications Comments at 55, Reply at 21,24-25; NCTA Comments at 25; NCTA CS Docket 97-98 Comments at 39; TCI CS Docket 97-98 Comments at 16; Time Warner Cable CS Docket 97-98 Comments at 28.

cable through a duct where there are no inner-ducts.<sup>365</sup> Sprint states that once an attacher uses an empty duct, 100% of the space has been effectively used.<sup>366</sup>

114. Electric utilities oppose the half-duct methodology, stating that electric and communications cable cannot share the same duct due to practical and safety concerns as evidenced by the NESC.<sup>367</sup> Generally, the electric utilities state that safety considerations compel differences between electric utility and other conduit systems.<sup>368</sup> American Electric, et al., indicate that underground conduit is often used by the electric utilities solely to hold conductors that carry high voltage electric current.<sup>369</sup> Further, they state that the difference between electric utility conduit systems and other conduit systems makes it impossible to develop a uniform conduit formula that is equally applicable to electric and telephone utility conduit systems.<sup>370</sup> NCTA replies that utilities have not demonstrated that sharing of conduits between telecommunications carriers and electric utilities poses significant safety risks.<sup>371</sup> Some electric utilities claim that they do not have the information necessary to apply the formula and that the methodology is inappropriate for the pricing of access to electric utility conduit.<sup>372</sup> Specifically, the electric utilities claim that they cannot "readily determine the number of feet of conduit or the number of ducts deployed or available in their system."<sup>373</sup>

115. We adopt our proposed rebuttable presumption that a cable or telecommunications attacher occupies a half-duct of space in order to determine a reasonable conduit attachment rate. We note that the NESC rule relied on by the electric utilities does not prohibit the sharing of space between electric and communications. Rather, the rule conditions the sharing of such space on the maintenance and operation being performed by the utility.<sup>374</sup> We continue to believe that the half-duct methodology is the

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<sup>365</sup>The term "inner-duct" generally refers to small diameter pipe or tubing placed inside conventional duct to allow the installation of multiple wires or cables.

<sup>366</sup>Sprint Comments in CS Docket 97-98 at 11.

<sup>367</sup>See American Electric, et al., Comments at 54; Duquesne Light Comments at 49-52; Ohio Edison Comments at 47-49; Union Electric Comments at 41-46 (citing NESC Rule 341(A)(6) which states: Supply, control and communication cables shall not be installed in the same duct unless the cables are maintained or operated by the same utility).

<sup>368</sup>American Electric, et al., Comments at 55; Dayton Power Comments at 3; Edison Electric/UTC Reply at 26.

<sup>369</sup>American Electric, et al., Comments at 55-57.

<sup>370</sup>American Electric, et al., Comments at 55.

<sup>371</sup>NCTA Reply at 23.

<sup>372</sup>American Electric, et al., Comments at 52-53; Edison Electric/UTC Comments at 28.

<sup>373</sup>American Electric, et al., Comments in CS Docket 97-98 at 83.

<sup>374</sup>NESC Rule 341(A)(6) states that: "Supply, control, and communication cables shall not be installed in the same duct unless the cables are maintained or operated by the same utility."

"simplest and most reasonable approximation of the actual space occupied by an attachor."<sup>375</sup> This method, patterned after the one used by the Massachusetts Department of Public Utilities ("MDPU"),<sup>376</sup> allows for determining the cost per foot of one duct and then dividing by two instead of actually measuring the duct space occupied. The MDPU finds, and we agree, that this method is reasonable because an attachor's use of a duct does not preclude the use of the other half of the duct so the attachor should not have to pay for the entire duct. In situations where the formula is inappropriate because it has been demonstrated that there are more than two users in the conduit or that one particular attachment occupies the entire duct, so as to preclude another from using the duct, our half-duct presumption can be rebutted. If a new entity is installing an attachment in a previously unoccupied duct, we believe that such entity should be encouraged to place inner-duct prior to placing its wires in the duct.

d. Conduit Pole Attachment Formula

116. We believe that a formula encompassing statutory directives of how utilities should be compensated for the use of conduit adds certainty and clarity to negotiations as well as assists the Commission when it addresses complaints. We conclude that the addition of the conduit unusable and conduit usable space factors, developed to implement Section 224(e)(2)<sup>377</sup> and Section 224(e)(3),<sup>378</sup> is consistent with a just, reasonable, and nondiscriminatory pole attachment rate for telecommunications carriers in conduit.<sup>379</sup> We adopt the following formula to be used to determine the maximum just and reasonable pole attachment rate for telecommunications carriers in a conduit system, effective February 8, 2001, encompasses the elements enumerated in the law:

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

<sup>375</sup> Pole Attachment Fee Notice, 12 FCC Rcd 7449 at para. 46.

<sup>376</sup> See *Greater Media, Inc. v. New England Telephone and Telegraph*, Massachusetts D.P.U. 91-218 (1992).

<sup>377</sup> For allocating the cost of unusable space in a conduit for telecommunications carriers, see discussion at para. 104 above for the following basic formula:

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

<sup>378</sup> For allocating the cost of usable space in a conduit for telecommunications carriers, see discussion at para. 105 above for the following basic formula:

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

<sup>379</sup> 47 U.S.C. § 224(e)(1).

## D. Rights-of-Way

### 1. Background

117. The amended Section 224(a)(4) of the Communication Act defines "pole attachment" to include "... right-of-way owned or controlled by a utility." The Commission has previously determined that the access and reasonable rate provisions of Section 224 apply where a cable operator or telecommunications carrier seeks to install facilities in a right-of-way but does not intend to make a physical attachment to any pole, duct or conduit.<sup>380</sup> For example, a utility must provide a requesting cable operator or telecommunications carrier with "non-discriminatory access" to any right-of-way owned or controlled by the utility.<sup>381</sup> An electric utility may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits and rights-of-way, on a non-discriminatory basis, where there is "insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes."<sup>382</sup>

118. The Commission's proceedings and cases generally have addressed issues involving physical attachments to poles, ducts, or conduits. The *Notice* sought information about the frequency at which rights-of-way rate disputes might arise and the range of circumstances that would be involved.<sup>383</sup> We also asked whether we should adopt a methodology and/or formula to determine a just and reasonable rate, or whether rights-of-way complaints should be addressed on a case-by-case basis.<sup>384</sup> If a methodology were recommended, the Commission requested comment on the elements, including any presumptions, that could be used to calculate the costs relating to usable and unusable space in a right-of-way.

119. Generally, cable and telecommunications carriers urge the Commission to establish a set of guiding principles against which rights-of-way pole attachment complaints would be reviewed to minimize the number of disputes to be resolved through the complaint process.<sup>385</sup> Attaching entity interests assert that, without some form of established methodology or formula, the parties to a pole attachment agreement would be without instruction and the attaching entity would be at the mercy of the

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<sup>380</sup>*Local Competition Order*, 11 FCC Rcd at 16058-107, paras. 1119-1240; 47 U.S.C. § 224(a)(4); *see also* AT&T Comments at 18.

<sup>381</sup>47 U.S.C. § 224(f)(1).

<sup>382</sup>47 U.S.C. § 224(f)(2). These considerations were addressed as access issues in the *Local Competition Order*. 11 FCC Rcd at 16058-107, paras. 1119-1240.

<sup>383</sup>*Notice*, 12 FCC Rcd at 11740, para. 42.

<sup>384</sup>*Id.* at 11740, para. 43.

<sup>385</sup>*See* AT&T Comments at 17-18, Reply at 20; Bell Atlantic Reply at 27; MCI Reply at 24-25; NCTA Comments at 27-28; *But see* Winstar Comments at 11-12.

right-of-way owner.<sup>386</sup>

## 2. Discussion

120. The record indicates there have been few instances of attachment to a right-of-way that did not include attachment to a pole, duct or conduit.<sup>387</sup> Comments of cable operators, telecommunications carriers and utility pole owners confirm that there are too many different types of rights-of-way, with different kinds of restrictions placed on the various kinds of rights-of-way, to develop a methodology that would assist a utility and potential attachers in their efforts to arrive at just and reasonable compensation for the attachment.<sup>388</sup> Such restrictions may also vary by state and local laws of real property, eminent domain, utility, easements, and from underlying property owner to property owner.<sup>389</sup>

121. This *Order*, like the statute and the *Local Competition Order*, sets forth guiding principles to be used in determining what constitutes just, reasonable and nondiscriminatory rates for pole attachments in rights-of-way. The information submitted in this proceeding is not sufficient to enable us to adopt detailed standards that would govern all right-of-way situations. We thus believe it prudent for the Commission to gain experience through case-by-case adjudication to determine whether additional "guiding principles" or presumptions are necessary or appropriate.<sup>390</sup> Therefore, we will address complaints about just, reasonable, and nondiscriminatory pole attachments to a utility's right-of-way on a case-by-case basis.

## V. COST ELEMENTS OF THE FORMULA FOR POLES AND CONDUIT

122. Section 224 ensures a utility pole owner just and reasonable compensation for pole attachments made by telecommunications carriers.<sup>391</sup> When Congress in 1978 directed the Commission to regulate rates for pole attachments used for the provision of cable service, Congress established a zone

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<sup>386</sup>See MCI Reply at 24-25; Winstar Reply at 6-7.

<sup>387</sup>See, e.g., American Electric, et al. Comments at 65; Ameritech Comments at 15-16; Carolina Power, et al., Comments at 16; GTE Comments at 14-15; USTA Comments at 14-15; U S West Comments at 10.

<sup>388</sup>See, e.g., American Electric, et al., Comments at 60; Ameritech Comments at 15; Carolina Power, et al., Comments at 16-17.

<sup>389</sup>See, e.g., American Electric, et al., Comments at 60; Carolina Power, et al., Comments at 16-17.

<sup>390</sup>Other rights-of-way issues were raised in the comments but are outside the scope of this rulemaking are the subject of petitions of reconsideration, or involve litigation relating to the access provisions of Section 224. See *Gulf Power Co. et al. v. United States*, C.A. No. 3:96 CV 381 (N.D. Fla.) Until such time as the Commission resolves the petitions for reconsideration, or a court issues a decision addressing Section 224's access provisions, the Commission's decisions continue to provide appropriate guidance to both utility pole owners and attaching entities for the purpose of negotiating pole attachments.

<sup>391</sup>47 U.S.C §§ 224(b), (d)(1), (e)(1).

of reasonableness for such rates, bounded on the lower end by incremental costs<sup>392</sup> and on the upper end by fully allocated costs.<sup>393</sup> In the pole attachment context, incremental costs are those costs that the utility would not have incurred "but for" the pole attachments in question.<sup>394</sup> Fully allocated costs refer to the portion of operating expenses and capital costs that a utility incurs in owning and maintaining poles that are associated with the space occupied by pole attachments.<sup>395</sup> The Commission has noted that, in arriving at an appropriate rate between these two boundaries, it is important to ensure that the attaching entity is not charged twice for the same costs, once as up-front "make-ready" costs and again for the same costs if they are placed in the corresponding pole line capital account that is used to determine the recurring attachment rate.

123. In regulating pole attachment rates, the Commission implemented a cost methodology premised on historical or embedded costs.<sup>396</sup> These are costs that a firm has incurred in the past for providing a good or service and are recorded for accounting purposes as past operating expenses and depreciation. Many parties in this proceeding, as well as in the *Pole Attachment Fee Notice* proceeding,<sup>397</sup> advocate extension of historical costs, while a number of parties advocate that the Commission adopt a forward-looking economic cost-pricing ("FLEC") methodology for pole attachments.<sup>398</sup> Forward-looking cost methodologies seek to consider the costs that an entity would incur if it were to construct facilities now to provide the good or service at issue.

124. We did not raise the issue of forward looking costs in the *Notice* in this proceeding. While we do not prejudge the arguments raised by the commenters, we decline to address at this time proposals to shift to a forward looking cost methodology. Accordingly, we will continue the use of historical costs in our pole attachment rate methodology, specifically as it is applied to telecommunications carriers and cable operators providing telecommunications services.

## VI. IMPLEMENTATION AND EFFECTIVE DATE OF RULES

125. Section 224(e)(4) states that:

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<sup>392</sup>1977 *Senate Report* at 19; see also *Second Report and Order*, 72 FCC 2d at 4.

<sup>393</sup>See 47 U.S.C. § 224(d)(1); see also 1977 *Senate Report* at 19.

<sup>394</sup>1977 *Senate Report* at 19; see also 72 FCC 2d at 62.

<sup>395</sup>1977 *Senate Report* at 19-20.

<sup>396</sup>72 FCC 2d at 66, para. 15

<sup>397</sup>NCTA CS Docket No. 97-98 Comments at 3, Reply at 12-19; USTA CS Docket No. 97-98 Reply at 5-6; U S West Comments at 2.

<sup>398</sup>See American Electric, et al., Comments at 11-18, CS Docket No. 97-98 Comments at 14-95; Edison Electric/UTC Comments at 8, Reply at 6-7.

[t]he regulations under paragraph (1) shall become effective 5 years after the date of enactment of the Telecommunications Act of 1996. Any increase in the rates for pole attachments that result from the adoption of the regulations required by this subsection shall be phased in equal annual increments over a period of 5 years beginning on the effective date of such regulations.<sup>399</sup>

Because the 1996 Act was enacted on February 8, 1996, Section 224(e)(4) requires the Commission to implement the telecommunications carrier rate methodology beginning February 8, 2001.

126. The Commission proposed that the amount of any rate increase should be phased in at the beginning of the five years, with one-fifth of the total rate increase added each year. The *Notice* sought comment on our proposed five-year phase-in of the telecommunications carrier rate. It also sought comment on any other proposals that would equitably phase in the telecommunications carrier rate within the five years allotted by Section 224(e)(4).<sup>400</sup>

127. Commenters request that the Commission clarify its phase-in requirement by specifying when the first phase-in increase is to begin or when the first annual increment should go into effect. USTA notes an ambiguity regarding the Commission's proposal that the increment be added to the rate in each of the subsequent five years.<sup>401</sup> USTA's concern is that the Commission's proposal gives the impression that the phase in would not occur until after the first full year Section 224(e)(4) applies, or February 8, 2002. MCI requests that the Commission clarify that the five-year phase-in pertains to any rate increase resulting from the absorption of unusable costs by telecommunications carriers. It asks that the Commission affirm that Congress intended only rate increases to be phased in and not rate changes or reductions.<sup>402</sup> New York State Investor Owned Electric Utilities offer a plan to implement the phase-in whereby the billing rate would be calculated by applying 1/5, 2/5, 3/5, and 4/5 of the difference between the current Section 224(d)(3) rate and the new Section 224(e) rate calculated each year and adding that amount to the incremental Section 224(d)(3) rate.<sup>403</sup>

128. SBC further recommends that the Commission provide explicit procedures for this phase-in in order to avoid disputes over interpretation of Section 224(e)(4)'s requirement.<sup>404</sup> It recommends that the amount of the increase be calculated based on the data available in the previous year, the year 2000, and that the amount of the increase not be recalculated during the five year phase-in. SBC requests that a full share be added in 2001, even though the carrier rate is not effective until February 8, 2001, and that after the fifth year, for the year 2006, rates be calculated in accordance with the carrier formula, including any changes in data through the end of the five year period.

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<sup>399</sup>47 U.S.C. § 224(e)(4).

<sup>400</sup>*Notice*, 12 FCC Rcd at 11741, para. 44.

<sup>401</sup>USTA Comments at 15.

<sup>402</sup>MCI Comments at 23.

<sup>403</sup>New York State Investor Owned Electric Utilities Comments at 27.

<sup>404</sup>SBC Comments at 35-36.

129. We conclude that the statutory language is explicit in requiring that any increase in the rates for pole attachments shall be phased-in in equal annual increments over five years beginning on the effective date of such regulations.<sup>405</sup> We clarify that the language "beginning on the effective date of such regulations" refers to February 8, 2001, or five years after the enactment of the 1996 Act. We find New York State Investor Owned Electric Utilities' plan to implement the phase-in consistent with the Commission's requirement that the increases be phased-in in equal increments over five years, with the goal to have the entire amount of the increase implemented within five years of February 8, 2001.<sup>406</sup>

130. We affirm that the five-year phase-in is to apply to rate increases only and that the amount of the increase or the difference between the Section 224(d) rate and the 224(e) rate shall be applied annually until the full amount of the increase is absorbed within five years of February 8, 2001.<sup>407</sup> Rate reductions are not subject to the phase-in and are to be implemented immediately.

## VII. FINAL REGULATORY FLEXIBILITY ACT ANALYSIS

131. As required by the Regulatory Flexibility Act ("RFA"),<sup>408</sup> an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in the *Notice*.<sup>409</sup> The Commission sought written public comment on the proposals in the *Notice* including comment on the IRFA. The comments received are discussed below. This present Final Regulatory Flexibility Analysis ("FRFA") conforms to the RFA.<sup>410</sup>

### 1. Need for, and Objectives of, the Order

<sup>405</sup>See Carolina Power, et al., Comments at 17; GTE Comments at 15; and Edison Electric/UTC Comments at 31.

<sup>406</sup>For example, if a telecommunications provider pays a Section 224(d)(3) rate on February 7, 2001 of \$5.00 per pole and application of the new formula pursuant to Section 224(e) produces a rate of \$7.00 per pole, the difference or increase of \$2.00 per pole would be applied in five annual increments of \$0.40 (or 20%) until the full amount of the increase is reached in the year 2005. The rate per pole for each year should be as follows:

Beginning February 8, 2001	\$5.40
Beginning February 8, 2002	\$5.80
Beginning February 8, 2003	\$6.20
Beginning February 8, 2004	\$6.60
Beginning February 8, 2005	\$7.00

<sup>407</sup>See *Conf. Rpt.* at 99.

<sup>408</sup>See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) ("CWAAA"). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA").

<sup>409</sup>*Notice of Proposed Rulemaking*, CS Docket No. 97-151, 12 FCC Rcd 11725, 11741-51, paras. 45-74 (1997).

<sup>410</sup>See 5 U.S.C. § 604.

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

## 2. Summary of Significant Issues Raised by Public Comments In Response to the IRFA

133. No comments submitted in response to the *Notice* were specifically identified by the commenters as being in response to the IRFA contained in the *Notice*. Small Cable Business Association ("SCBA") filed comments in response to the IRFA contained in the *Pole Attachment Fee Notice*, and, to the extent they are relevant to the issues in this proceeding, we incorporate them herein by reference. SCBA claims in its IRFA comments that, because of the statutory exclusion of cooperatives from the definition of utility, Section 224 does not minimize market entry barriers for small cable operators.<sup>411</sup> According to SCBA, the IRFA in the *Pole Attachment Fee Notice* fails to consider this issue.<sup>412</sup>

## 3. Description and Estimate of the Number of Small Entities To Which Rules Will Apply

134. The RFA generally defines a "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."<sup>413</sup> In addition, the term "small business" has the same meaning as the term small business concern under the Small Business Act.<sup>414</sup> A "small business concern" is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration ("SBA").<sup>415</sup> For many of the entities described below, the SBA has defined small business categories through Standard Industrial Classification ("SIC") codes.

### a. Utilities

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<sup>411</sup>SCBA IRFA Comments in CS Docket No. 97-98 at 2.

<sup>412</sup>*Id.*

<sup>413</sup>5 U.S.C. § 601(6).

<sup>414</sup>5 U.S.C. § 601(3) (incorporating by reference the definitions of "small business concern" in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more 'definitions' of such term which are appropriate to the activities of the agency and publishes such definitions in the Federal Register."

<sup>415</sup>Small Business Act, 15 U.S.C. § 632.

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

(1) *Electric Utilities (SIC 4911, 4931 & 4939)*

136. *Electric Services (SIC 4911)*. The SBA has developed a definition for small electric utility firms.<sup>416</sup> The Census Bureau reports that a total of 1379 electric utilities were in operation for at least one year at the end of 1992. According to SBA, a small electric utility is an entity whose gross revenues did not exceed five million dollars in 1992.<sup>417</sup> The Census Bureau reports that 447 of the 1379 firms listed had total revenues below five million dollars.<sup>418</sup>

137. *Electric and Other Services Combined (SIC 4931)*. The SBA has classified this entity as a utility whose business is less than 95% electric in combination with some other type of service.<sup>419</sup> The Census Bureau reports that a total of 135 such firms were in operation for at least one year at the end of 1992. The SBA's definition of a small electric and other services combined utility is a firm whose gross revenues did not exceed five million dollars in 1992.<sup>420</sup> The Census Bureau reported that 45 of the 135 firms listed had total revenues below five million dollars.<sup>421</sup>

138. *Combination Utilities, Not Elsewhere Classified (SIC 4939)*. The SBA defines this utility as providing a combination of electric, gas, and other services which are not otherwise classified.<sup>422</sup> The Census Bureau reports that a total of 79 such utilities were in operation for at least one year at the end of 1992. According to SBA's definition, a small combination utility is a firm whose gross revenues did

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<sup>416</sup>Executive Office of the President, Office of Management and Budget, Standard Industrial Classification Manual (1987).

<sup>417</sup>13 C.F.R. § 121.201.

<sup>418</sup>U.S. Department of Commerce, Bureau of the Census, 1992 Economic Census Industry and Enterprise Receipts Size Report, Table 2D (Bureau of Census data under contract to the Office of Advocacy of the SBA).

<sup>419</sup>See *supra* note 416.

<sup>420</sup>13 C.F.R. § 121.201.

<sup>421</sup>See *supra* note 418.

<sup>422</sup>See *supra* note 416.

not exceed five million dollars in 1992.<sup>423</sup> The Census Bureau reported that 63 of the 79 firms listed had total revenues below five million dollars.<sup>424</sup>

(2) *Gas Production and Distribution*  
(SIC 4922, 4923, 4924, 4925 & 4932)

139. *Natural Gas Transmission (SIC 4922)*. The SBA's definition of a natural gas transmitter is an entity that is engaged in the transmission and storage of natural gas.<sup>425</sup> The Census Bureau reports that a total of 144 such firms were in operation for at least one year at the end of 1992. According to SBA's definition, a small natural gas transmitter is an entity whose gross revenues did not exceed five million dollars in 1992.<sup>426</sup> The Census Bureau reported that 70 of the 144 firms listed had total revenues below five million dollars.<sup>427</sup>

140. *Natural Gas Transmission and Distribution (SIC 4923)*. The SBA has classified this entity as a utility that transmits and distributes natural gas for sale.<sup>428</sup> The Census Bureau reports that a total of 126 such entities were in operation for at least one year at the end of 1992. The SBA's definition of a small natural gas transmitter and distributor is a firm whose gross revenues did not exceed five million dollars.<sup>429</sup> The Census Bureau reported that 43 of the 126 firms listed had total revenues below five million dollars.<sup>430</sup>

141. *Natural Gas Distribution (SIC 4924)*. The SBA defines a natural gas distributor as an entity that distributes natural gas for sale.<sup>431</sup> The Census Bureau reports that a total of 478 such firms were in operation for at least one year at the end of 1992. According to the SBA, a small natural gas distributor is an entity whose gross revenues did not exceed five million dollars in 1992.<sup>432</sup> The Census

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<sup>423</sup>13 C.F.R. § 121.201.

<sup>424</sup>See *supra* note 418.

<sup>425</sup>See *supra* note 416.

<sup>426</sup>13 C.F.R. § 121.201.

<sup>427</sup>See *supra* note 418.

<sup>428</sup>See *supra* note 416.

<sup>429</sup>13 C.F.R. § 121.201.

<sup>430</sup>See *supra* note 418.

<sup>431</sup>See *supra* note 416.

<sup>432</sup>13 C.F.R. § 121.201.

Bureau reported that 267 of the 478 firms listed had total revenues below five million dollars.<sup>433</sup>

142. *Mixed, Manufactured, or Liquefied Petroleum Gas Production and/or Distribution (SIC 4925)*. The SBA has classified this entity as a utility that engages in the manufacturing and/or distribution of the sale of gas. These mixtures may include natural gas.<sup>434</sup> The Census Bureau reports that a total of 43 such firms were in operation for at least one year at the end of 1992. The SBA's definition of a small mixed, manufactured or liquefied petroleum gas producer or distributor is a firm whose gross revenues did not exceed five million dollars in 1992.<sup>435</sup> The Census Bureau reported that 31 of the 43 firms listed had total revenues below five million dollars.<sup>436</sup>

143. *Gas and Other Services Combined (SIC 4932)*. The SBA has classified this entity as a gas company whose business is less than 95% gas, in combination with other services.<sup>437</sup> The Census Bureau reports that a total of 43 such firms were in operation for at least one year at the end of 1992. According to the SBA, a small gas and other services combined utility is a firm whose gross revenues did not exceed five million dollars in 1992.<sup>438</sup> The Census Bureau reported that 24 of the 43 firms listed had total revenues below five million dollars.<sup>439</sup>

(3) *Water Supply (SIC 4941)*

144. The SBA defines a water utility as a firm who distributes and sells water for domestic, commercial and industrial use.<sup>440</sup> The Census Bureau reports that a total of 3,169 water utilities were in operation for at least one year at the end of 1992. According to SBA's definition, a small water utility is a firm whose gross revenues did not exceed five million dollars in 1992.<sup>441</sup> The Census Bureau reported that 3065 of the 3169 firms listed had total revenues below five million dollars.<sup>442</sup>

(4) *Sanitary Systems (SIC 4952, 4953 & 4959)*

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<sup>433</sup>See *supra* note 418.

<sup>434</sup>See *supra* note 416.

<sup>435</sup>13 C.F.R. § 121.201.

<sup>436</sup>See *supra* note 418.

<sup>437</sup>See *supra* note 416.

<sup>438</sup>13 C.F.R. § 121.201.

<sup>439</sup>See *supra* note 418.

<sup>440</sup>See *supra* note 416.

<sup>441</sup>13 C.F.R. § 121.201.

<sup>442</sup>See *supra* note 418.

145. *Sewerage Systems (SIC 4952)*. The SBA defines a sewage firm as a utility whose business is the collection and disposal of waste using sewage systems.<sup>443</sup> The Census Bureau reports that a total of 410 such firms were in operation for at least one year at the end of 1992. According to SBA's definition, a small sewerage system is a firm whose gross revenues did not exceed five million dollars.<sup>444</sup> The Census Bureau reported that 369 of the 410 firms listed had total revenues below five million dollars.<sup>445</sup>

146. *Refuse Systems (SIC 4953)*. The SBA defines a firm in the business of refuse as an establishment whose business is the collection and disposal of refuse "by processing or destruction or in the operation of incinerators, waste treatment plants, landfills, or other sites for disposal of such materials."<sup>446</sup> The Census Bureau reports that a total of 2287 such firms were in operation for at least one year at the end of 1992. According to SBA's definition, a small refuse system is a firm whose gross revenues did not exceed six million dollars.<sup>447</sup> The Census Bureau reported that 1908 of the 2287 firms listed had total revenues below six million dollars.<sup>448</sup>

147. *Sanitary Services, Not Elsewhere Classified (SIC 4959)*. The SBA defines these firms as engaged in sanitary services.<sup>449</sup> The Census Bureau reports that a total of 1214 such firms were in operation for at least one year at the end of 1992. According to SBA's definition, a small sanitary service firms gross revenues did not exceed five million dollars.<sup>450</sup> The Census Bureau reported that 1173 of the 1214 firms listed had total revenues below five million dollars.<sup>451</sup>

(5) *Steam and Air Conditioning Supply (SIC 4961)*

148. The SBA defines a steam and air conditioning supply utility as a firm who produces and/or sells steam and heated or cooled air.<sup>452</sup> The Census Bureau reports that a total of 55 such firms

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<sup>443</sup>See *supra* note 416.

<sup>444</sup>13 C.F.R. § 121.201.

<sup>445</sup>See *supra* note 418.

<sup>446</sup>See *supra* note 416.

<sup>447</sup>13 C.F.R. § 121.201.

<sup>448</sup>See *supra* note 418.

<sup>449</sup>See *supra* note 416.

<sup>450</sup>13 C.F.R. § 121.201.

<sup>451</sup>See *supra* note 418.

<sup>452</sup>See *supra* note 416.

were in operation for at least one year at the end of 1992. According to SBA's definition, a steam and air conditioning supply utility is a firm whose gross revenues did not exceed nine million dollars.<sup>453</sup> The Census Bureau reported that 30 of the 55 firms listed had total revenues below nine million dollars.<sup>454</sup>

(6) *Irrigation Systems (SIC 4971)*

149. The SBA defines irrigation systems as firms who operate water supply systems for the purpose of irrigation.<sup>455</sup> The Census Bureau reports that a total of 297 firms were in operation for at least one year at the end of 1992. According to SBA's definition, a small irrigation service is a firm whose gross revenues did not exceed five million dollars.<sup>456</sup> The Census Bureau reported that 286 of the 297 firms listed had total revenues below five million dollars.<sup>457</sup>

b. Telephone Companies (SIC 4813)

150. Many of the decisions and rules adopted herein may have a significant effect on a substantial number of small telephone companies. The SBA has defined a small business for SIC code 4813 (Telephone Communications, except Radiotelephone) to be a small entity when it has no more than 1500 employees.<sup>458</sup> The Census Bureau reports that, at the end of 1992, there were 3497 firms engaged in providing telephone services, as defined therein, for at least one year.<sup>459</sup> This number contains a variety of different categories of carriers, including local exchange carriers ("LECs"), interexchange carriers ("IXCs"), competitive access providers ("CAPs"), cellular carriers, mobile service carriers, operator service providers, pay telephone operators, personal communications service ("PCS") providers, covered SMR providers and resellers. Some of those 3497 telephone service firms may not qualify as small entities or small incumbent LECs because they are not "independently owned and operated."<sup>460</sup> We therefore conclude that fewer than 3497 telephone service firms are small entity telephone service firms or small incumbent LECs that may be affected by this *Order*. Below, we estimate the potential number of small entity telephone service firms or small incumbent LEC's that may be affected by the rules adopted herein in this service category.

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<sup>453</sup>13 C.F.R. § 121.201.

<sup>454</sup>See *supra* note 418.

<sup>455</sup>See *supra* note 416.

<sup>456</sup>13 C.F.R. § 121.201.

<sup>457</sup>See *supra* note 418.

<sup>458</sup>13 C.F.R. § 121.201.

<sup>459</sup>United States Department of Commerce, Bureau of the Census, *1992 Census of Transportation, Communications, and Utilities: Establishment and Firm Size*, at Firm Size 1-123 (1995) ("1992 Census").

<sup>460</sup>15 U.S.C. § 632(a)(1).

(1) *Wireline Carriers and Service Providers*

151. The SBA has developed a definition of small entities for telephone communications companies other than radiotelephone (wireless) companies. The Census Bureau reports that, there were 2321 such telephone companies in operation for at least one year at the end of 1992.<sup>461</sup> According to SBA's definition, a small business telephone company other than a radiotelephone company is one employing no more than 1500 persons.<sup>462</sup> Of the 2321 non-radiotelephone companies listed by the Census Bureau, 2295 were reported to have fewer than 1000 employees. Thus, at least 2295 non-radiotelephone companies that might qualify as small entities or small incumbent LECs, or small entities based on these employment statistics. Although some of these carriers are likely not independently owned and operated, we are unable at this time to estimate with greater precision the number of wireline carriers and service providers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 2295 small entity telephone communications companies other than radiotelephone companies that may be affected by the decisions or rules adopted in this *Order*.

(2) *Local Exchange Carriers*

152. Neither the Commission nor SBA has developed a definition of small providers of local exchange services. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies (SIC 4813).<sup>463</sup> The most reliable source of information regarding the number of LECs nationwide appears to be the data that the Commission publishes annually in its *Telecommunications Industry Revenue* report, regarding the Telecommunications Relay Service ("TRS"). According to "TRS Worksheet" data released in November 1997, there are 1371 companies reporting that they categorize themselves as LECs.<sup>464</sup> Although some of these carriers are likely not independently owned and operated, or have more than 1500 employees, we are unable at this time to estimate with greater precision the number of LECs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 1371 small incumbent LECs that may be affected by the rules adopted herein.

(3) *Interexchange Carriers*

153. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of interexchange services. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies (SIC 4813). The most reliable source of information regarding the number of IXC's nationwide of which we are aware appears to be the data that we collect annually in connection with TRS. According to our most recent

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<sup>461</sup> 1992 Census, *supra* at Firm size 1-123.

<sup>462</sup> 13 C.F.R. § 121.201.

<sup>463</sup> *Id.*

<sup>464</sup> Federal Communications Commission, *Telecommunications Industry Revenue: TRS Fund Worksheet Data, Figure 2 (Number of Carriers Paying Into the TRS Fund by Type of Carrier) (Nov. 1997)* ("*TRS Worksheet*" data).

data, 143 companies reported that they were engaged in the provision of interexchange services.<sup>465</sup> Although some of these carriers are likely not independently owned and operated, or have more than 1500 employees, we are unable at this time to estimate with greater precision the number of IXCs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 143 small entity IXCs that may be affected by the decisions and rules adopted in this *Order*.

(4) *Competitive Access Providers*

154. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of competitive access services. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies (SIC 4813). The most reliable source of information regarding the number of CAPs nationwide of which we are aware appears to be the data that we collect annually in connection with the *TRS Worksheet*. According to our most recent data, 109 companies reported that they were engaged in the provision of competitive access services.<sup>466</sup> Although some of these carriers are likely not independently owned and operated, or have more than 1500 employees, we are unable at this time to estimate with greater precision the number of CAPs that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 109 small entity CAPs that may be affected by the decisions and rules adopted herein.

(5) *Cellular Service Carriers*

155. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to providers of cellular services. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies (SIC 4812). The most reliable source of information regarding the number of cellular service carriers nationwide of which we are aware appears to be the data that we collect annually in connection with the *TRS Worksheet*. The *TRS Worksheet* places cellular licensees and Personal Communications Service ("PCS") licensees in one group. According to the most recent data, there are 804 carriers reporting that they categorize themselves as either PCS or cellular carriers.<sup>467</sup> Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1500 employees, we are unable at this time to estimate with greater precision the number of cellular service carriers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 804 small entity cellular service carriers that may be affected by the decisions and rules adopted in this *Order*.

(6) *Mobile Service Carriers*

156. Neither the Commission nor SBA has developed a definition of small entities specifically

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<sup>465</sup>*TRS Worksheet*.

<sup>466</sup>*Id.* This *TRS Worksheet* category also includes Competitive Local Exchange Carriers ("CLECs").

<sup>467</sup>*Id.*

applicable to mobile service carriers, such as paging companies. The closest applicable definition under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies (SIC 4813). The most reliable source of information regarding the number of mobile service carriers nationwide of which we are aware appears to be the data that we collect annually in connection with the *TRS Worksheet*. According to our most recent data, 172 companies reported that they were engaged in the provision of mobile services.<sup>468</sup> Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1500 employees, we are unable at this time to estimate with greater precision the number of mobile service carriers that would qualify under SBA's definition. Consequently, we estimate that there are fewer than 172 small entity mobile service carriers that may be affected by the decisions and rules adopted in this *Order*.

(7) *Broadband Personal Communications  
Services ("PCS") Licensees*

157. The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission has defined "small entity" for Blocks C and F as an entity that has average gross revenues of less than \$40 million in the three previous calendar years. For Block F, an additional classification for "very small business" was added and is defined as an entity that, together with their affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.<sup>469</sup> These regulations defining "small entity" in the context of broadband PCS auctions has been approved by the SBA.<sup>470</sup> No small businesses within the SBA-approved definition bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auction. A total of 93 small and very small business bidders won approximately 40% of the 1479 licenses for Blocks D, E, and F.<sup>471</sup> However, licenses for blocks C through F have not been awarded fully, therefore there are few, if any, small businesses currently providing PCS services. Based on this information, we conclude that the number of broadband PCS licensees will include the 90 winning C Block bidders and the 93 qualifying bidders in the D, E, and F blocks, for a total of 183 small PCS providers as defined by the SBA and the Commission's auction rules. We note that the *TRS Worksheet* data track PCS licensees in the reporting category "Cellular or Personal Communications Service Carrier." As noted *supra* in the paragraph regarding cellular carriers, according to the most recent data, there are 804 carriers reporting that they place themselves in this category.

(8) *Specialized Mobile Radio ("SMR") Licensees*

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<sup>468</sup>*Id.*

<sup>469</sup>*See Report and Order* (Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap), WT Docket No. 96-59, FCC 96-278 (1996) at para. 60, 61 FR 33859 (July 1, 1996).

<sup>470</sup>*See Fifth Report and Order* (Implementation of Section 309(j) of the Communications Act -- Competitive Bidding), PP Docket No. 93-253, 9 FCC Rcd 5532, 5581-84 (1994).

<sup>471</sup>FCC News, *Broadband PCS, D, E and F Block Auction Closes*, No. 71744 (released January 14, 1997).

158. Pursuant to 47 C.F.R. §§ 90.814(b)(1) and 90.912(b)(1), the Commission has defined small entity in auctions for geographic area 800 MHz and 900 MHz SMR licenses as a firm that had average annual gross revenues of less than \$15 million in the three previous calendar years. This definition of a small entity in the context of 800 MHz and 900 MHz SMR has been approved by the SBA.<sup>472</sup> The rules adopted in this *Order* may apply to SMR providers in the 800 MHz and 900 MHz bands that either hold geographic area licenses or have obtained extended implementation authorizations. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of less than \$15 million. We assume, for purposes of this FRFA, that all of the extended implementation authorizations may be held by small entities which may be affected by the decisions and rules adopted in this *Order*. We note that the *TRS Worksheet* data track SMR licensees in the reporting category "Paging and Other Mobile Carriers." According to the most recent data, there are 172 carriers, including SMR carriers, reporting that they place themselves in this category.

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

(9) *Resellers*

160. Neither the Commission nor SBA has developed a definition of small entities specifically applicable to resellers. The closest applicable definition under SBA rules is for all telephone communications companies (SIC 4812 and 4813). The most reliable source of information regarding the number of resellers nationwide of which we are aware appears to be the data that we collect annually in connection with the *TRS Worksheet*. According to our most recent data, 339 companies reported that they were engaged in the resale of telephone services.<sup>473</sup> Although it seems certain that some of these carriers

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<sup>472</sup>See *Second Order on Reconsideration and Seventh Report and Order* (Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool), PR Docket No. 89-583, 11 FCC Rcd 2639, 2693-702 (1995); *First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rulemaking* (Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band), PR Docket No. 93-144, 11 FCC Rcd 1463 (1995).

<sup>473</sup>*TRS Worksheet*.

are not independently owned and operated, or have more than 1500 employees, we are unable at this time to estimate with greater precision the number of resellers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 339 small entity resellers that may be affected by the decisions and rules adopted in this *Order*.

c. Wireless (Radiotelephone) Carriers (SIC 4812)

161. Although wireless carriers have not historically affixed their equipment to utility poles, pursuant to the terms of the 1996 Act, such entities are entitled to do so with rates consistent with the Commission's rules discussed herein. SBA has developed a definition of small entities for radiotelephone (wireless) companies. The Census Bureau reports that there were 1176 such companies in operation for at least one year at the end of 1992.<sup>474</sup> According to SBA's definition, a small business radiotelephone company is one employing no more than 1500 persons.<sup>475</sup> The Census Bureau also reported that 1164 of those radiotelephone companies had fewer than 1000 employees. Thus, even if all of the remaining 12 companies had more than 1500 employees, there would still be 1164 radiotelephone companies that might qualify as small entities if they are independently owned and operated. Although some of these carriers are likely not independently owned and operated, we are unable at this time to estimate with greater precision the number of radiotelephone carriers and service providers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are fewer than 1164 small entity radiotelephone companies that may be affected by the rules adopted herein.

d. Cable System Operators (SIC 4841)

162. The SBA has developed a definition of small entities for cable and other pay television services, which includes all such companies generating less than \$11 million in revenue annually.<sup>476</sup> This definition includes cable systems operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems and subscription television services. According to the Census Bureau, there were 1423 such cable and other pay television services generating less than \$11 million in revenue.<sup>477</sup>

163. The Commission has developed its own definition of a small cable system operator for the purposes of rate regulation. Under the Commission's rules, a "small cable company," is one serving fewer than 400,000 subscribers nationwide.<sup>478</sup> Based on our most recent information, we estimate that

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<sup>474</sup>See 1992 Census *supra* at note 460.

<sup>475</sup>13 C.F.R. § 121.201.

<sup>476</sup>13 C.F.R. § 121.201.

<sup>477</sup>See *supra* note 416.

<sup>478</sup>47 C.F.R. § 76.901(e). The Commission developed this definition based on its determinations that a small cable system operator is one with annual revenues of \$100 million or less. *Sixth Report and Order and Eleventh Order on Reconsideration* (Implementation of Sections of the 1992 Cable Act: Rate Regulation), 10 FCC Rcd 7393.

there were 1439 cable systems that qualified as small cable system operators at the end of 1995.<sup>479</sup> Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable systems. Consequently, we estimate that there are fewer than 1439 small entity cable system operators that may be affected by the decisions and rules adopted in this *Order*.

164. The Communications Act also contains a definition of a small cable system operator, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than one percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000."<sup>480</sup> The Commission has determined that there are 61,700,000 subscribers in the United States. Therefore, we found that an operator serving fewer than 617,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed \$250 million in the aggregate.<sup>481</sup> Based on available data, we find that the number of cable systems serving 617,000 subscribers or less totals 1450. Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed \$250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable systems under the definition in the Communications Act.

e. Municipalities

165. The term "small governmental jurisdiction" is defined as "governments of . . . districts, with a population of less than 50,000."<sup>482</sup> There are 85,006 governmental entities in the United States.<sup>483</sup> This number includes such entities as states, counties, cities, utility districts and school districts. We note that Section 224 specifically excludes any utility which is cooperatively organized, or any person owned by the Federal Government or any State. For this reason, we believe that Section 224 will have minimal if any affect upon small municipalities. Further, there are 18 states and the District of Columbia that regulate pole attachments pursuant to Section 224(c)(1). Of the 85,006 governmental entities, 38,978 are counties, cities and towns. The remainder are primarily utility districts, school districts, and states. Of the 38,978 counties, cities and towns, 37,566 or 96%, have populations of fewer than 50,000.

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

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<sup>479</sup>Paul Kagan Associates, Inc., *Cable TV Investor*, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

<sup>480</sup>47 U.S.C. § 543(m)(2).

<sup>481</sup>47 C.F.R. § 76.1403(b).

<sup>482</sup>5 U.S.C. § 601(5).

<sup>483</sup>United States Dept. of Commerce, Bureau of the Census, *1992 Census of Governments*.

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

167. We did not receive any comments asserting that small entities will be required to hire additional staff and expend additional time and money to determine the appropriate rate for telecommunications carriers under our new rules. SCBA was the only commenter to claim that there will be a disproportionate burden placed on small entities. SCBA claims that small cable systems will be particularly hurt by the statutory exemption of cooperatives from the definition of utility because small cable systems often operate in rural areas and therefore necessarily attach their plant to rural telephone and electric cooperatives.<sup>484</sup> We note that SBCA does not appear to be claiming that our rules will disproportionately burden small cable systems, but that where our rules do not apply, small cable system operators will be disproportionately harmed. Because the exemption for cooperatives was set forth by Congress clearly in Section 224(a)(1), the Commission is unable to address SBCA's concerns in this regard. We conclude that our rules will not disproportionately burden small entities.

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

168. The 1996 Act requires the Commission to adopt a telecommunications carrier methodology within two years of the enactment of the 1996 Act.<sup>485</sup> We sought comment in the *Notice* on various alternative ways of implementing the statutory requirements and any other potential impact of these proposals on small business entities. We sought comment on the implementation of a methodology to ensure just, reasonable and nondiscriminatory pole attachment and conduit rates for telecommunications carriers. We also sought comment on how to develop a rights-of-way rate methodology for telecommunications carriers.

169. In accordance with the RFA, the Commission has endeavored to minimize significant impact on small entities. With regard to our pole attachments complaint process, we rejected a proposal that we establish an amount in controversy as a minimum threshold for filing a complaint because, among other things, it might preclude small entities from obtaining relief from unjust, unreasonable or

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<sup>484</sup>SBCA IRFA Comments in CS Docket No. 97-98 at 2.

<sup>485</sup>See Section VI above.

discriminatory pole attachment rates.<sup>486</sup> We also rejected as too burdensome the suggestion that cable operators be required to certify annually as to whether they are providing telecommunications services.<sup>487</sup> To minimize the burden on utility pole owners, including those that qualify as small entities, and to promote certainty and efficiency in determining the pole attachment rate for telecommunications carriers, we have maintained our formula presumptions, including our one-foot presumption of usable space.<sup>488</sup> We also determined that, as an alternative to requiring utility pole owners to conduct potentially expensive pole-by-pole inventories for the number of attachers on each pole, we would require pole owners to develop, through information it possesses, a presumptive average number of attachers, based on location (i.e., urban, rural and urbanized).<sup>489</sup>

170. **Report to Congress:** The Commission will send a copy of the *Order*, including this FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, *see* 5 U.S.C. § 801(a)(1)(A). A copy of the *Order* and this FRFA (or summary thereof) will also be published in the Federal Register, *see* 5 U.S.C. § 604(b), and will be sent to the Chief Counsel for Advocacy of the Small Business Administration.

### VIII. PAPERWORK REDUCTION ACT OF 1995 ANALYSIS

171. The requirements adopted in this *Order* have been analyzed with respect to the Paperwork Reduction Act of 1995 (the "1995 Act") and found to impose modified information collection requirements on the public. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public to take this opportunity to comment on the information collection requirements contained in this *Order*, as required by the 1995 Act. Public comments are due 60 days from date of publication of this *Order* in the Federal Register. Comments should address: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (2) the accuracy of the Commission's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

172. As stated above, written comments by the public on the modified information collection requirements are due 60 days from date of publication of this *Order* in the Federal Register. Comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 234, 1919 M Street, NW, Washington, DC 20554, or via the Internet to [jboley@fcc.gov](mailto:jboley@fcc.gov). For additional information on the information collection requirements, contact Judy Boley at 202-418-0214 or via the Internet at the above address.

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<sup>486</sup>See Section III.B above.

<sup>487</sup>See Section IV.A.2 above.

<sup>488</sup>See Sections IV.A.1 and IV.A.5 above.

<sup>489</sup>See Section IV.A.4.d. above.

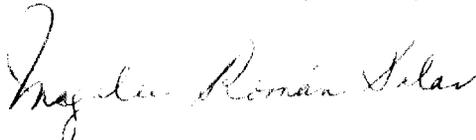
**IX. ORDERING CLAUSES**

173. IT IS ORDERED that, pursuant to Sections 1, 4(i) and 224 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and 224, the Commission's rules are hereby amended as set forth in Appendix A.

174. IT IS FURTHER ORDERED that Section 1.1402 of the Commission's rules, as amended in Appendix A hereto, will become effective 30 days after the date of publication of this *Report and Order* in the Federal Register, and that Sections 1.1403, 1.1404, 1.1409, 1.1417 and 1.1418 of the Commission's rules, as amended in Appendix A hereto, will become effective 140 days after the date of publication of this *Report and Order* in the Federal Register, unless the Commission publishes a notice before that date stating that the Office of Management and Budget ("OMB") has not approved the information collection requirements contained in the rules.

175. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this *Report and Order*, including the Final Regulatory Flexibility Analyses, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas

Secretary

**APPENDIX A****Revised Rules**

Part 1 of title 47 of the Code of Federal Regulations is amended as follows:

**PART 1 -- PRACTICE AND PROCEDURE**

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

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

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

**Sec. 1.1402 Definitions.**

\* \* \* \* \*

(c) With respect to poles, the term usable space means the space on a utility pole above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment. With respect to conduit, the term usable space means space within a conduit system which is available, or which could, with reasonable effort and expense, be made available, for the purpose of installing wires, cable and associated equipment for telecommunications services.

\* \* \* \* \*

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

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

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

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

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