

with actually providing ‘space’ on a pole for pole attachments because a utility would incur these costs ‘regardless of the presence of pole attachments.’”<sup>339</sup> Thus, TWTC proposes that those costs should be eliminated from the telecom rate.<sup>340</sup>

125. TWTC suggests instead that utilities should determine “how much *extra* a utility must incur to provide non-usable and usable space on poles for pole attachments (in both construction and maintenance costs) and then fully allocate those costs based on the cost-apportionment formulas under Section 224(e)(2) and (3).”<sup>341</sup> The underlying economic or analytical theory for TWTC’s proposal is not entirely clear, however.

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

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

<sup>340</sup> See TWTC White Paper, RM-11293, at 19-20.

<sup>341</sup> See TWTC White Paper, RM-11293, at 20.

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

<sup>343</sup> If  $C(q)$  represents the cost of producing an output  $q$  and  $\Delta q$  represents an increment of output, then incremental cost is equal to  $C(q+\Delta q) - C(q)$ . If incremental cost is used as a guide to pricing, then price should be set equal to the average incremental cost  $\frac{C(q + \Delta q) - C(q)}{\Delta q}$ . If there are no fixed costs and initial output  $q = 0$ , then

incremental cost pricing is equivalent to average cost pricing. If  $\Delta q$  is small, then incremental cost pricing approximates marginal cost pricing. Cf. *Local Competition Order*, 11 FCC Rcd at 15844, para. 675.

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

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

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

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

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

#### **b. Commission Rate Proposal**

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

##### **(i) Interpretation of the Statutory Framework**

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

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

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

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

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

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<sup>348</sup> National Broadband Plan at 110.

<sup>349</sup> See *supra* para. 113.

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

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

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

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

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

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

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<sup>354</sup> See, e.g., *2001 Order on Reconsideration*, 16 FCC Rcd at 12131-32, para. 55.

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

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

<sup>357</sup> National Broadband Plan at 110.

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

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

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

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

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

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

<sup>362</sup> See, e.g., CHARLES F. PHILLIPS, JR., *THE REGULATION OF PUBLIC UTILITIES* 176-80 (1993).

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

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

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

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

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

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

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

<sup>367</sup> See, e.g., TWTC White Paper, RM-11293, at 18-20.

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

<sup>369</sup> CCU May 4, 2010 *Ex Parte* Letter at 1-2.

<sup>370</sup> See *supra* n.365 for related discussion.

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

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

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

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<sup>372</sup> Income taxes are capital costs because they apply to the return equity holders receive for providing funds used to pay for the pole.

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

<sup>374</sup> *See* Sen. Rep. No. 95-580, 1978 U.S.C.C.A.N. 109, at 23.

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

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

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

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

**(ii) Specific Rate Proposal**

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

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

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

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

<sup>379</sup> See, e.g., *FCC v. Florida Power*, 480 U.S. 245.

<sup>380</sup> Telecommunications Act of 1996, Public Law No. 104-104, 110 Stat. 56 (1996).

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

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

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

### c. Other Alternatives and Overarching Considerations

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

## 5. Incumbent LEC Rate Issues

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

(Continued from previous page)

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

<sup>383</sup> S. Rep. No. 95-580, 1978 U.S.C.C.A.N. 109, at 21.

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

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

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

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

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

<sup>386</sup> See National Broadband Plan at 110.

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

<sup>388</sup> USTelecom Oct. 27, 2008 *Ex Parte* Letter at 6.

<sup>389</sup> Windstream Comments at 3.

<sup>390</sup> Windstream Comments at 2.

<sup>391</sup> See, e.g., USTelecom Oct. 27, 2008 *Ex Parte* Letter at 6.

<sup>392</sup> See, e.g., CenturyTel Comments at 3-5, 12-15; Frontier Comments at 2-3; ITTA Comments at 1-6; Verizon Reply Comments at 7.

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

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

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

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<sup>393</sup> See, e.g., Comcast Comments at 6; Verizon Reply Comments at 13 n.34 (distinguishing between joint use and joint ownership agreements).

<sup>394</sup> See, e.g., Comcast Comments at 6.

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

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

<sup>397</sup> NCTA Reply Comments at 21.

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

<sup>399</sup> NCTA Reply Comments at 21.

<sup>400</sup> NCTA Reply Comments at 22.

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

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

## V. PROCEDURAL MATTERS

### A. Paperwork Reduction Act Analysis

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

### B. Regulatory Flexibility Analysis

150. As required by the Regulatory Flexibility Act of 1980, as amended,<sup>403</sup> the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) for this further notice of proposed rulemaking, of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this further notice of proposed rulemaking. The IRFA is in Appendix C. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the further notice of proposed rulemaking. The Commission will send a copy of the notice of proposed rulemaking, including this IRFA, to the Chief Counsel for Advocacy of the SBA.<sup>404</sup> In addition, the notice of proposed rulemaking and IRFA (or summaries thereof) will be published in the Federal Register.<sup>405</sup>

### C. *Ex Parte* Presentations

151. This proceeding shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.<sup>406</sup> Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the

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<sup>401</sup> See, e.g., Verizon Reply Comments at 12-13.

<sup>402</sup> See, e.g., ITTA Comments at 5; Verizon Reply Comments at 13.

<sup>403</sup> 5 U.S.C. § 603.

<sup>404</sup> See 5 U.S.C. § 603(a).

<sup>405</sup> *Id.*

<sup>406</sup> 47 C.F.R. §§ 1.1200-1.1216.

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

#### D. Comment Filing Procedures

152. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. All pleadings are to reference WC Docket No. 07-245 and GN Docket No. 09-51. Comments may be filed using: (1) the Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies.<sup>409</sup>

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

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

154. All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th Street, S.W., Room TW-A325, Washington, D.C. 20554. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. The filing hours are 8:00 a.m. to 7:00 p.m. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, S.W., Washington D.C. 20554.

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

156. Parties should send a copy of each filing to the Competition Policy Division, Wireline Competition Bureau, Federal Communications Commission, 445 12th Street, SW, Washington, D.C. 20554, or by e-mail to [CPDcopies@fcc.gov](mailto:CPDcopies@fcc.gov). Parties shall also serve one copy with the Commission's copy contractor, Best Copy and Printing, Inc. (BCPI), Portals II, 445 12th Street, SW, Room CY-B402, Washington, D.C. 20554, (202) 488-5300, or via e-mail to [fcc@bcpiweb.com](mailto:fcc@bcpiweb.com).

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

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<sup>407</sup> 47 C.F.R. § 1.1206(b)(2).

<sup>408</sup> 47 C.F.R. § 1.1206(b).

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

**VI. ORDERING CLAUSES**

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

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

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

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch  
Secretary

## APPENDIX A

## Pole Attachment Rates

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

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

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

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

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

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

**APPENDIX B**  
**Proposed Rules**

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

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

**Subpart J—Pole Attachment ~~Complaint~~ Procedures**

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

**§ 1.1402 Definitions.**

\* \* \* \*

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

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

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

\* \* \* \*

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

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

**§ 1.1404 Complaint.**

\* \* \* \*

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

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

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

\* \* \* \*

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

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

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

(3) The remedy sought by the complainant;

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

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

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

**1.1409 Commission consideration of the complaint.**

\* \* \* \*

(e) \* \* \*

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

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

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

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

**1.1410 Remedies.**

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

- (a) Terminate the unjust and unreasonable rate, term, or condition;
- (b) Substitute in the pole attachment agreement the just and reasonable rate, term, or condition established by the Commission; ~~and~~
- (c) Order a refund, or payment, if appropriate. The refund or payment will normally be the difference between the amount paid under the unjust and/or unreasonable rate, term, or condition and the amount that would have been paid under the rate, term, or condition established by the Commission ~~from the date that the complaint, as acceptable, was filed, plus interest, consistent with the applicable statute of limitations; and~~
- (d) Order an award of compensatory damages, consistent with the applicable statute of limitations.

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

- (a) Order that access be permitted within a specified time frame and in accordance with specified rates, terms and conditions; and
- (b) Order an award of compensatory damages, consistent with the applicable statute of limitations.

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

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

- (a) All time limits in this subsection are to be calculated according to section 1.4 of this title.
- (b) A request for access triggers a requirement to perform the obligations in section 1.1403(b) within 45 days, including a survey and engineering analysis used to support a utility's decision. If the utility fails to complete and deliver the survey to the requesting entity within 45 days after the request, the requesting entity may use a contractor to complete the survey and engineering analysis. The utility shall cooperate with the requesting entity in directing and supervising the authorized contractor.
  - (1) For poles, ducts, conduits, and rights-of-way owned by an incumbent LEC utility, the requesting entity shall use a contractor that has at least the same qualifications and training as the incumbent LEC's own workers that perform the same tasks.
  - (2) For poles, ducts, conduits, and rights-of-way owned by a non-incumbent LEC utility, the requesting entity shall use an authorized contractor.
- (c) Within 14 days of providing a survey as required by section 1.1420(b), a utility shall tender an offer to perform all necessary make-ready work, including an estimate of its charges.
  - (1) The requesting entity may accept a valid offer and make an initial payment upon receipt, or until the offer is withdrawn.
  - (2) The utility may withdraw an outstanding offer to perform make-ready work after 14 days.
- (d) Upon receipt of payment, a utility shall notify immediately all attaching entities that may be affected by the project, and shall specify the date after which the utility or its agents become entitled to move the facilities of the attaching entity.
  - (1) The utility shall set a date for completion of make-ready no later than 45 days after the notice.
  - (2) The utility shall direct and coordinate the sequence and timing of rearrangement of facilities to afford each attaching entity a reasonable opportunity to use its own personnel to move its facilities.
  - (3) Completion of all make-ready work and final payment by the requesting entity shall complete the grant of requested access and all necessary authorization.
- (e) If make-ready work is not completed by any other attaching entities as required by paragraph

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

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

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

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

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

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

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

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

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

**1.1422 Contractors.**

(a) Utilities shall make available

(1) a list of authorized contractors; and

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

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

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

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

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

**1.1424 Exclusion from work among the electric lines.**

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

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

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

(2) when the utility deems it safe.

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

**1.1426 Charges for access and make-ready.**

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

- (b) Payment for make-ready charges is due in the following increments:
- (1) payment of 50 percent of estimated charges requires the recipient utility to begin make-ready performance.
  - (2) payment of 25 percent of estimated charges is due 22 days after the first payment.
  - (3) payment of remaining make-ready charges is due when access is granted.

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

**1.1428 Administration of pole attachment requests.**

- (a) Where a pole is jointly owned by more than one utility:
- (1) the owners shall designate a single owner to manage requests for pole attachment; and
  - (2) each owner shall make publicly available the identity of the managing utility for its poles.
- (b) Requesting entities shall not be required to interact with an owner other than the single managing pole owner.
- (c) The managing pole owner shall:
- (1) collect from each existing attacher a statement of any costs attributable to rearrangement of the existing attacher's facilities to accommodate a new attacher.
  - (2) bill the new attacher for these costs, plus any expenses the managing pole owner incurs in its role as clearinghouse; and
  - (3) disburse compensatory payment to the existing attachers.

**APPENDIX C**  
**List of Commenters**

***Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments, WC Docket No. 07-245; RM-11293; RM-11303, Notice of Proposed Rulemaking, 22 FCC Rcd 20195, 20198-99, para. 9 (2007).***

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

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

**Reply Commenter****Abbreviation**

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

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

## APPENDIX D

## Initial Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),<sup>1</sup> the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this Further Notice of Proposed Rulemaking (Further Notice). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the Further Notice provided on the first page of the Further Notice. The Commission will send a copy of the Further Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).<sup>2</sup> In addition, the Further Notice and IRFA (or summaries thereof) will be published in the Federal Register.<sup>3</sup>

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

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

**B. Legal Basis**

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

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

4. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules and policies, if adopted.<sup>4</sup> The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”<sup>5</sup> In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.<sup>6</sup> A

<sup>1</sup> See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§601-12, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

<sup>2</sup> See 5 U.S.C. § 603(a).

<sup>3</sup> See 5 U.S.C. § 603(a).

<sup>4</sup> 5 U.S.C. § 603(b)(3).

<sup>5</sup> 5 U.S.C. § 601(6).

<sup>6</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of “small-business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an (continued....)”

“small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.<sup>7</sup>

5. *Small Businesses.* Nationwide, there are a total of approximately 29.6 million small businesses, according to the SBA.<sup>8</sup>

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

7. *Small Governmental Jurisdictions.* The term “small governmental jurisdiction” is defined generally as “governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.”<sup>11</sup> Census Bureau data for 2002 indicate that there were 87,525 local governmental jurisdictions in the United States.<sup>12</sup> We estimate that, of this total, 84,377 entities were “small governmental jurisdictions.”<sup>13</sup> Thus, we estimate that most governmental jurisdictions are small.

8. We have included small incumbent local exchange carriers in this present RFA analysis. As noted above, a “small business” under the RFA is one that, inter alia, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and “is not dominant in its field of operation.”<sup>14</sup> 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.<sup>15</sup> We have therefore included small incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

9. *Incumbent Local Exchange Carriers (“ILECs”).* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers.

(Continued from previous page)

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

<sup>7</sup> 15 U.S.C. § 632.

<sup>8</sup> See SBA, Office of Advocacy, “Frequently Asked Questions,” <http://web.sba.gov/faqs> (accessed Jan. 2009).

<sup>9</sup> Independent Sector, *The New Nonprofit Almanac & Desk Reference* (2002).

<sup>10</sup> 5 U.S.C. § 601(4).

<sup>11</sup> 5 U.S.C. § 601(5).

<sup>12</sup> U.S. Census Bureau, *Statistical Abstract of the United States: 2006*, Section 8, p. 272, Table 415.

<sup>13</sup> We assume that the villages, school districts, and special districts are small, and total 48,558. See U.S. Census Bureau, *Statistical Abstract of the United States: 2006*, section 8, p. 273, Table 417. For 2002, Census Bureau data indicate that the total number of county, municipal, and township governments nationwide was 38,967, of which 35,819 were small. *Id.*

<sup>14</sup> 15 U.S.C. § 632.

<sup>15</sup> Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of “small-business concern,” which the RFA incorporates into its own definition of “small business.” See 15 U.S.C. § 632(a) (“Small Business Act”); 5 U.S.C. § 601(3) (“RFA”). SBA regulations interpret “small business concern” to include the concept of dominance on a national basis. See 13 C.F.R. § 121.102(b).

Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>16</sup> According to Commission data,<sup>17</sup> 1,311 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,311 carriers, an estimated 1,024 have 1,500 or fewer employees and 287 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our proposed action.

10. *Competitive Local Exchange Carriers (“CLECs”), Competitive Access Providers (“CAPs”), “Shared-Tenant Service Providers,” and “Other Local Service Providers.”* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>18</sup> According to Commission data,<sup>19</sup> 1005 carriers have reported that they are engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 1005 carriers, an estimated 918 have 1,500 or fewer employees and 87 have more than 1,500 employees. In addition, 16 carriers have reported that they are “Shared-Tenant Service Providers,” and all 16 are estimated to have 1,500 or fewer employees. In addition, 89 carriers have reported that they are “Other Local Service Providers.” Of the 89, all have 1,500 or fewer employees. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, “Shared-Tenant Service Providers,” and “Other Local Service Providers” are small entities that may be affected by our proposed action.

11. *Interexchange Carriers (“IXCs”).* Neither the Commission nor the SBA has developed a small business size standard specifically for providers of interexchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>20</sup> According to Commission data,<sup>21</sup> 300 carriers have reported that they are engaged in the provision of interexchange service. Of these, an estimated 268 have 1,500 or fewer employees and 32 have more than 1,500 employees. Consequently, the Commission estimates that the majority of IXCs are small entities that may be affected by our proposed action.

12. *Satellite Telecommunications and All Other Telecommunications.* These two economic census categories address the satellite industry. The first category has a small business size standard of \$15 million or less in average annual receipts, under SBA rules.<sup>22</sup> The second has a size standard of \$25 million or less in annual receipts.<sup>23</sup> 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.<sup>24</sup>

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<sup>16</sup> 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 517110.

<sup>17</sup> FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, “Trends in Telephone Service” at Table 5.3, Page 5-5 (Aug. 2008) (“Trends in Telephone Service”). This source uses data that are current as of November 1, 2006.

<sup>18</sup> 13 C.F.R. § 121.201, NAICS code 517110.

<sup>19</sup> “Trends in Telephone Service” at Table 5.3.

<sup>20</sup> 13 C.F.R. § 121.201, NAICS code 517110.

<sup>21</sup> “Trends in Telephone Service” at Table 5.3.

<sup>22</sup> 13 C.F.R. § 121.201, NAICS code 517410.

<sup>23</sup> 13 C.F.R. § 121.201, NAICS code 517919.

<sup>24</sup> 13 C.F.R. § 121.201, NAICS codes 517410 and 517910 (2002).

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

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

15. *Wireless Telecommunications Carriers (except Satellite)*. Since 2007, the Census Bureau has placed wireless firms within this new, broad, economic census category.<sup>31</sup> Prior to that time, such firms were within the now-superseded categories of “Paging” and “Cellular and Other Wireless Telecommunications.”<sup>32</sup> Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.<sup>33</sup> 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.<sup>34</sup> Of this total, 804 firms had employment of 999 or fewer employees, and three firms

<sup>25</sup> U.S. Census Bureau, 2007 NAICS Definitions, “517410 Satellite Telecommunications”; <http://www.census.gov/naics/2007/def/ND517410.HTM>.

<sup>26</sup> U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization),” Table 4, NAICS code 517410 (issued Nov. 2005).

<sup>27</sup> *Id.* An additional 38 firms had annual receipts of \$25 million or more.

<sup>28</sup> U.S. Census Bureau, 2007 NAICS Definitions, “517919 All Other Telecommunications”; <http://www.census.gov/naics/2007/def/ND517919.HTM#N517919>.

<sup>29</sup> U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization),” Table 4, NAICS code 517910 (issued Nov. 2005).

<sup>30</sup> *Id.* An additional 14 firms had annual receipts of \$25 million or more.

<sup>31</sup> U.S. Census Bureau, 2007 NAICS Definitions, “517210 Wireless Telecommunications Categories (Except Satellite)”; <http://www.census.gov/naics/2007/def/ND517210.HTM#N517210>.

<sup>32</sup> U.S. Census Bureau, 2002 NAICS Definitions, “517211 Paging”; <http://www.census.gov/epcd/naics02/def/NDEF517.HTM>; U.S. Census Bureau, 2002 NAICS Definitions, “517212 Cellular and Other Wireless Telecommunications”; <http://www.census.gov/epcd/naics02/def/NDEF517.HTM>.

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

<sup>34</sup> U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization),” Table 5, NAICS code 517211 (issued Nov. 2005).