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Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of)
)
Implementation of Section 224 of the Act) WC Docket No. 07-245
)
A National Broadband Plan for Our Future) GN Docket No. 09-51

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ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: May 20, 2010

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By the Commission: Chairman Genachowski and Commissioners Copps, McDowell, Clyburn and Baker issuing separate statements.

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I. INTRODUCTION

1. In this Order and Further Notice of Proposed Rulemaking, we begin the process of revising the Commission's pole attachment rules to lower the costs of telecommunications, cable, and broadband deployment and to promote competition, as recommended in the National Broadband Plan. In the Order, we clarify that communications providers have a statutory right to use space- and cost-saving techniques that are consistent with pole owners' use of those techniques. We also establish that providers have a statutory right to timely access to poles. In the Further Notice, we seek comment on additional reforms to promote deployment and competition. For example, we propose timelines to obtain pole attachments, which some evidence suggests could cut in half the time to prepare a pole for access in many cases. We also seek comment on ways to clarify rights and responsibilities in the pole attachment process, improve communications between attachers and pole owners, improve dispute resolution, and reduce the variation in pole access rates. These steps will reduce network providers' costs and speed access to utility poles. In turn, lower costs and faster access will benefit consumers by removing barriers to telecommunications and cable network deployment, increasing broadband availability, and increasing competition in the provision of broadband, voice, and video services.

II. BACKGROUND

2. In 1978, Congress first directed the Commission to ensure that the rates, terms, and conditions for pole attachments by cable television systems are just and reasonable when it added section 224 to the Act.¹ The Telecommunications Act of 1996 (1996 Act)² expanded the definition of pole attachments to include attachments by providers of telecommunications service,³ and granted both cable systems and telecommunications carriers⁴ an affirmative right of nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by a utility.⁵ However, the 1996 Act permits utilities to deny access where there is insufficient capacity and for reasons of safety, reliability or generally applicable engineering purposes.⁶ Besides establishing a right of access, the 1996 Act mandates a rate

¹ Pole Attachment Act of 1978, Pub. L. No. 95-234, 92 Stat. 33 (1978). Section 224 provides that the Commission will regulate pole attachments except where such matters are regulated by a state. 47 U.S.C. § 224(c). *See also States That Have Certified That They Regulate Pole Attachments*, WC Docket No. 10-101, Public Notice, DA 10-893 (rel. May 19, 2010). Section 224 also withholds from the Commission jurisdiction to consider attachment complaints where the utility is a railroad, cooperatively organized, or owned by a government entity. 47 U.S.C. § 224(a)(1).

² Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of 47 U.S.C.).

³ 47 U.S.C. § 224(a)(4).

⁴ For purposes of section 224, Congress excluded incumbent LECs from the definition of "telecommunications carriers." 47 U.S.C. § 224(a)(5).

⁵ 47 U.S.C. § 224(f)(1). As a general matter, all references to poles in this item refer to the infrastructure covered by the statutory definition of "pole attachments," including poles, ducts, conduit, and rights-of-way, unless otherwise indicated. 47 U.S.C. § 224(a)(4).

⁶ 47 U.S.C. § 224(f)(2); *see also Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket Nos. 96-98, 95-185, Report and Order, 11 FCC Rcd 15499, 16080-81, paras. 1175-77 (1996) (*Local Competition Order*) (subsequent history omitted) (extending the provisions of section 224(f)(2) to other utilities).

formula for telecommunications carriers that differs from the rate formula for attachments used solely to provide cable service.⁷

3. The Commission implemented the new section 224 access requirements in the *Local Competition Order*.⁸ At that time, the Commission concluded that it would determine the reasonableness of a particular condition of access on a case-by-case basis.⁹ Finding that no single set of rules could take into account all attachment issues, the Commission specifically declined to adopt the National Electric Safety Code (NESC) in lieu of access rules.¹⁰ The Commission also recognized that utilities typically develop individual standards and incorporate them into pole attachment agreements, and that, in some cases, federal, state, or local laws also impose relevant restrictions.¹¹ The *Local Competition Order* acknowledged concerns that utilities might deny access unreasonably, but rather than adopt a set of substantive engineering standards, the Commission decided that procedures for requiring utilities to justify the conditions they placed on access would best safeguard attachers' rights.¹² The Commission did adopt five rules of general applicability and several broad policy guidelines in the *Local Competition Order*.¹³ The Commission also stated that it would monitor the effect of the case-specific approach, and would propose specific rules at a later date if conditions warranted.¹⁴

4. In the *1998 Implementation Order*, the Commission adopted rules implementing the 1996 Act's new pole attachment rate formula for telecommunications carriers.¹⁵ The Commission also

⁷ See 47 U.S.C. § 224(d) (describing the "cable rate formula"), (e) (describing the "telecom rate formula").

⁸ *Local Competition Order*, 11 FCC Rcd at 15499.

⁹ *Local Competition Order*, 11 FCC Rcd at 16067-68, para. 1143.

¹⁰ *Local Competition Order*, 11 FCC Rcd at 16068-69, paras. 1145-46 (finding that the NESC's depth of detail—64 pages of rules dictating minimum clearances alone—and allowance for variables make it unworkable for setting access standards).

¹¹ *Local Competition Order*, 11 FCC Rcd at 16068-69, paras. 1147-48 (finding that applicable federal regulations include rules promulgated by the Federal Energy Regulatory Commission (FERC) and by the Occupational Safety and Health Administration (OSHA), and that utility internal operating standards reflect regional and local conditions as well individual needs and experiences of the utility).

¹² See *Local Competition Order*, 11 FCC Rcd at 16058-107, paras. 1119-240 (Part XI.B. "Access to Rights of Way").

¹³ *Local Competition Order*, 11 FCC Rcd at 16071-74, paras. 1151-58. The five specific rules are: (1) a utility may rely on industry codes, such as the NESC, to prescribe standards with respect to capacity, safety, reliability and general engineering principles; (2) a utility will still be subject to any federal requirements, such as those imposed by FERC or OSHA, which might affect pole attachments; (3) state and local requirements will be given deference if not in direct conflict with Commission rules; (4) rates, terms and conditions of access must be uniformly applied to all attachers on a nondiscriminatory basis; and (5) a utility may not favor itself over other parties with respect to the provision of telecommunications or video services. See also *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) (*Pole Attachment Notice*) (noting the Commission's establishment of access rules in the *Local Competition Order* and determination to revisit them if needed).

¹⁴ See *Local Competition Order*, 11 FCC Rcd at 16068, para. 1143; *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket Nos. 96-98, 95-185, Order on Reconsideration, 14 FCC Rcd 18049, 18051, paras. 4-5 (1999) (*Local Competition Reconsideration Order*) (allowing parties flexibility to reach agreements on access subject to dispute resolution mechanism if negotiations fail).

¹⁵ *Implementation of Section 703(e) of the Telecommunications Act, Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, Report and Order, 13 FCC Rcd 6777 (1998) (1998 (continued....))

concluded that cable television systems offering both cable and Internet access service should continue to pay the cable rate.¹⁶ The Commission further held that the statutory right of nondiscriminatory access includes attachments by wireless carriers.¹⁷ The latter two determinations were challenged but ultimately upheld by the Supreme Court.¹⁸ In particular, the Court held that section 224 gives the Commission broad authority to adopt just and reasonable rates.¹⁹ The Court also deferred to the Commission's conclusion that wireless carriers are entitled by section 224 to attach facilities to poles.²⁰

5. On November 20, 2007, the Commission issued the *Pole Attachment Notice*²¹ in recognition of the importance of pole attachments to the deployment of communications networks, in part in response to petitions for rulemaking from USTelecom and Fibertech Networks.²² USTelecom argued that incumbent LECs, as providers of telecommunications service, are entitled to just and reasonable pole attachment rates, terms, and conditions of attachment even though, under section 224, they do not count as "telecommunications carriers" and have no statutory right of access.²³ Fibertech petitioned the Commission to initiate a rulemaking to set access standards for pole attachments, including standards for timely performance of make-ready work, use of boxing and extension arms, and use of qualified third-party contract workers, among other concerns.²⁴ The *Pole Attachment Notice* focused on the effect of disparate pole-attachment rates on broadband competition and arrived at two tentative conclusions: first, that all attachers should pay the same pole attachment rate for all attachments used to provide broadband Internet access service²⁵ and second, that the rate should be higher than the current cable rate, yet no

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Implementation Order), *aff'd in part, rev'd in part, Gulf Power v. FCC*, 208 F.3d 1263 (11th Cir. 2000) (*Gulf Power v. FCC*), *rev'd, Nat'l Cable & Telecommunications Ass'n v. Gulf Power*, 534 U.S. 327 (2002) (*Gulf Power*).

¹⁶ See 1998 *Implementation Order*, 13 FCC Rcd at 6796, para. 34.

¹⁷ See 1998 *Implementation Order*, 13 FCC Rcd at 6797-99, paras. 36-42 (applying the definitions of "telecommunications carriers," "telecommunications services," and relevant provisions of section 224 to wireless carriers).

¹⁸ See *Gulf Power v. FCC*, 208 F.3d at 1273-75 (wireless), 1275-78 (cable rate) (finding that the term "any telecommunications carrier" in section 224 excluded attachment of wireless carriers' equipment, and that the term "solely cable service" rendered provision of Internet access service by cable systems ineligible for cable rate); *Gulf Power*, 534 U.S. at 333-39 (cable rate), 339-342 (wireless) (finding that cable rate did not limit agency discretion to determine rates, and holding that any service provided "by" a cable system is, by definition, a "cable" service; also finding inclusion of wireless equipment within "any attachment" reasonable and entitled to deference).

¹⁹ See *Gulf Power*, 534 U.S. at 336, 338-89. The Court rejected the view that "the straightforward language of [section 224's] subsections (d) and (e) establish two specific just and reasonable rates [and] no other rates are authorized." *Id.* at 335 (citing *Gulf Power v. FCC*, 208 F.3d at 1276 n.29).

²⁰ See *Gulf Power*, 534 U.S. at 341.

²¹ *Pole Attachment Notice*, 22 FCC Rcd at 20195.

²² See United States Telecom Association *Petition for Rulemaking*, RM-11293 (filed Oct. 11, 2005) (USTelecom Petition); Fibertech Networks, LLC, *Petition for Rulemaking*, RM-11303 (filed Dec. 7, 2005) (Fibertech Petition). The records generated by both petitions were incorporated by reference. *Pole Attachment Notice*, 22 FCC Rcd at 20200, para. 12, n.12.

²³ *Pole Attachment Notice*, 22 FCC Rcd at 20205, para. 24; 47 U.S.C. § 224 (a)(5) (excluding incumbent local exchange carriers from the definition of "telecommunications carrier"); 47 U.S.C. § 224(a)(4) (defining "pole attachment" to include attachments by "any . . . provider of telecommunications service"); 47 U.S.C. § 224 (b)(1) (requiring the Commission to regulate pole attachments).

²⁴ *Pole Attachment Notice*, 22 FCC Rcd at 20210, para. 37.

²⁵ *Pole Attachment Notice*, 22 FCC Rcd at 20206, para. 26.

greater than the telecommunications rate.²⁶ In addition to the concerns raised by USTelecom and Fibertech, the *Pole Attachment Notice* inquired about application of the telecommunications rate to wireless pole attachments²⁷ and other pole access concerns.²⁸

6. The American Recovery and Reinvestment Act of 2009 included a requirement that the Commission develop a national broadband plan to ensure that every American has access to broadband capability.²⁹ On March 16, 2010, the National Broadband Plan was released, and identified access to rights-of-way—including access to poles—as having a significant impact on the deployment of broadband networks.³⁰ Accordingly, the Plan included several recommendations regarding pole attachment policies to further advance broadband deployment.³¹ In particular, the Plan recommended that:

- The FCC establish rental rates for pole attachments that are as low and close to uniform as possible, consistent with Section 224 of the Communications Act of 1934, as amended, to promote broadband deployment;
- The FCC implement rules that will lower the cost of the pole attachment “make-ready” process. For example, the FCC should authorize attachers to use space- and cost-saving techniques, such as boxing or extension arms, where practical and in a way that is consistent with pole owners’ use of those techniques;
- The FCC establish a comprehensive timeline for each step of the Section 224 access process and reform the process for resolving disputes regarding infrastructure access; and
- The FCC improve the collection and availability of information regarding the location and availability of poles, ducts, conduits and rights-of-way.³²

III. ORDER

7. As discussed above, the National Broadband Plan recommended a number of actions intended to lower the cost and improve the speed of access to utility poles. We find that it is in the public interest to implement some of these recommendations immediately to clarify the rules governing pole attachments and to streamline the pole attachment process. In particular, we clarify that the statutory nondiscriminatory access requirement allows communications providers to use space- and cost-saving attachment techniques where practical and consistent with pole owners’ use of those techniques. We also conclude that the statutory right to just and reasonable access to poles includes the right of timely access. In the Notice below, we seek comment on possible changes to the Commission’s regulatory framework governing pole access.

²⁶ *Pole Attachment Notice*, 22 FCC Rcd at 20209, para. 36.

²⁷ *Pole Attachment Notice*, 22 FCC Rcd at 20209, para 34.

²⁸ *Pole Attachment Notice*, 22 FCC Rcd at 20211, para. 38.

²⁹ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, § 6001(k)(2) (2009).

³⁰ Omnibus Broadband Initiative, Federal Communications Commission, Connecting America: The National Broadband Plan, at 109 (2010), available at <http://download.broadband.gov/plan/national-broadband-plan.pdf> (National Broadband Plan or Plan).

³¹ National Broadband Plan at 109-13.

³² *Id.* at 110-12.

A. Nondiscriminatory Use of Attachment Techniques

8. We conclude that the nondiscriminatory access obligation established by section 224(f)(1) of the Act requires a utility to allow cable operators and telecommunications carriers to use the same pole attachment techniques that the utility itself uses.³³ For example, in the 2007 *Pole Attachment Notice*,³⁴ the Commission sought comment on the use of techniques such as boxing³⁵ and bracketing.³⁶ As attachers have explained, boxing and bracketing can help avoid the cost and delay of pole replacement or make-ready³⁷ work involving electrical facilities, and could be appropriate when practical—for example, when the facilities on the pole can be safely reached by a ladder or bucket truck—and when such techniques previously have been allowed by the pole owner.³⁸ Similarly, the National Broadband Plan recommends that the Commission give attachers the right to use these techniques “where practical and in a way that is consistent with pole owners’ use of [them].”³⁹

9. We now clarify that utilities must allow attachers to use the same attachment techniques that the utility itself uses in similar circumstances, although utilities retain the right to limit their use when necessary to ensure safety, reliability, and sound engineering. Our conclusion here is consistent with the interpretation of the Act in prior bureau orders.⁴⁰

10. Clarifying this application of a utility’s nondiscriminatory access obligation provides certainty that will spur competition and promote the deployment of a variety of technologies. As observed in the National Broadband Plan and by commenters, allowing attachers equal use of techniques like boxing and bracketing will encourage competition and advance the deployment of telecommunications, cable, and both wireless and wireline broadband services.⁴¹ Accordingly, any

³³ See 47 U.S.C. § 224(f)(1) (“A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole . . . owned or controlled by it.”).

³⁴ *Pole Attachment Notice*, 22 FCC Rcd at 20208-09, 20214, paras. 33, 47.

³⁵ “Boxing” refers to the installation of communications on both sides of the same pole at approximately the same height.

³⁶ “Bracketing” refers to the installation of “extension arms,” which extend from the pole to support communications lines at the same level as existing lines attached to the pole. See, e.g., FPL et al. Comments at 18-19. All comments are in WC Docket No. 07-245 unless otherwise noted. A list of commenters is provided in Appendix C.

³⁷ “Make-ready” is any rearrangement of equipment and attachments in order to make room on either an existing pole or a new, different pole for a new attacher. *Florida Cable Order* at 2002 (quotation omitted).

³⁸ Fibertech Petition at 13.

³⁹ National Broadband Plan at 111.

⁴⁰ In *Salsgiver*, the Enforcement Bureau held that, when a utility allows boxing on some occasions, an agreement between it and an attacher banning the attacher from doing the same “is discriminatory and thus in violation of section 224.” *Salsgiver Communications, Inc. v. N. Pittsburgh Tel. Co.*, File No. EB-06-MD-004, Order, 22 FCC Rcd 20536, 20543, para. 21 (Enf. Bur. 2007). Likewise, in *Cavalier*, the Enforcement Bureau found that a utility that “uses extension arms and boxing for its own attachments . . . must allow other attachers to do the same.” *Cavalier Tel., LLC v. Virginia Elec. & Power Co.*, File No. PA-99-005, Order, 15 FCC Rcd 9563, 9572, para. 19 (Cab. Servs. Bur. 2000). Although *Cavalier* was later vacated at the joint request of the parties, the Enforcement Bureau granted the request because it found that “[t]he opportunity to resolve . . . numerous proceedings in multiple fora outweighs our interest in preserving [the decision].” *Cavalier Tel., LLC v. Virginia Elec. & Power Co.*, File No. EB-02-MD-005, Order, 17 FCC Rcd 24414, 24420, para. 19 (Enf. Bur. 2002).

⁴¹ See National Broadband Plan at 111; Fibertech Petition at 14 (“The availability of these techniques has played a significant role in enabling Fibertech to deploy over 1,300 route-miles of fiber-optic cable in Connecticut since 2001.”); Sunesys Comments, RM-11303, at 5 (filed Jan. 30, 2006).

attachment technique that a utility uses or allows to be used will henceforth be presumed appropriate for use by attachers on that utility's poles under comparable circumstances. We believe that this action will promote the deployment of and competition for telecommunications, cable, and broadband services.

11. Our holding is carefully tailored to reflect the legitimate needs of pole owners, as well. Some pole owners contend that the use of boxing and bracketing complicates pole maintenance and replacement,⁴² can compromise safety,⁴³ and may not be consistent with sound engineering practices.⁴⁴ Commenters also assert that utilities should be free to prohibit their use or, at the very least, to consider the appropriateness of such techniques on a case-by-case basis.⁴⁵ We agree and emphasize that our commitment to ensuring this form of nondiscriminatory access is limited by the utility's existing practices. If a utility believes that boxing and bracketing are fundamentally unsafe or otherwise incompatible with proper attachment practice, it can choose not to use or allow them at all. Moreover, even once the presumption that such techniques are appropriate has been triggered, a utility may rebut it with respect to any single pole or class of poles for reasons of safety, reliability and generally applicable engineering purposes.⁴⁶

12. We recognize that some pole owners employ these techniques sparingly⁴⁷ and may be concerned that this clarification will allow attachers to use boxing and attachment arms in situations

⁴² See, e.g., FPL et al. Comments at 18 ("Boxing and bracketing slow down the process of pole change-outs, complicates transfers, and makes both more costly."); Coalition of Concerned Utilities Comments at 83 ("Boxing . . . makes it more difficult to change-out poles."); Verizon Comments, RM-11303, at 2-3 (filed Jan. 30, 2006) (stating that boxing complicates pole replacements and removals, and that cable arms make it more difficult for technicians to work on nearby attachments); NSTAR Reply Comments, RM-11303, at 2 (filed Mar. 1, 2006) ("Boxing and/or extension arms significantly complicate the process of replacing [sic] a pole.").

⁴³ See, e.g., Coalition of Concerned Utilities Comments at 82-83 ("[B]oxing and extension arms make it more difficult and hazardous for climbers to access the pole."); USTelecom Comments, RM-11303, at 4 (filed Jan. 30, 2006) (noting that boxing is hazardous to linemen who have to replace a pole); Western Massachusetts Electric Comments, RM-11303, at 2 (filed Jan. 30, 2006) ("The use of boxing and extension arms poses a hazard to [utility] employees and the general public."); EEI/UTC Comments at 84 ("The overwhelming majority of electric utilities rarely, if ever, allow boxing and extension arms because of serious safety and operational concerns.").

⁴⁴ See, e.g., Coalition of Concerned Utilities Comments at 83 (stating that extension arms create loading concerns, and that boxing can compromise the integrity of poles); USTelecom Comments, RM-11303, at 4 (filed Jan 30, 2006) (explaining that extension arms create unbalanced tension in poles); Western Massachusetts Electric Company Comments, RM-11303, at 2 (filed Jan. 30, 2006) ("Extension arms . . . do not create a 40-inch vertical separation as required by the NESC.").

⁴⁵ See, e.g., Coalition of Concerned Utilities Comments at 83 ("Pole owners need to retain the discretion to review each pole design and each proposed distribution route to determine whether boxing or extension arms should be allowed."); Verizon Comments, RM-11303, at 2 (filed Jan. 30, 2006) ("The safety and feasibility of using boxing or extension arms must be evaluated on a case-by-case basis, taking account of numerous factors, such as the location of the pole and the placement of prior attachments."); UTC Comments, RM-11303, at 10 (filed Jan. 30, 2006) (asserting that these activities should be reviewed on a case-by-case basis, and that factors like the age and size of a pole must be considered).

⁴⁶ See 47 U.S.C. § 224(f)(2).

⁴⁷ See, e.g., Coalition of Concerned Utilities Comments at 83 (stating that some Coalition members prohibit the practices altogether, while others permit them only in limited quantities); Verizon Comments, RM-11303, at 3 (filed Jan. 30, 2006) (explaining that Verizon does not permit extension arms to be used merely to increase the capacity of a pole, but it sometimes employs them to obtain sufficient clearance or to improve cable alignment); PacifiCorp et al. Comments at 32 (explaining that, in many cases, these techniques have been used as a last resort after a detailed analysis of the affected pole).

where the pole owner itself would not.⁴⁸ We believe, however, that this framework will allow utilities to limit the use of these techniques whenever appropriate and, thereby, prevent attachers from employing the techniques inappropriately. Our present holding is not designed to broaden the range of circumstances in which these techniques are used. Rather, it is to prevent utilities from denying attachers the benefits of these techniques in situations where the utility itself would, or has, used them.⁴⁹

13. If a utility chooses to allow boxing and bracketing in some circumstances but not others, the limiting circumstances must be clear, objective, and applied equally to the utility and attaching entity. They should also be publicly available—on a website, for instance—with the utility providing examples where helpful. Such *ex ante* guidance will help attachers make informed decisions and should facilitate the attachment process. If a utility denies an attachment technique that it uses for reasons not included in those made publicly available, it must explain its decision in writing to the requesting entity. In the Further Notice, we seek comment on additional considerations regarding boxing and bracketing, including the ability of utilities to prohibit boxing and bracketing going forward, and whether utilities' decisions regarding the use of boxing and bracketing should also be made publicly available.

14. We reject the argument that our conclusion is inconsistent with section 224(f)(2) of the Act, which allows electric utilities to deny access where there is “insufficient capacity.”⁵⁰ Although we recognize that the Eleventh Circuit held in *Southern Co. v. FCC* that utilities are not obligated to provide access to a pole when it is agreed that the pole's capacity is insufficient to accommodate a proposed attachment, we do not find that to be the case when boxing and bracketing are able to be used.⁵¹ The Eleventh Circuit held that the term “insufficient capacity” in section 224(f)(2) is ambiguous, and that the Commission has discretion in filling that “gap in the statutory scheme.”⁵² The court upheld the Commission's finding that “insufficient capacity” means the absence of usable physical space on a pole.⁵³ Applying that definition here, we find that a pole does not have “insufficient capacity” if it could accommodate an additional attachment using conventional methods of attachment that a utility uses in its

⁴⁸ See, e.g., Coalition of Concerned Utilities Comments at 83 (“To grant an attaching entity global permission to box poles or attach extension arms simply because the utility pole owner has permitted it on other occasions would drastically add to the potential problems.”); Verizon Comments, RM-11303, at 2 (filed Jan. 30, 2006) (“That boxing or extension arms could be safely employed on one pole does not mean that either can be safely used on a different pole in another location.”); USTelecom Reply Comments, RM-11303, at 2 (filed Mar. 1, 2006) (stating that, when pole owners employ these techniques, it is usually, if not always, because they have gauged the safety and engineering soundness of the attachment in question).

⁴⁹ See 47 U.S.C. § 224(f)(1); see also Fibertech/KDL Comments at 12 (“Pole owners decrying boxing as unsafe have abandoned these objections when boxing became necessary to quickly and inexpensively deploy their services.”); Alpheus and 360 networks Comments at 3 (“Utilities frequently use boxing and extension arms for their own facilities but prohibit competitive providers from using these space- and cost-saving methods with no rational explanation.”); McleodUSA Comments, RM-11303, at 2-3 (filed Jan. 30, 2006) (“[B]oxing and extension arms have been widely used by telephone utilities throughout [McleodUSA's] service area, even on some of the utilities' poles where such practices are supposedly prohibited.”).

⁵⁰ See, e.g., AEP et al. Comments, RM-11303, at 17-18 (filed Jan. 30, 2006); Ameren et al. Comments, RM-11303, at 15-16 (filed Jan. 30, 2006); see also 47 U.S.C. § 224(f)(2).

⁵¹ See *Southern Co. v. FCC*, 293 F.3d 1338, 1346-47 (11th Cir. 2002) (*Southern Company*) (“The FCC's position is contrary to the plain language of § 224(f)(2). . . . When it is agreed that capacity is insufficient, there is no obligation to provide third parties with access to a particular pole.”).

⁵² *Southern Company*, 293 F.3d at 1348 (“Nothing in the language of the statute specifies the conditions under which capacity should be deemed insufficient”).

⁵³ *Id.* at 1349.

own operations, such as boxing and bracketing. Unlike requiring a pole owner to replace a pole with a taller pole, these techniques take advantage of usable physical space on the existing pole.

15. The Eleventh Circuit acknowledged in *Southern* that its decision was driven by the need to “construe statutes in such a way to ‘give effect, if possible, to every clause and word of a statute.’”⁵⁴ By virtue of that decision, however, the statutory language of section 224(f)(2) is given effect, in that utilities may deny access for “insufficient capacity” when “it is agreed that capacity on a given pole or other facility is insufficient.”⁵⁵ Thus, no particular interpretation of section 224(f)(2) is required in the context of boxing and bracketing simply to “give effect” to that statutory language.

16. We find that our reading of the ambiguous term “insufficient capacity” is a reasonable middle ground. Some utilities have argued that a pole has insufficient capacity—and thus access may be denied under section 224(f)(2)—if any make-ready work is needed.⁵⁶ At the other extreme, the statute might be read to require a utility to completely replace a pole—an interpretation that some commenters oppose.⁵⁷ We see no reason to adopt either of those extreme positions. Within those extremes is a range of practices, such as line rearrangement, overlashing, boxing, and bracketing that exploit the capacity of existing infrastructure in some way. Although commenters are divided regarding whether a pole has insufficient capacity if techniques such as boxing and bracketing are necessary to accommodate a new attachment,⁵⁸ we find more persuasive the position that a pole does not have insufficient capacity if a new

⁵⁴ 293 F.3d at 1346-47.

⁵⁵ *Id.* at 1346. See also *Florida Cable Telecomm. Assoc., Inc.; Comcast Cablevision of Panama City, Inc.; Mediacom Southeast, L.L.C.; and Cox Communications Gulf, L.L.C., Complainants, v. Gulf Power Co., Respondent*, EB Docket No. 04-381, Initial Decision of Chief Administrative Law Judge Richard L. Sippel, 22 FCC Rcd 1997, 2005-06, para. 24 (2007) (*Florida Cable Order*) (“*Southern Co.* narrowly holds that ‘when it is agreed [by pole owner and attacher] that capacity is insufficient,’ a utility may not be required to provide an attacher with access to a pole. . . . since there was never an agreement between Complainants and Gulf Power regarding pole capacity, the *Southern Co.* decision is not relevant to any [Hearing Decision Order] issue, and has no decisional application in this case.”).

⁵⁶ See, e.g., *Florida Cable Order*, 22 FCC Rcd at 2006, para. 25 (rejecting a utility’s “erroneous[] argu[ment] that a need to use make-ready to accommodate an attachment constitutes proof of full capacity”). We disagree with the claim that the Commission previously defined “capacity expansion” to include any form of make ready. See, e.g., *Gulf Power Co. Exceptions to the Initial Decision*, EB Docket No. 04-381, at 7-9 (filed Mar. 7, 2007). In the excerpt from the prior order relied on by this position, the Commission discussed legislative history in which Congress noted that it may be necessary for a utility to replace an existing pole to accommodate a new attachment by a cable operator. The Commission used the phrase “[t]his capacity expansion process” in reference to the discussion of pole replacement in the legislative history; the Commission did not say that rearranging existing attachments constitutes “capacity expansion.” See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 14 FCC Rcd at 18067, para. 53. Moreover, the term “capacity expansion” does not appear in the relevant provisions of the Act or our rules, so the Commission’s discussion of that term has little regulatory significance for our interpretation of section 224(f)(2) here. The issue is whether a pole has “insufficient capacity,” and we find that when a utility could accommodate a new attachment on a pole by using attachment techniques that the utility employs in its own operations, consistent with applicable safety codes, capacity is not “insufficient.” To the extent the Commission’s statement concerning “capacity expansion” in the prior order is any way inconsistent with that finding, we disavow that statement.

⁵⁷ See, e.g., *Ameren and Virginia Electric Reply Comments* at 22.

⁵⁸ Compare, e.g., Letter from Eric B. Langley, Counsel for Oncor Electric Delivery, Co. et al., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, at 8 (filed Dec. 3, 2009) (“Electric utilities are not required to expand capacity (perform make-ready) under section 224(f)(2).”), and AEP et al., Comments, RM-11303, at 17-18 (filed Jan. 30, 2006) (“Make ready work in general and the use of [boxing and bracketing] in particular are themselves expansions in capacity.”), with TWTC Reply Comments at 35-37 (“pole capacity is insufficient . . . only (continued....)”).

attachment can be added to the existing pole using conventional attachment techniques. Utilization of existing infrastructure, rather than replacing it, is a fundamental principal underlying the Act.⁵⁹ As discussed above, we find that our interpretation still ensures that “insufficient capacity” is given some meaning, while also, to the greatest extent possible, helping spur competition and promoting the deployment of communications technologies, consistent with the broad “pro competitive” purposes of the 1996 Act, as well as the more specific direction of section 706 of the 1996 Act that the Commission promote the deployment of advanced services “by utilizing, in a manner consistent with the public interest, convenience, and necessity, . . . measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.”⁶⁰ Accordingly, we conclude that, where a pole can accommodate new attachments through boxing, bracketing, or similar attachment techniques, there is not “insufficient capacity” within the meaning of section 224(f)(2).

B. Timely Access to Pole Attachments

17. We also hold that access to poles, including the preparation of poles for attachment, commonly termed “make-ready,” must be timely in order to constitute just and reasonable access.⁶¹ Section 224 of the Act requires utilities to provide cable television systems and any telecommunications carrier with nondiscriminatory access to any poles, ducts, conduits, and rights-of-way owned or controlled by it, and instructs the Commission to ensure that the terms and conditions for pole attachments are just and reasonable.⁶² The Commission previously has recognized the importance of timeliness in the context of specific aspects of the pole attachment process.⁶³ The National Broadband Plan likewise recognized

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when space for new attachments cannot be made through reasonable make-ready construction by way of pole change-outs and line rearrangements.”). In short, there is no “agree[ment] that capacity is insufficient” where an attachment can be accommodated through the use of boxing or bracketing. See *Southern Company*, 293 F.3d at 1347.

⁵⁹ See generally, *Local Competition Order*, 11 FCC Rcd at 15508-11, paras 10-15.

⁶⁰ 47 U.S.C. § 1302 (2010). Section 706 of the Telecommunications Act of 1996, Pub. L. No. 104-104, title VII, Sec. 706, 110 Stat. 56, 153 (1996) (the Act), as amended in relevant part by the Broadband Data Improvement Act, Pub. L. No. 110-385, 122 Stat. 4096 (2008), is now codified in Title 47, Chapter 12 of the United States Code. See 47 U.S.C. § 1301 *et seq.*

⁶¹ Indeed, the Commission has long recognized that, with regard to pole attachment access, “time is of the essence.” *Local Competition Order*, 11 FCC Rcd at 16102, para. 1224.

⁶² 47 U.S.C. § 224(b)(1); 47 U.S.C. § 224(f)(1).

⁶³ See, e.g., 47 C.F.R. § 1.1403(b) (requiring utilities to respond to applications within 45 days by either granting access to poles or confirming the denial in writing by the 45th day); *Kansas City Cable Partners d/b/a Time Warner Cable Of Kansas City v. Kansas City Power & Light Co.*, File Nos. PA 99-001, PA-99-002, Consolidated Order, 14 FCC Rcd 11599, 11607, paras. 20-21 (Enf. Bur. 1999) (holding that “because of the lengthy delay that Time Warner has already suffered, which is preventing Time Warner from providing upgraded services to its customers, we believe it is necessary to order KCPL to grant the applications and proceed with the make-ready and change-out work”).

Other statutory “just and reasonable” requirements likewise have been interpreted to preclude unreasonable delay. See, e.g., 47 C.F.R. § 51.305(a)(4) (inquiry into whether interconnection is “just” and “reasonable” includes “the time within which the incumbent LEC provides such interconnection”); *Core v. Verizon*, File No. EB-01-MD-007, Memorandum Opinion and Order, 18 FCC Rcd 7962, 7975-76, 7978, paras. 32-33, 41 (2003) (finding that Verizon failed to interconnect with Core in a timely manner, and thus violated the section 251(c)(2) obligation to interconnect on rates, terms, and conditions that are just and reasonable); *American Network, Inc., Petition for Declaratory Ruling Concerning Backbilling of Access Charges*, Memorandum Opinion and Order, 4 FCC Rcd 550, 552 at para. 19 (Com. Carr. Bur. 1989), petition for recon. denied, 4 FCC Rcd 8797 (1989) (stating that “[a] delay of (continued. . .)

the importance of timely access to poles.⁶⁴ We thus hold that, pursuant to section 224 of the Act, the duty to proceed in a timely manner applies to the entirety of the pole attachment process. Make-ready or other pole access delays not warranted by the circumstances thus are unjust and unreasonable under section 224.

18. Section 224 also provides for the adoption of rules to carry out its provisions, and we seek comment in the Notice below regarding a proposed comprehensive timeline for each step of the pole access process.⁶⁵ We clarify, however, that utilities must perform make-ready promptly and efficiently, consistent with evaluation of capacity, safety, reliability, and generally applicable engineering practices, whether or not a specific rule applies to an aspect of the make-ready process.⁶⁶

IV. FURTHER NOTICE OF PROPOSED RULEMAKING

19. In this Further Notice, we seek comment on how to improve access to essential infrastructure, and expedite the build-out of affordable broadband services as well as telecommunications and cable services.⁶⁷ We propose a specific timeline for all wired pole attachment requests (including fiber or other wired attachments by wireless carriers), and seek comment on the timeline and exceptions or refinements, as well as the development of a timeline for the attachment of wireless facilities.

20. We also propose rules allowing the use of contract workers in certain circumstances, and propose reforming our access dispute-resolution process consistent with the aims of the National Broadband Plan. We seek comment on these reforms, and other ways to speed the availability of broadband by making it easier and less expensive for telecommunications and cable companies to use existing infrastructure.⁶⁸ We also seek to establish rental rates for pole attachments that are as low and close to uniform as possible, consistent with section 224 of the Act, and we seek comment on proposals to accomplish this goal.

A. The Need for a Revised Approach

21. When the Commission implemented the pole attachment access provisions of the 1996 Act, it decided not to adopt comprehensive access rules but rather to rely on negotiation and, where

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much less than 24 months between the rendering of service and the receipt of an initial bill for such service may be an unjust and unreasonable practice for purposes of Section 201(b) of the Act”); *MCI Telecommunications Corp. v. FCC*, 627 F.2d 322, 340 (D.C. Cir. 1980) (“[The Communications Act] assumes that rates will be finally decided within a reasonable time encompassing months, occasionally a year or two, but not several years or a decade. The standard of ‘just and reasonable’ rates is subverted when the delay continues for several years”).

⁶⁴ See, e.g., National Broadband Plan at 129 (citing assertions from an attacher that “the most significant obstacle to the deployment of fiber transport is FiberNet’s inability to obtain access to pole attachments in a timely manner”); *id.* at 130 (noting the importance of accurate information about poles “if there is to be a timely and efficient process for accessing and utilizing this important infrastructure”).

⁶⁵ 47 U.S.C. § 224(b)(2).

⁶⁶ 47 U.S.C. § 224(b)(1); 47 U.S.C. § 224(f)(2); *Local Competition Order*, 11 FCC Rcd at 16080-81, paras. 1175-77.

⁶⁷ Section 224 of the Act requires utilities to provide nondiscriminatory access to a “cable television system” or a “telecommunications carrier.” 47 U.S.C. § 224(f)(1). Although we discuss the benefits of pole attachment access for the deployment of broadband, we do not alter the statutory rights regarding what type of entities have a statutory right to pole attachments under section 224.

⁶⁸ See 47 U.S.C. §§ 224(f)(1) (the attachers’ right of access) and (f)(2) (the utilities’ right to deny attachment where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes).

needed, case-specific adjudication to resolve disputes over access terms and conditions.⁶⁹ The Commission stated that it would monitor the effect of this approach and propose specific rules if needed.⁷⁰

22. Experience since the *Local Competition Order* has not met the Commission's expectation that "swift and specific enforcement procedures"⁷¹ would satisfy the need for timely access to pole attachments. This enforcement process has not always led to clear standards, due to the incentives to reach negotiated settlements as well as the fact-intensive nature of many disputes. Going forward, we intend to rely in part on new, broadly applicable rules to ensure that terms and conditions of access to pole attachments are just, reasonable, and nondiscriminatory,⁷² as well as a continued reliance on an improved enforcement regime. We explain our reasons for this reassessment below.

23. We continue to endorse negotiated agreements, and to recommend mediation to parties that reach an impasse.⁷³ When a complaint is filed, negotiated agreement remains the quickest and least burdensome way for parties to resolve disputed terms of access. Settlement satisfies the criteria of speed and individual analysis, but has one significant drawback: it establishes no precedent for others to follow.⁷⁴ On the other hand, fully adjudicated pole attachment complaints establish precedent but can be lengthy and expensive, which may deter parties from pursuing some cases. Moreover, current remedies are largely prospective, and also may act to deter the pursuit of legitimate claims.⁷⁵ Further, some issues appear to remain subject to dispute even when formal complaints lead to controlling precedents. For example, disputes regarding the use of "boxing"⁷⁶ and drop poles⁷⁷ have been resolved through adjudication, but remain contentious. Finally, even when a precedent is established and acknowledged, the result may seem unwise to parties that had no say in the case, yet are bound by the result.⁷⁸

⁶⁹ *Local Competition Order*, 11 FCC Rcd at 16067-68, para 1143 (deciding to rely on case-specific resolution); see generally *Local Competition Order* at 16056-107, paras. 1123-1240 (addressing the right to non-discriminatory access under 47 U.S.C. § 224(f)).

⁷⁰ *Local Competition Order*, 11 FCC Rcd at 16067-68, para 1143.

⁷¹ *Local Competition Order*, 11 FCC Rcd at 16101-02, para. 1224.

⁷² The term "pole attachments" comprises ducts, conduit, and rights-of way except when a narrower meaning is clear in context, e.g., wireless carriers do not attach "pole-top" facilities to underground conduit. If the term appears ambiguous, and is not clarified in the text, the full statutory meaning applies.

⁷³ The Enforcement Bureau offers to mediate disputes over pole attachments access, among others, as a public service.

⁷⁴ National Broadband Plan at 112.

⁷⁵ See 47 C.F.R. § 1.1410 (limiting remedies for pole attachment complaints to termination of an unjust rate, term, or condition; substitution of a rate, term, or condition established by the Commission; and order of a refund, or payment, if appropriate); see also *infra* Section [enforcement-remedies].

⁷⁶ See *Salsgiver*, 22 FCC Rcd at 20543, para. 21.

⁷⁷ See *Mile Hi Cable Partners et al. v. Public Serv. Co. of Colorado*, File No. PA 98-003, Order, 15 FCC Rcd 11450, 11460 at para. 17 (Cab. Servs. Bur. 2000) (*Mile Hi Order*) (describing a service "drop" as an adjunct to the main communications line that connects a subscriber to the distribution network, and a "drop pole" as the pole used to support the service drop when needed to maintain ground clearances or to cross a road).

⁷⁸ See, e.g., Oncor Comments at 17 (maintaining that current penalty limits leave unlawful attachers in no worse position than if they complied); Empire Comments at 3 (arguing that current penalty limits make non-compliance a rational decision); NREC Reply Comments at 17 (stating that current penalty limits create perverse incentive not to comply with attachment procedures); Letter from Eric B. Langley and J. Russell Campbell, Counsel for Tampa (continued....)

24. For these reasons, we propose specific rules regarding access to pole attachments. We also propose to reform our pole attachment complaint rules to ensure that the enforcement process is suited to resolving access-related complaints and is fair to all parties.⁷⁹ We intend the rules we propose to clarify application of the “just and reasonable” and “nondiscrimination” legal requirements to terms and conditions of access. For the same reasons the Commission gave in 1996, we do not propose to adopt or endorse national engineering standards, however.⁸⁰ We also reaffirm that “no single set of rules can take into account all of the issues that can arise in the context of a single installation or attachment.”⁸¹ Nothing we propose alters the reliance utilities may place on the NESC and similar codes, or supplants or modifies regulations by FERC and OSHA.⁸² State and local requirements affecting pole attachments remain entitled to deference unless they are in direct conflict with a federal policy.⁸³ Individual utilities will continue to make pole-by-pole determinations regarding capacity, safety, reliability, and generally applicable engineering purposes.⁸⁴

B. Improving Access to Pole Attachments

1. Make-Ready Timeline

25. As discussed above, timely action by all the relevant participants in the pole attachment process is important to ensure just and reasonable access to poles.⁸⁵ Although we make clear that the statute mandates timely access to poles, consistent with the recommendation of the National Broadband Plan, we believe that a comprehensive timeline is appropriate to help ensure this obligation is satisfied.

26. In particular, the timing for obtaining access to poles can vary widely, with delays impacting not only communications providers’ ability to serve particular customers,⁸⁶ but even their

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Electric Company et al., to Marlene Dortch, Secretary, FCC, WC Docket No. 07-245 at 7-8 & n.26 (filed Apr. 13, 2007).

⁷⁹ See 47 C.F.R. §§ 1.1401-1418 (The Commission’s rules Part 1, Subpart J, Pole Attachment Complaint Procedures).

⁸⁰ *Local Competition Order*, 11 FCC Rcd at 16070-71, para. 1149 (stating that “[u]niversally accepted codes such as the NESC do not attempt to prescribe specific requirements applicable to each attachment request and neither shall we”).

⁸¹ *Local Competition Order*, 11 FCC Rcd at 16068, para. 1145.

⁸² *Local Competition Order*, 11 FCC Rcd at 16071-72, paras. 1151-52.

⁸³ *Local Competition Order*, 11 FCC Rcd at 16072-73, para. 1154.

⁸⁴ Indeed, all decisions adopted in the *Local Competition Order* and subsequent Commission decisions remain fully in force unless and until expressly modified. See, e.g., *Local Competition Order*, 11 FCC Rcd at 16083, para. 1182.

⁸⁵ See *supra* Section III.B (holding that just and reasonable access includes timely completion of make-ready).

⁸⁶ For example, KDL cites instances where a KDL wholesale customer “cannot provide requested Gigabyte Ethernet WAN networks to three Kentucky school districts because KDL has been unable to get the pole access necessary to complete construction of the necessary fiber network.” Letter from Kelley A. Shields, Counsel for Fibertech and Kentucky Data Link, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, RM-11293, RM-11303, Attach. at 1 (filed Jan. 7, 2010). KDL cites another example in Virginia, where “KDL has been working since February 2008 to build the network necessary to provide a WAN network for a school district, and is still waiting for the pole owner to complete make ready work. As a result of this delay, the school district has not been able to conduct standardized testing online as it had hoped and planned to do.” *Id.* In addition, KDL observes that another wholesale customer “planned to provide broadband to eleven rural communities in Indiana by 2007, and secured a loan from the United States Department of Agriculture Rural Utility Service to fund this deployment. As a result of make ready delays, only three of those eleven communities’ networks have been built (a fourth is currently (continued....))

decision whether to serve a particular market at all.⁸⁷ And although communications providers cite examples of utilities that provide swift access to poles,⁸⁸ there is evidence of many other examples of significant delays—in some cases multiple years.⁸⁹ Further, a survey of utilities indicates that while, in most cases, utilities meet their obligation to approve or deny a request for pole access within 45 days,⁹⁰ the performance of make-ready work can take 60-90 days in 27 percent of cases, and more than 90 days in 31 percent of cases.⁹¹ Based on this evidence, our timeline below, which proposes a 45-day deadline

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underway).” *Id.* Other commenters cite an instance where a “utility failed to perform the make-ready work necessary to allow the provider to construct its plant on a timely basis, claiming that the utility lacked sufficient resources to meet the requested timetable. When the provider could not meet the customer’s delivery date nor provide a reasonable estimate of a later delivery date, because of the utility’s refusal to provide timetables or perform the work, the customer contacted the utility directly to attempt to obtain that information. The utility instead contracted directly with the customer and, using the utility’s crews, quickly constructed the necessary fiber in the power space and leased it to the customer directly. The utility apparently had no trouble finding the resources to support the customer once it took over the account.” Letter from Andrew D. Lipman et al., Counsel for 360networks et al., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, RM11293, RM-11303, Attach. at 5 (filed. Sept. 19, 2008).

⁸⁷ See, e.g., Sunesys Comments at 9 (Sunesys “has determined that it is not economically feasible to compete in Delaware” in light of make-ready costs and delays by the utility).

⁸⁸ See, e.g., Sunesys Comments at 14 (citing examples of utilities that provide access to poles within three months of receiving an application); segTEL Comments, RM-11303, at 5 (filed Jan. 30, 2006) (citing an example of a utility that provides access on average 60 days from the time of the application); TWTC Reply Comments, RM-11303, Jarvis Decl. at para. 4 (filed Mar. 1, 2006) (citing an example of a utility that generally provides access within 120 days of receiving an application).

⁸⁹ See, e.g., Letter from Brita D. Strandberg, Counsel for Fibertech Networks, Inc. and Kentucky Data Link, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, GC Docket Nos. 09-29, 09-51, RM-11209, RM-11303, Attach. at 1 (filed Sept. 2, 2009) (citing an example of 6 months to provide make-ready estimates in Kentucky, with the start of make-ready work delayed “months” after payment of make-ready costs); *id.*, Attach. at 2 (citing a providers’ experience that it takes an average of 270 days to complete the pole licensing process in Montgomery county, Maryland); Letter from Andrew D. Lipman et al., Counsel for 360networks et al., to Marlene H. Dortch, Secretary, FCC, Docket No. 07-245, RM11293, RM-11303, Attach. at 7 (filed. Sept. 19, 2008) (“Comments describe delays reaching 12 months, 15 months, 16 months, 3 years and 4 years”); Sunesys Comments at 14 (citing examples of some utilities that take over 15 months to provide pole access, with another taking 4 years); Knology Comments at 21 (citing an instance where a make-ready project took “several years” for completion); TWTC Comments, Exh. A. (of 45 Time Warner Telecom pole applications to Verizon at the time, 13 were still pending, and six delays to “receive letter of make ready completion” were 240, 217, 215, 134, 115, and 108 days); segTEL Comments, RM-11303, at 5 (filed Jan. 30, 2006) (citing a utility dealing with “applications for as few as 40 pole attachments at a time, tolerates a backlog of applications that have been pending for more than 500 days, even after segTEL has paid in full for make-ready work”); TWTC Reply Comments, RM-11303, Jarvis Decl. at para. 5 (filed Dec. 7, 2005) (citing an example of a utility that “often approves applications within 30 days, but it does not schedule or perform make-ready work with the same expedience. Scheduling the make-ready alone can take months or even years.”).

⁹⁰ UTC Comments, App. at 12-13 (a 2007 survey of utilities revealed that “approximately 19% of all applications on average take longer than 45 days to process”).

⁹¹ *Id.*, App. at 17.

for completing make-ready work, appears to have the potential to speed pole access more than 50 percent of the time, and to cut average make-ready time in half (or better) in approximately 30 percent of cases.⁹²

a. Background

27. Currently, Commission rules require that a utility provide a response to an application within 45 days, but do not otherwise address the duration of the process for obtaining access to poles.⁹³ Some attachers have requested that the Commission adopt a timeline governing the other aspects of the pole access process.⁹⁴ The National Broadband Plan similarly recommends that “[t]he FCC should establish a comprehensive timeline for each step of the Section 224 access process.”⁹⁵ Both commenters and the National Broadband Plan recommend that any Commission-imposed timeline be informed by the experience of states that are implementing pole access timelines.⁹⁶

28. Of the 20 states that have certified to regulating pole attachments,⁹⁷ at least five have imposed or are in the process of imposing mandatory timeframes governing aspects of the make-ready process.⁹⁸ For example, New Hampshire recently adopted comprehensive regulations addressing pole

⁹² We note, however, that we seek comment below on the appropriate scope of the proposed timeline, and thus any timeline ultimately adopted might not encompass the identical set of make-ready scenarios included in the survey data.

⁹³ 47 C.F.R. 1.1403 (b),

⁹⁴ See, e.g., Fibertech Petition; see also *Pole Attachment Notice*, 22 FCC Rcd at 20210-11, 20214, paras. 37, 47.

⁹⁵ National Broadband Plan at 111.

⁹⁶ See, e.g., National Broadband Plan at 111 (Recommendation 6.3) (observing that “[s]everal states, including Connecticut and New York, have established firm timelines for the entire process, from the day that a prospective attacher files an application, to the issuance of a permit indicating that all make-ready work has been completed”); Letter from Thomas B. Magee, Counsel for Coalition of Concerned Utilities, to Marlene Dortch, Secretary, FCC, WC Docket Nos. 07-245, 09-154, GN Docket Nos. 09-29, 09-51 (filed Dec. 10, 2009) (citing as “more reasonable” the New Hampshire timeline); Sunesys Comments, GN Docket No. 09-51 at 10-11 (filed June 8, 2009) (describing timelines in New York and Connecticut); Letter from Edison Electric Institute and Utilities Telecom Council to Marlene Dortch, Secretary, FCC, WC Docket No. 07-245, RM-11293, RM-11303, at 8 (filed Apr. 16, 2009) (EELUTC Apr. 16, 2009 *Ex Parte* Letter) (arguing that “in Utah, a 120-day make-ready [timeline] may represent a better balance” than other proposed timelines); Letter from Thomas Magee, Counsel for the Coalition of Concerned Utilities, to Marlene Dortch, Secretary, FCC, WC Docket No. 07-245 at 8-9 (filed May 1, 2009) (Coalition of Concerned Utilities May 1, 2009 *Ex Parte* Letter) (citing Vermont as having “established more reasonable deadlines”); Fibertech Petition at 19 (praising New York’s then-recent timeline).

⁹⁷ *Corrected List Of States That Have Certified That They Regulate Pole Attachments*, WC Docket No. 07-245, Public Notice, 23 FCC Rcd 4878 (Wireline Comp. Bur. 2008).

⁹⁸ See Utah Admin. Code § R746-345-3 (Utah Pole Attachment Rules); Rules and Orders of the Vermont Public Service Board, Rules Applicable to More than One Type of Utility at 3.700: Pole Attachments, at 3.708. Applications for Attachment and Make-ready Work (Vermont Pole Attachment Rules); Case 03-M-0432 – Proceeding on Motion of the Commission Concerning Certain Pole Attachment Issues, *Order Adopting Policy Statement on Pole Attachments*, at 3, (NY PSC Aug. 6, 2004) (New York Order); Filing of Adopted Rules, Puc 1300 Utility Pole Attachments, Final Proposal No, 2009-79, Commission Docket No. DRM 0&-004, New Hampshire Public Utilities Commission (New Hampshire Order); *Re The State’s Public Service Company Utility Pole Make-Ready Procedures - Phase I*, Docket No. 07-02-13 (CT Dept. of Pub. Util. Control, Apr. 30, 2008) (Connecticut Order); *Oxford Networks f/k/a Oxford County Telephone Request for Commission Investigation into Verizon’s Practices and Acts Regarding Access to Utility Poles*, Maine Public Utilities Commission, Order on Reconsideration, Docket No. 2005-486 (Feb. 28, 2007) (Maine Order on Reconsideration).

attachments.⁹⁹ Connecticut includes shorter time limits for small jobs, although its timeline is not yet fully implemented.¹⁰⁰ Both Utah and Vermont have adopted timelines that include deadlines for both surveys and make-ready completion that vary depending on the size of the request.¹⁰¹ New York's timeline, which has been in use since 2004, sets specific deadlines for the survey, the estimate, acceptance, payment, and make-ready performance, and the use of contractors,¹⁰² as well as rules regarding the application process, schedules of charges, and expedited dispute resolution.¹⁰³

b. A Comprehensive Timeline for Section 224 Access

29. We propose a comprehensive timeline for the make-ready process, as recommended in the National Broadband Plan. We begin the process of establishing a federal timeline that covers each step of the pole attachment process, from application to issuance of the final permit.¹⁰⁴ We further believe that the federal timeline should be comprehensive and applicable to all forms of communications attachments. We also propose that we should adopt a timeline covering the process of certifying wireless equipment for attachment.¹⁰⁵ The record before the Commission includes many examples of delay in make-ready work in states without make-ready timelines, in contrast to evidence of more expedited deployment in those states that have adopted timelines.¹⁰⁶ To provide predictability and regularity for the deployment of broadband, telecommunications, and cable infrastructure, we support the adoption of a pragmatic timeline. We discuss the details of the proposed timeline in the section below.

30. In considering a timeline, we are unpersuaded by generalized assertions that the potential for resource diversion renders the establishment of an objective timeframe to be necessarily infeasible.¹⁰⁷ We recognize the challenges that introducing a timeline can create, and in particular the critical role that infrastructure personnel play in maintaining and restoring electric and telecommunications service. However, section 224 imposes a responsibility on utilities to provide just and reasonable access to any pole, duct, conduit, or right-of-way owned or controlled by it, in addition to preserving their ability to

⁹⁹ See N.H. Code Admin. R. Ch. Puc 1300 (adopted Dec. 2009).

¹⁰⁰ See Connecticut Order at section III.B.4.c

¹⁰¹ Utah Pole Attachment Rules at C. 1-4.; Vermont Pole Attachment Rules at 3.708.

¹⁰² New York Order at 3.

¹⁰³ See New York Order, App. A, at 2 (applications), 4-5 (schedule of charges), and 14 (expedited dispute resolution).

¹⁰⁴ National Broadband Plan at 111.

¹⁰⁵ *Id.*

¹⁰⁶ See, e.g., *supra* note 89. See also National Broadband Plan at 111 n.21 (citing examples by KDL and Fibertech).

¹⁰⁷ For example, some commenters argue that the imposition of an "artificial" deadline ignores the realities of utility operations and, among other shortcomings, would be practically impossible for many utilities to meet. Coalition of Concerned Utilities May 1, 2009 *Ex Parte* Letter at 5. In particular, some utilities argue that timelines interfere with their primary mission to deliver electric service and ignore or disrupt the utility's maintenance schedule. See, e.g., Coalition of Concerned Utilities Comments at 84-86 (maintaining that deadlines do not allow for how much work the utility already is doing, or has committed to do and that access requests should not come before the needs of the utility); PacifiCorp et al. Comments at 29 (arguing against mandatory response times because utilities' first priority must always be to supply electric power to customers on the grid); FPL et al. Comments at 5 (arguing against time limits that would interfere with its ability to meet customers' needs, which is its first priority). Utilities also raise a variety of other circumstances that they claim render timely performance outside of their control, including weather; coordination of electric interruptions; municipal permitting. See Coalition of Concerned Utilities May 1, 2009 *Ex Parte* Letter at 6.

deliver their traditional services.¹⁰⁸ We therefore are skeptical of the ‘zero-sum’ view that some commenters seem to take with respect to the resources devoted to pole attachments and regular maintenance.¹⁰⁹ To the extent utilities or other commenters assert that they are unable to satisfy these requirements, we ask commenters to provide further detail. Are utilities unable to hire enough workers to perform timely surveys and make-ready, and to ramp up their operations to meet demand? Inasmuch as they are unable to perform pole attachments as needed without impeding their provision of electric service, why is this so? Are these issues really a claim of insufficient cost recovery, rather than inability to provide make-ready work in a timely fashion? The fact that other states have successfully introduced timelines supports our proposal. To the extent the imposition of these timelines have raised issues of safety or unsound engineering, we seek specific comment identifying those instances.

c. A Proposed Five-Stage Timeline for Wired Pole Attachment

31. We propose adopting a specific five-stage timeline to govern the pole attachment process for wired attachments.¹¹⁰ The National Broadband Plan identifies New York and Connecticut as states where a timeline speeds the process considerably,¹¹¹ and we agree with many of the commenters that assert that these state timelines appear to have expedited facilities deployment.¹¹² To further the goals of the National Broadband Plan, we propose to adopt the timeline outlined below, consisting of the following five stages: (1) survey; (2) estimate; (3) attacher acceptance; (4) performance; and, if needed, (5) multiparty coordination.

32. The timeline we propose today comprises elements of our existing rules, the New York timeline, and the Coalition Proposal.¹¹³ Unlike the variable deadlines that apply in Utah and Vermont,¹¹⁴ New York’s 45-day survey deadline accords with our current 45-day response rule and thus leaves undisturbed the current practices and expectations that arise during the first 45 days after a request for

¹⁰⁸ 47 U.S.C. § 224(f)(1).

¹⁰⁹ See, e.g., EEI/UTC Comments, RM-11303, at 8 (filed Feb. 1, 2006) (maintaining that the practical effect of Fibertech’s proposal would require electric utilities to give telecommunications or cable television attachments priority over electric utility attachments); PacifiCorp et al. Comments at 29 (“Electric utilities deploy their crews in accordance with the needs of the electric grid, and their primary public service obligations. Their priorities should be set by their core business—supplying safe and reliable electric service to the public—and not by the commercial desires of companies wishing to install communications equipment on utility property.”).

¹¹⁰ For these proposed timelines, we draw a distinction based on the type of facility being attached by a provider of telecommunications services or cable system operator (such as a fiber-optic cable versus a wireless antenna). We do this because, although some providers of telecommunications services may predominantly provide wireless services, the pole attachments they seek may be the typical wired attachments, such as fiber-optic cable, for which there is no reason justifying different treatment. Accordingly, the proposed timeline would apply to all wired attachments and is not intended to be limited to traditional wireline carriers or cable system operators. See *infra* Section IV.B.1.e for discussion of timelines for the attachment of wireless equipment.

¹¹¹ National Broadband Plan at 111. The National Broadband Plan estimates that make-ready in New York is complete 105 days after receipt of a request for access. *Id.* at 111 n.22.

¹¹² See, e.g., Fibertech/KDL Comments at 21-24; NextG Comments at 21.

¹¹³ See 47 C.F.R. § 1.1403. The Coalition of Concerned Utilities opposes a comprehensive timeline covering request through the issuance of a permit. However, they submit a “Compromise Access Proposal” that would establish timeframes for certain aspects of “Non-Complex Make-ready” work. Letter from Thomas Magee and Jack Richards, Counsel for the Coalition of Concerned Utilities, WC Docket Nos. 07-245, 09-145, GN Docket Nos. 09-29, 09-51, at Attach. 2 (filed Oct. 7, 2009).

¹¹⁴ See Utah Pole Attachment Rules at 1-4; Vermont Pole Attachment Rules at C. and E.

access.¹¹⁵ We also incorporate aspects of the Coalition Proposal that accord with the New York timeline, as well as the Coalition Proposal request to exclude from this timeline pole replacement and attachment of wireless equipment.¹¹⁶ Although we propose a specific timeline, we leave open the possibility of incorporating into our rules other elements of the state timelines if warranted by the record.

33. The five-step timeline we propose retains the current 45-day deadline for utilities to respond in detail to requests for attachment.¹¹⁷ A utility would tender an estimate of charges to perform any make-ready work no later than 14 days after completing the initial survey and engineering assessment. That estimate would expire 14 days later unless the applicant accepts it and makes payment. Payment would trigger performance of make-ready, which in normal circumstances should be completed within 45 days.¹¹⁸ If existing attachers fail to move their facilities as directed by the utility, the timeline would allow the utility an additional 30 days to complete the project. Depending how long the applicant reviews the estimate, and whether the existing attachers complete their work in a timely manner, make-ready should be complete within a 105 to 149 day window after the utility receives a complete application for access. As noted above, we do not propose at this time to apply this timeline to make-ready for wireless equipment or pole replacement.

34. We describe below the five stages of the proposed timeline, and the proposed length of each stage. We seek comment both on the appropriateness of breaking down make-ready into five stages, as well as the length of each stage.

35. *Stage 1 - Survey: 45 Days.* As current rules dictate, a request for access continues to trigger a 45 day period for the utility to respond. We propose that, as the first stage of our timeline, we should retain existing Commission rule 1.1403(b). A “request for access” is a complete application that provides the utility with the information necessary to begin to survey the poles. The current rule gives utilities 45 days to provide a written explanation of evidence and information for denying the request for reasons of lack of capacity, safety, reliability or engineering standards.¹¹⁹ The rule is functionally identical to a requirement for a survey and engineering analysis when applied to wired facilities, and is generally understood by utilities as such.¹²⁰ For reasons we discuss below, the rule remains applicable to

¹¹⁵ Compare the New York Timeline at 3 (45 days for surveys) with the Coalition Proposal (45 days for surveys; size of requests limited) and with 47 C.F.R. § 1.1403(b) (45 days for explanation of relevant evidence and information supporting denial, if access is not granted).

¹¹⁶ We seek comment below on whether this timeline, or some variation, is appropriate for wireless attachments. See *infra* section IV.B.1.e.

¹¹⁷ 47 C.F.R. § 1403(b).

¹¹⁸ 47 C.F.R. § 1403(c).

¹¹⁹ 47 C.F.R. § 1.1403(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 the denial in writing by the 45th day. The utility's denial of access shall be specific, shall include all relevant evidence and information supporting its denial, and shall explain how such evidence and information relate to a denial of access for reasons of lack of capacity, safety, reliability or engineering standards.

¹²⁰ See, e.g., UTC Comments, Attach. at 12 (UTC Attach.) (“Under the FCC rules, an application must be approved or denied in writing within 45 days from the date that it is filed with the utility. The typical process involves reviewing the proposal for completeness, conducting a field survey, conducting an engineering analysis (load and clearance), estimating make-ready and construction costs, submitting the estimate to the applicant and approving the attachment.”). No party of record disputes that a “denial” of access also encompasses partial or conditional grants of access, and grants of access that are contingent on make-ready.

wireless facilities, but could apply in a somewhat different manner.¹²¹ A 45-day survey limit accords with the time allowed for surveys in New York, Connecticut, and the Coalition Proposal, as well as the current rule.¹²²

36. We propose that all requests for attachment be included in the timeframe for the survey stage, even where the request ultimately indicates a lack of capacity. We note that the Eleventh Circuit has held that utilities are not obligated by statute to replace poles that are full to capacity.¹²³ In addition, pole replacement may take significantly longer than make-ready on existing poles.¹²⁴ Any right the owner has to refuse to install a new pole, and other questions about timing, however, do not affect the applicant's right to know whether the owner considers pole replacement necessary.

37. We also seek comment on whether we should clarify what constitutes a sufficient request to trigger the timeline. Utilities state that application errors cause them to miss deadlines,¹²⁵ and New York has adopted specific rules governing the application process. We seek comment on whether we should adopt similar regulations, or leave the details of the application process in the hands of individual parties.¹²⁶ We also seek comment on whether timing should be adjusted when an application that appears complete includes errors that delay the survey. Should significant errors justify stopping the clock? Should it matter whether the errors reflect lack of due care by the applicant, or lack of information that the utility could have provided?

38. *Stage 2 - Estimate: 14 Days.* We propose that, as the second stage in our pole access timeline, a utility must tender an estimate of its charges to perform any make-ready work within 14 days

¹²¹ See *infra* Section IV.B.1.e.

¹²² New York Order at 3; *Re The State's Public Service Company Utility Pole Make-Ready Procedures - Phase I*, Docket No. 07-02-13 (CT Dept. of Pub. Util. Control, Apr. 30, 2008) (Connecticut Order) (stating that Verizon's current policy requires a 45-day time interval to provide make-ready estimates). The Coalition proposes that application of the 45-day limit should apply for routes of less than 10 miles when the total number of pole attachments from all attachers within a 30 day period do not exceed 600.

¹²³ *Southern Company*, 293 F.3d at 1338 (holding the Commission's requirement that utilities replace poles on a nondiscriminatory basis to be incompatible with the plain meaning of "lack of capacity" as used in section 224(f)(2) of the Act).

¹²⁴ segTEL Comments at 4, citing *Exhibit A. Oxford Networks f/k/a Oxford County Telephone Request for Commission Investigation into Verizon's Practices and Acts Regarding Access to Utility Poles, Maine Public Utilities Commission*, Order, Docket No. 2005-486 (Oct. 26, 2006); *Oxford Networks f/k/a Oxford County Telephone Request for Commission Investigation into Verizon's Practices and Acts Regarding Access to Utility Poles, Maine Public Utilities Commission*, Order on Reconsideration, Docket No. 2005-486 (Feb. 28, 2007) (contrasting Maine's 180-day timeframe when poles must be replaced with Maine's 90-day timeframe for make-ready without pole replacement).

¹²⁵ UTC Attach. at 13.

¹²⁶ New York Order, App. A at 2.

Applications for pole attachment licenses shall be processed by the utility pole owner within five business days of receipt. All applications shall be reviewed promptly by the pole Owners for completeness, in order to avoid miscommunications and delay. Applicants shall be notified promptly of any deficiencies. If required information is missing, the clock will not start for the pole attachment process, provided the information is reasonably available to the Attacher. If the Owner cannot review the application within five business days and give a date to the Attacher for beginning the preconstruction survey because of multiple applications, the applicant must be contacted within the five business days and a proposed alternate schedule worked out between the parties.

after completing the survey. Both the New York timeline and the Coalition Proposal include a similar deadline,¹²⁷ and we propose that such a timeframe is reasonable. Although utilities commonly provide an estimate with the survey and engineering analysis,¹²⁸ an estimate of charges is not clearly required under the current 45-day response rule.¹²⁹ We propose a deadline for estimates that is separate from the survey in order to permit a utility to separate the engineering analysis from its estimation of charges, and to permit the attacher time to examine and consider the engineering assessment before it reviews an invoice.

39. *Stage 3 - Acceptance: 14 Days.* We propose that, as the third stage in our timeline, the applicant should have 14 days to accept the tendered estimate, consistent with New York's practice.¹³⁰ We consider it unreasonable to require a utility to commit indefinitely to its make-ready proposal and estimate of charges, and believe that imposing this time limit on prospective attachers will provide additional certainty. Limiting review also meets our intention that the timeline should be comprehensive, and address each phase of the process. The applicant may accept the estimate sooner, and need not wait 14 days before accepting or rejecting it.

40. *Stage 4 - Performance: 45 Days.* We propose that, as the fourth stage in our timeline, payment by the applicant should trigger a 45-day period for the completion of make-ready work, consistent with the approach in New York and Connecticut. Given the experience in New York and Connecticut, we find 45 days to be a reasonable time period for the actual performance of make-ready work. To implement this approach, we propose that, when it receives payment, a utility must notify immediately all entities whose existing attachments may be affected by the project. We further propose that notification must include a reminder that those attachers have 45 days to move, rearrange, or remove any facilities as needed to perform the make-ready work and that, if they fail to do so, the utility or its agents, or the new attacher, using authorized contractors, may move or remove any facilities that impede performance of make-ready, consistent with the fifth stage of the timeline, discussed below.¹³¹

41. Moreover, we propose that the obligation to complete make-ready work in this timeframe extend not only to the utility, but also to existing attachers. Existing Commission rules already impose obligations on attachers in certain circumstances,¹³² and, as the National Broadband Plan recognized,

¹²⁷ New York Order at 3 (14 day limit); Coalition Proposal (15 day limit).

¹²⁸ UTC Attach. at 12.

¹²⁹ 47 C.F.R. § 1.1403(b).

¹³⁰ New York Order at 3 ("Attachers have 14 days from receipt of the estimate to accept and pay for the make-ready work.").

¹³¹ As described below, the proposed timeline is consistent with current Commission rules requiring that a "utility shall provide [an existing cable or telecommunications carrier attacher] 60 days written notice prior to [removing or modifying] facilities," because the utility will not actually remove or modify such attachers' existing attachers' facilities until immediately after the 60th day. 47 C.F.R. § 1.1403(c). Under our rules, these existing attachers have 15 days in which to file a request for a temporary stay, but we anticipate that existing attachers will cooperate in rearrangement of their facilities. See 47 C.F.R. § 1.1403(d), formerly 47 C.F.R. § 1.1403(b); *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, CC Docket No. 78-144, First Report and Order, 68 FCC 2d 1585, para. 8 (1978) (*Pole Attachments First Report and Order*) (petitions for temporary stay must be filed a minimum of 45 days in advance of modification likely to cause irreparable harm and likely cessation of service, and indicate unlawful nature of change); *Local Competition Order* 11 FCC Rcd at 16102, para. 1225 (doubting that stays or other equitable relief will be granted in the absence of a specific showing, beyond the *prima facie* case, that such relief is warranted).

¹³² See, e.g., 47 C.F.R. § 1.1403(e) (requiring cable attachers to notify pole owners when they begin offering telecommunications services); 47 C.F.R. § 1.1404(i) (before filing a complaint, attachers have an obligation to attempt to discuss resolution of disputes with the pole owner, unless they believe it would be fruitless to do so); 47 (continued....)

“[d]elays can also result from existing attachers’ action (or inaction) to move equipment to accommodate a new attacher, potentially a competitor” and thus “reform must address the obligations of existing attachers as well as the pole owner.”¹³³ Utilities also contend that existing attachers cause delays and have little incentive to cooperate, especially if the applicant will be a competitor, and this constrains their ability to provide timely pole access to new attachers.¹³⁴ We seek comment with regard to this assertion, as well as the incentive and ability of other attachers on a pole to discriminate against a new attacher. We invite comment on alternative or additional policies that could ensure the cooperation needed as part of the make-ready process.

42. By contrast, we note that the Coalition Proposal would not adopt a specific number of days for completion of relevant make-ready work, instead proposing to perform such work “in a manner that does not discriminate in favor of the utility’s own needs or customer work.”¹³⁵ We seek comment on what metrics and data would be needed to evaluate compliance with such an approach, and how it would be reported or otherwise made available.¹³⁶ We also seek comment on the balance reflected in the Coalition Proposal in this regard between attachers’ interests in timely, predictable pole access and pole owners’ interests in ensuring safety, reliability, and sound engineering.

(Continued from previous page) _____

C.F.R. § 1.1416(b) (existing attacher must share in the cost of any modifications to a pole if, after having been given notice of the modification, it adds to or modifies its attachment).

¹³³ National Broadband Plan at 129 (citing Letter from Joseph R. Lawhon, Counsel for Georgia Power Co., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, GN Docket Nos. 09-29, 09-51 (filed Nov. 17, 2009) Attach. B (noting one example covering 294 poles in Georgia in which the electric utility completed its work within 55 days but in which the process of coordinating with existing attachers took an additional 5 months)).

¹³⁴ FPL et al. Comments at 19-21 (citing other attachers as cause of make-ready delays); FPL et al. Reply Comments at 11-12 (arguing that delay caused by failure of other attachers to move, and that 60-day notice rule delays work, interferes with timeline); Coalition of Concerned Utilities Comments 73-74 (stating that utilities must often perform work that attachers are supposed to perform); EEI/UTC Comments 39-41 (attachers ignore 60-day notice, which creates a safety hazard and is unfair to other attachers, but the utility has no authority to force competing providers to coordinate the necessary transfer of wires). However, some utilities report that certain local exchange carriers strongly prefer to use their own employees to transfer facilities, and may be bound by collective bargaining agreements to use their own workers to handle certain facilities. AT&T Reply Comments at 40, n.114 (agreements with certain unions may impede their ability to respond to request for access); Coalition of Concerned Utilities Comments at 88 (arguing agreements with unions must be honored to preserve working relationship).

¹³⁵ Coalition Proposal at 1.

¹³⁶ For example, in the context of Bell Operating Company (BOC) applications for authority to offer in-region interLATA service, state commissions often adopted a number of performance metrics, accompanied by reporting, and penalties for failure to meet the relevant standards (such as parity between its affiliate and wholesale customers). *See, e.g., Performance Measurements and Standards for Unbundled Network Elements and Interconnection, et al.*, Notice of Proposed Rulemaking, 16 FCC Rcd 20641, 20649, para. 15 (2001) (“We recognize that many state commissions have already adopted an extensive set of performance measurements, standards, and penalty plans to capture incumbent LECs’ performance in provisioning UNEs, interconnection trunks and collocation. For example, . . . in the context of section 271 proceedings, many states have developed measurements and standards to evaluate the extent to which the BOCs have opened their local markets to competition.”). *See also, e.g., Application by SBC Communications Inc., Southwestern Bell Tel. Co., and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Texas*, Memorandum Opinion and Order, 15 FCC Rcd 18354 (2000) (discussing Texas metrics); *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, 15 FCC Rcd 3953 (1999) (discussing New York metrics).

43. *Stage 5 – Multiparty Coordination: 30 Days.* We propose that the fifth stage of our timeline—if needed—will provide time for any coordination and make-ready work required in the event that some existing attachers fail to move their facilities as directed by the utility. We note that incumbent LECs typically occupy more space on a pole than other communications attachers and, due to their location on a pole, often must be the first to move their communications attachments as part of the make-ready process. And while current Commission rules provide that attachments by a cable operator or non-incumbent LEC telecommunications carrier may not be moved by the utility until 60 days have passed, that rule does not govern attachments by incumbent LECs.¹³⁷ Thus, after 45 days, the utility or its agent may move incumbent LEC attachments as needed and, after 60 days, may act independently of other existing attachers to finish the project.¹³⁸

44. Consequently, it is reasonable to allow extra time for the utility or its agent to complete the make-ready with a free hand.¹³⁹ Given that the utility will have surveyed the poles and coordinated rearrangement, and, after 60 days, may act independently of other existing attachers, we consider 30 days after the 45th day a reasonable extension of time to undertake any coordination or planning required to finish the project.¹⁴⁰ We seek comment on this proposal.

45. In addition to defining a default timeline, we recognize the need to define certain exceptions or limitations in appropriate circumstances. We seek comment on those issues below.

d. Adjustments to the Timeline for the Number of Pole Attachment Requests

46. As noted above, many of the state timelines have modifications or limitations based on factors such as the number of pole attachments requested. In addition, we recognize the potential need to address utilities' concerns about possible operational or logistical challenges or the need to respond to factors outside their control. Thus, we seek comment on any necessary adjustments or exclusions from the timeline proposed above.

¹³⁷ See 47 C.F.R. § 1.1403(c). Non-incumbent LEC attachers will retain the right to move their own attachments until the expiration of this 60-day period.

¹³⁸ Although some commenters contend that we lack authority over incumbent LEC pole attachments under section 224, their arguments appear to focus on the Commission's ability to regulate the rates, terms, and conditions under which other utilities provide incumbent LECs access to their poles, rather than suggesting that the Commission lacks authority to regulate the rearrangement of pole attachments of incumbent LECs. See, e.g., Letter from Sean B. Cunningham, Counsel for AEP et al., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, WC Docket No. 09-154, GN Docket No. 09-51, at 2 (filed May 5, 2010) (AEP May 5, 2010 Ex Parte Letter); Letter from Sean B. Cunningham, Counsel for AEP et al., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, WC Docket No. 09-154, GN Docket No. 09-51 (filed May 12, 2010); EEI/UTC Comments at 99-104. We note that our pole attachment regulations have encompassed incumbent LEC attachments in other contexts, and we believe that we have legal authority to adopt the requirements proposed above. See, e.g., *1998 Implementation Order*, 13 FCC Rcd at 6802, para. 50 (holding that incumbent LECs are attaching entities for purposes of allocating costs of unusable space). We seek comment below on other issues relating to regulation of incumbent LEC attachments. See *supra* Part IV.D.5.

¹³⁹ EEI/UTC maintains the utility has no authority to move attachments but cites no authority for this proposition. EEI/UTC Comments 39-41 (attachers ignore 60-day notice, which creates a safety hazard and is unfair to other attachers, but the utility has no authority to force competing providers to coordinate the necessary transfer of wires). The Commission's rule 1.1403(c) authorizes utilities to move attachments after 60 days, and permits utilities to move attachments in emergencies and for routine maintenance without notice.

¹⁴⁰ Compare 75 days (45-day performance deadline, plus 30 days of extra time) with 45 day limit in New York and Connecticut.

47. *Size of Request.* We seek comment on whether requests for access to a particularly large number of poles should be excepted from our timeline, or subject to an alternative timeline. Requests for access vary widely, and we seek comment on how best to incorporate the size or complexity of requests into our rules. Utah and Vermont adjust the duration of the survey and performance deadlines for both the size of the job and size of the utility. Utah divides requests for attachment into four categories: (1) up to 20 poles; (2) 21 to 300 poles, or up to .5 percent of the owner's poles in Utah; (3) 300 to 3,000 poles, or 5 percent of the owner's poles in Utah, up to 3,000 poles; and (4) requests that exceed 3,000 poles or 5 percent of the owner's poles in Utah, which are negotiated individually.¹⁴¹ At each step, the lower outcome of the absolute number or percentage test applies.¹⁴² Vermont staggers the timeline solely according to the percentage of the owner's poles where attachment is requested, which it divides at .5 percent, 3 percent, and 5 percent; any request that exceeds 5% of the owner's poles must be negotiated individually.¹⁴³ Similarly, New York requires applicants to give advance notice of "significant" attachment requests.¹⁴⁴

48. We seek comment on the merits and effectiveness of the states' timeline adjustments or notice requirements as modifications to the proposed federal timeline described above. Utah and Vermont's approach has the virtue of calibrating the timeline to fit both the size of the request and the size of the utility, but implementation depends upon access to data that may not currently be readily available for utilities nationally. Should utilities below a certain size have the option of sorting attachment requests into categories determined by a percentage of the utility's in-state poles, and adjusting the timeline accordingly? If so, how should we define a large, medium, and small request, and what timeframe would be appropriate for each level? Should small utilities negotiate all timelines individually? Alternatively, should the timeline apply to small utilities for requests up to a certain size, with any larger requests subject to individual negotiation?

49. Providing access on a rolling basis, or capping the number of attachments in a given time period, might provide an alternative approach to modifying the proposed timeline to accommodate larger jobs. The Coalition Proposal would limit any individual request to 250 poles, with pole access requests limited to 600 attachments in any one month.¹⁴⁵ Utah considers a request to attach to more than 300 poles a large request, and counts all requests from any particular prospective attacher within a calendar month as one application.¹⁴⁶ Regarding surveys, UTC reports that, on average, approximately 19 percent of all requests take longer than 45 days to process and, of that number, the reason for 30 percent of missed deadlines was the size of the project.¹⁴⁷ We seek comment regarding whether, and if so, how, the reasonable size of a request would fit the timeline that we propose. We also ask whether that size should be adjusted for small utilities, and, if so, what thresholds are appropriate.

¹⁴¹ See Utah Pole Attachment Rules at 1-4.

¹⁴² See Utah Pole Attachment Rules at 1-4.

¹⁴³ See Vermont Pole Attachment Rules at C and E.

¹⁴⁴ See New York Order, App. A at 1.

¹⁴⁵ See Coalition Proposal at 1.

¹⁴⁶ See Utah Pole Attachment Rules:

All applications by a potential attacher within a given calendar month shall be counted as a single application for the purposes of calculating the response time to complete the make-ready estimate for the pole owner. The due date for a response to all applications within the calendar month shall be calculated from the date of the last application during that month.

¹⁴⁷ UTC Attach. at 12-13.

50. Just as some requests might prove too large for the timeline to accommodate, some attachers might seek faster action on smaller requests. Connecticut accelerates the deadline when an applicant requests access to four or fewer attachments.¹⁴⁸ Utah distinguishes access requests for 20 poles or less.¹⁴⁹ Should we adopt an alternative timeline for small requests, and, if so, how many poles should count as a small request and what deadlines should apply? Commenters should consider whether some deadlines may be easier to scale back than others, and address the concern that a utility that can act quickly alone may not be able to induce other attachers to act quickly in concert. Section 224 requires that the utility give existing attachers a “reasonable opportunity” to modify their attachments.¹⁵⁰ What notice would be appropriate in the context of particular small jobs?

51. *Stopping the Clock.* We acknowledge that circumstances beyond a utility’s control may require prioritization, or otherwise warrant interrupting the timeline. In New York, “circumstances beyond the owner’s control, other than resource problems, will excuse meeting the timetable. Non-payment of charges will also stop the clock for meeting timetables.”¹⁵¹ In Vermont, the clock stops for extraordinary circumstances or reasons beyond the pole owner’s control.¹⁵² We invite comment with regard to stopping and restarting the clock. Are guidelines necessary or helpful? What type of communication or notice between parties is expected? If so, what potential disputes would guidelines resolve, and should guidelines be specific or general? We would expect the utility to return to the timeline as soon as circumstances permit, which will generally be the same point that the utility resumes normal operation, and to keep all interested parties reasonably informed.

e. Wireless Attachment Timeline Issues

52. We also solicit comment on developing timelines for section 224 access other than wired pole attachments. First, we seek comment on whether the wired pole attachment timeline is appropriate for wireless equipment.¹⁵³ Utilities assert that wireless attachment presents different safety, reliability, and engineering concerns¹⁵⁴ because wireless equipment varies widely; is often placed in or near the

¹⁴⁸ Connecticut Order at 18:

“[T]he Department concludes that in those cases when the pole attachment application has no make-ready work activities or has four or less utility pole attachments, the time interval should be reduced considerably via either the make-ready estimate or make-ready work processes. Specifically, the Department expects that the total time interval be reduced from 90 days to between 30 and 50 days depending upon the circumstances. The working group should work out the details on this issue.”

¹⁴⁹ See Utah Pole Attachment Rules at 1-4.

¹⁵⁰ 47 U.S.C. § 224(h).

¹⁵¹ New York Order at 8.

¹⁵² See Vermont Pole Attachment Rules, Article VII (L), Second Revised Sheet 55a (“The [utility] will complete Make-Ready Work within the following time frames, except for reasons beyond the Company’s control”).

¹⁵³ We affirm the right of wireless telecommunications carriers to attach pursuant to section 224, and their right to attachment of fiber or other wired facilities is the same as other telecommunications carriers. See *supra* note 110.

¹⁵⁴ See, e.g., FPL et al. Comments at 16-17 (arguing that communications facilities in the power supply space would endanger utility employees and third party workers; would require additional safety precautions, and increase wind loading); Alabama Power et al. Comments at 34 (maintaining that pole top attachments could increase customer outages due to lightning and wind, and may emit a hazardous RF signal); EEI/UTC Comments at 25 (distinguishing wireless facilities from ordinary cable and telephone wires including power supplies and antennas; maintaining that wireless facilities emit hazardous RF levels, and citing lack of workers trained to work with wireless equipment and interference with pole maintenance).

electric lines; and requires a power source.¹⁵⁵ The current rule requiring a response to pole access requests within 45 days applies in full to utilities that receive requests by wireless carriers, however. We clarify that, where a utility has no master agreement with a carrier for wireless attachments requested, such as pole top attachments, the utility may satisfy the requirement to respond with a written explanation of its concerns with regard to capacity, safety, reliability, or engineering standards. We seek comment on whether we should require that the response be sufficiently detailed to serve as a basis for negotiating a master agreement, which would dictate a timely process for future attachments.¹⁵⁶

53. We seek comment on considerations that would affect a timeline tailored to suit requests for attachment of wireless equipment after a utility and the carrier have reached a master agreement.¹⁵⁷ Attachment of wireless equipment may complicate engineering analyses, but may also avoid the multiparty notice and coordination issues that characterize rearrangement of wired facilities. Also, wireless carriers using a distributed antenna system (DAS) attach to relatively few poles compared to cable operators and wireline carriers that attach to every pole that their network passes. Should a timeline for requests for wireless equipment reflect these circumstances, and if so how? We particularly ask utilities that have permitted wireless equipment to be installed on their poles to report their experience, and to describe their typical timeframes for meeting wireless attachment requests. For example, PCIA and the DAS Forum submitted a “sample” pole attachment agreement used by Verizon New York Inc., permitting attachments including “antennas, transceivers, amplifiers, cables, and all associated equipment and hardware.”¹⁵⁸ Our goal is to bring regularity and predictability to attachment of wireless facilities while acknowledging that the attachment of wireless telecommunications equipment in or near the electric space may raise different safety, reliability, and engineering concerns.

f. Other Section 224 Timeline Issues

54. Section 224 provides that, when an owner intends to modify a pole, the owner shall provide both written notification to “any entity that has obtained an attachment” and a “reasonable opportunity to add to or modify its existing attachment.”¹⁵⁹ The record suggests that modification may be required during make-ready when, for example, a pole that has been grandfathered to a prior standard must be brought into compliance with current standards when a new attachment is added.¹⁶⁰ Similarly, a utility may have been unaware of a safety violation until make-ready is performed. Does the proposed

¹⁵⁵ See, e.g., Letter from Thomas B. Magee and Jack Richards, Counsel for Coalition of Concerned Utilities, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 07-245, 09-154, GN Docket Nos. 09-29, 09-51, at 4 (filed Oct. 7, 2009) (utilities need considerable time to evaluate safety and feasibility of proposed wireless attachment configurations in electric space); see also New York Public Service Commission, Proceeding on Motion of the Commission Concerning Wireless Facility Attachments to Utility Distribution Poles, Case 07-M-0741 (June 27, 2007).

¹⁵⁶ Letter from Jack Richards, Counsel for Coalition of Concerned Utilities, to Julius Genachowski, Chairman, FCC, WC Docket Nos. 07-245, 09-154, GN Docket Nos. 09-29, 09-51 (filed Feb. 26, 2010) (listing concerns that must be addressed during negotiations of a first agreement).

¹⁵⁷ See, e.g., T-Mobile Comments at 5 (urging the Commission to establish wireless-specific access requirements).

¹⁵⁸ Letter from Michael D. Sapperstein, Jr., Director of Gov’t Affairs, PCIA—The Wireless Infrastructure Association, to Marlene H. Dortch, Secretary, FCC (filed Apr. 19, 2010), Attach. B at 3.

¹⁵⁹ 47 U.S.C. § 224(h).

¹⁶⁰ See, e.g., Sunesys Comments at 8-9 (maintaining that the utility, and not the attacher, should pay for work performed to place the pole in compliance with applicable laws); Time Warner Cable Reply Comments at 43 (contending that violations alleged by utility may be unreasonable interpretations of safety code requirements or grandfathering).

timeline provide adequate time for utilities to implement this obligation? The definition of “pole attachment” in section 224(a)(4) includes attachments to a pole, duct, conduit, or right-of-way.¹⁶¹ The record compiled in this proceeding almost exclusively addresses issues of attachments to poles.¹⁶² Beyond timeline issues for access to poles, we seek comment on whether to implement this timeline for access to section 224 ducts, conduits, and rights-of-way owned or controlled by a utility. Has delayed access to infrastructure other than poles impeded the deployment of broadband or other services? If so, should the proposed pole attachment timeline set forth above be applied to requests for access to other infrastructure, or are modifications or other considerations needed?

2. Use of Outside Contractors

55. Attachers frequently seek the ability to use independent contractors to deploy their facilities when the utility fails to perform survey and make-ready work in a timely manner.¹⁶³ The National Broadband Plan recommends rules that allow attachers to use independent, utility-approved and certified contractors to perform engineering assessments and communications make-ready work, as well as independent surveys.¹⁶⁴ In defining how and when attachers may employ contractors in response to that recommendation, we first delineate between: (a) survey and make-ready work; and (b) the actual attachment of facilities. As a general matter, we believe it is appropriate to allow greater utility control over the former by permitting utilities to require the use of pre-approved contractors for this work, but continuing a less restrictive approach, originally established in 1996, for the latter. We also distinguish between electric utilities and incumbent LECs regarding the level of control that each may exercise over an attacher’s use of independent contractors.

a. Background

56. The Commission previously has addressed aspects of attachers’ rights to use independent contractors. In the *Local Competition Order*, the Commission “agree[d] that utilities should be able to require that only properly trained persons work in the proximity of the utilities’ lines,” but held that “we will not require parties seeking to make attachments to use the individual employees or contractors hired or pre-designated by the utility.”¹⁶⁵ Rather, “[a] utility may require that individuals who will work in the proximity of electric lines have the same qualifications, in terms of training, as the utility’s own workers, but the party seeking access will be able to use any individual workers who meet these criteria.”¹⁶⁶ The Commission reasoned that “[a]llowing a utility to dictate that only specific employees or contractors be used would impede the access that Congress sought to bestow on telecommunications providers and cable operators and would inevitably lead to disputes over rates to be paid to the workers.”¹⁶⁷

¹⁶¹ 47 U.S.C. § 224(a)(4).

¹⁶² We note that Fibertech raised an issue with access to incumbent LEC conduit for building access. *See* Fibertech Petition at 35-36.

¹⁶³ *See, e.g.*, Fibertech Petition at 18-21 (including praise for the New York Commission’s requirement that entitles applicants for attachment to hire contractors from a utility-approved list if the utility cannot or will not meet survey and make-ready deadlines); Alpheus and 360networks Comments at 3; segTEL Comments at 7-8; Sunesys Comments at 13; TWTC Reply Comments at 23; *but see* TWTC Comments at 17 (maintaining that utilities often require cable operators to pay \$100 a pole (or more) for the utility’s hiring of contractors to conduct pre-attachment inspections).

¹⁶⁴ National Broadband Plan at 111 (Recommendation 6.2).

¹⁶⁵ *Local Competition Order*, 11 FCC Rcd at 16083, para. 1182.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*