

57. On reconsideration, the Commission reaffirmed this approach.¹⁶⁸ Because it recognized “that utilities’ requirements with respect to qualifications and training of individuals working in proximity to utility facilities flow from such codes and requirements as the NESC and OSHA . . . [but that some] utilities have training programs and qualifications that are more strict than the NESC or OSHA would require,” the Commission declined to “adopt rules with respect to minimum skills and performance requirements for technicians or that parties provide minimum insurance for risks.”¹⁶⁹

b. Basic Right to Use Contractors

58. We note that although the *Local Competition Order* established a general principle that attachers may rely upon independent contractors, that order did not differentiate between two different types of work: (a) surveys and make-ready; and (b) post-make-ready attachment of lines. As a result, there have been ongoing disagreements regarding the ability of attachers to use contractors to perform survey and make-ready work under existing law.¹⁷⁰ As discussed below, addressing these issues in greater detail here we propose to clarify and revise this approach in several respects in the context of surveys and make-ready to reflect utilities’ concerns regarding safety, reliability, and sound engineering. We also find differing approaches warranted for incumbent LEC pole owners as compared to other pole owners.

59. In particular, with respect to surveys and communications make-ready work, we propose that: attachers may use contractors to perform surveys and make-ready work if a utility has failed to perform its obligations within the timeline,¹⁷¹ or as otherwise agreed to by the utility.¹⁷² As discussed above, we propose a pole access timeline based in significant part on the approach taken in New York. Within that regulatory framework, the New York Commission gives utilities the option of using their own workers to do the requested work, or to hire outside contractors themselves, or to allow attachers to hire approved outside contractors.¹⁷³ Under our proposed approach, utilities likewise would be entitled to rely

¹⁶⁸ *Local Competition Reconsideration Order*, 14 FCC Rcd at 18079, para. 86.

¹⁶⁹ *Id.* at 18079, para. 87.

¹⁷⁰ *Compare, e.g.*, EEL/UTC Apr. 16, 2009 *Ex Parte* Letter at 11 (Stating that “[e]lectric utilities generally do not allow attaching entities to perform their own make-ready”); EEL/UTC Comments at 87 (“Requiring utilities to allow third-party surveys and make-ready work would go far beyond current Commission rules requiring utilities to allow qualified third party workers to make attachments. Such a requirement would inappropriately allow contractors greater discretion than is currently given to third-party workers making attachments and could adversely affect critical infrastructure.”) *with* PacifiCorp et al. Comments at 30 (arguing that the Commission should not require use of third-party contractors for field surveys and electric make-ready, but stating that “[t]he FCC has already determined that qualified third-party contractors should be permitted to conduct make-ready associated with communications facilities.”) *with* Fibertech/KDL Comments at 25 (arguing that the Commission should require “[p]ole and conduit owners . . . to allow competitors to hire utility-approved contractors to perform field surveys, make-ready determinations, and make-ready work if the owner cannot or will not meet the relevant legal deadlines” which “is consistent with and codifies existing Commission policy”).

¹⁷¹ *See supra* Section IV.B.1.c.

¹⁷² For example, while the Commission has not mandated the use of multi-party contractors for make-ready work, it can be an efficient means to accomplish make-ready work, and parties are encouraged to consider that option. *See, e.g., Petition of Cavalier Telephone, LLC Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc. and for Arbitration*, WC Docket No. 02-359, Memorandum Opinion and Order, 18 FCC Rcd 25887, 25963-65, paras. 140-43 (Wir. Comp. Bur. 2003).

¹⁷³ *See* New York Order at 3 “[I]t is reasonable to require the utilities either to have an adequate number of their own workers available to do the requested work, to hire outside contractors themselves to do the work, or to allow (continued....)

on their own personnel unless they are unable to complete work within the timeline. If the utility decides to deploy its workforce on other projects or otherwise is unable to meet a deadline, the prospective attachers would be free to use contractors that are approved and certified by the utility. We seek comment on this general approach, including the relative benefits of preserving greater control for utilities as compared to potential time- or cost-savings that attachers might obtain if they have appropriate contractors available and ready to do make-ready work.

60. With respect to actual attachment of facilities to poles, we propose to retain our existing rules. The make-ready process is designed to address the utilities' safety, reliability and engineering concerns prior to a new attachment. So when that process is complete and facilities are ready to be attached, the utility's concerns are less pressing, and an attacher's interest in rolling out properly permitted facilities is proportionately larger. Therefore, for the post-make-ready attachment of facilities, we retain the existing standard of "same qualifications, in terms of training, as the utilities' own workers," and continue to deny utilities the right to predesignate or co-direct an attacher's chosen contractor.¹⁷⁴ We seek comment on this proposal, as well as other alternatives.

c. Approval and certification of contract workers

61. With respect to electric utilities and other non-incumbent LEC pole owners, we propose that: to perform surveys or make-ready work attachers may use contractors that a utility has approved and certified for purposes of performing such work. This is consistent with the approach of the New York Commission—cited approvingly by some attachers—which 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.¹⁷⁵ A number of utilities express concern that the safety and reliability of their poles may be jeopardized by independent contractors.¹⁷⁶ Crucial judgments about safety, capacity, and engineering are made during surveys and make-ready, and we find the utilities' concerns reasonable.¹⁷⁷ We think that permitting such utilities to decide which contractors it will approve and certify for surveys and make-ready addresses the need that utilities maintain control over safety and engineering standards, although we seek comment on alternative approaches, as well.

62. Although we propose to allow electric utilities and other non-incumbent LEC pole owners to pre-approve the contractors they will permit to perform surveys and make-ready, we do not think their discretion should be unbounded, and we propose the following requirements. First, we

(Continued from previous page) _____

Attachers to hire approved outside contractors." See also Fibertech Petition at 19 (endorsing New York's requirement).

¹⁷⁴ See *Local Competition Order*, 11 FCC Rcd at 16083, para. 1182 (holding that properly trained persons not hired or pre-designated by the utility may work in proximity of the utilities' lines); *Local Competition Reconsideration Order*, 14 FCC Rcd at 18079, para. 86-87 (reiterating that utilities must permit use of contract workers with same qualifications, in terms of training, as the utilities' own workers to work in proximity of electric lines).

¹⁷⁵ Fibertech Petition at 19-20 (citing New York Order at 3).

¹⁷⁶ See, e.g., PacifiCorp et al. Comments at 31 (maintaining that attachers are highly motivated to install facilities as quickly as possible to commence service and put speed before safety); Coalition of Concerned Utilities May 1, 2009 *Ex Parte* Letter at 10 (contending attachers are motivated by speed and not safety).

¹⁷⁷ One pole owner, Qwest, agrees that existing law requires utilities to permit prospective attachers to use contractors to complete field surveys and make-ready work, and states that it permits attachers to hire contractors that have demonstrated the requisite qualifications to perform both field surveys and make-ready. Qwest Comments, RM-11303, at 5-6 (filed Jan. 30, 2006). Qwest's view is reasonable, but the *Local Competition Order* standard—requiring utilities to permit the use of contractors with the same qualifications, in terms of training, as the utility's own workers—is open to interpretation, and leaves important questions unaddressed.

propose to require such utilities to post or otherwise share with attachers a list of approved- and certified contractors, including any contractors that the utility itself uses. Second, we propose to require each such utility to post or otherwise share with attachers the standards it uses to evaluate contractors for approval and certification and require the nondiscriminatory application of those standards. Under our proposal, these utilities may design their requirements as they see fit, by, for example, setting training standards, approving training manuals, or otherwise clarifying their requirements.

63. We believe that these requirements are minimally burdensome and are sufficient to prevent a utility from artificially limiting the list of approved contractors. We are unpersuaded by contentions from certain utilities that our decisions on outside contractors will lead to resource diversion of non-employee “resources,” undercutting their ability to deliver traditional services.¹⁷⁸ We emphasize that nothing in this proposal affects a utility’s control of its employees. We are aware of the need to balance the work of infrastructure personnel, but we are also mindful that section 224 imposes obligations on utilities that may require accommodations and adjustments. We seek further comment on the staffing issues, especially regarding the utilities’ rights to the time and attention of contractors. We invite comment concerning whether the proposed requirements are necessary, appropriate, and sufficient for their purpose.

64. We seek comment on this proposal, including whether it strikes the right balance of rights and burdens of attachers and utilities, and any implementation issues the Commission should address. For example, if no list is provided, or if one is not available when the application is filed, should the existing “same qualifications” standard apply by default? We also seek comment on whether any additional criteria are warranted. For example, should this list contain a minimum number of contractors to ensure ready availability of contractors if make-ready work is needed? Should the list automatically include any contractors previously used by the utility for its own purposes? Should there be a presumption that contractors that are approved and certified by a utility (or multiple utilities) other than the pole owner be acceptable for make-ready work?

65. We take a different approach with respect to incumbent LECs, and propose that: to perform surveys or make-ready work attachers may use any contractor that has the “same qualifications, in terms of training, as the utilities own workers.”¹⁷⁹ As discussed above, in the *Local Competition Order*, 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”¹⁸⁰ We view these risks as heightened in the context of incumbent LEC utility poles, where the new attacher typically will be a competitor of the incumbent LEC. Thus, the balancing of safety concerns and protection for attachers differs from the context of electric utility-owned poles, and leads us to propose an approach that grants greater flexibility to attachers. We seek comment on this approach, however, including whether the same approach should be used for all types of pole owners.

¹⁷⁸ See *supra* para. 30. See, e.g., Florida IOUs Comments at 21.

¹⁷⁹ See *Local Competition Order*, 11 FCC Rcd at 16083, para. 1182 (holding that properly trained persons not hired or pre-designated by the utility may work in proximity of the utilities’ lines); *Local Competition Reconsideration Order*, 14 FCC Rcd at 18079, para. 86-87 (reiterating that utilities must permit use of contract works with same qualifications, in terms of training, as the utilities own workers to work in proximity of electric lines).

¹⁸⁰ *Id.*

d. Direction and Supervision of Outside Contractors

66. We propose that, for surveys and make-ready work, utilities and prospective attachers may jointly direct and supervise contractors.¹⁸¹ As with approval and certification of contract workers, we propose a differing approach for incumbent LEC pole owners and other pole owners. And in the context of actual attachment of facilities to poles, we do not propose any affirmative right for utilities to jointly direct and supervise contractors.

67. For electric utilities and other non-incumbent LEC pole owners, we propose that: attachers performing surveys and make-ready work using contractors shall invite representatives of the utility to accompany the contract workers, and should mutually agree regarding the amount of notice to the utility. We further propose that, whenever possible, both parties' engineers should seek to find mutually satisfactory solutions to conflicting opinions, but when differences are irreconcilable, the pole owners' representative may exercise final authority to make all judgments that relate directly to insufficient capacity or safety, reliability, and sound engineering, subject to any otherwise-applicable dispute resolution process.¹⁸² We find persuasive two arguments that electric utilities advance: first, that section 224 entrusts them with the responsible management of facilities that are both essential and potentially hazardous;¹⁸³ and second, that communications attachers wish to roll out service as quickly as possible, and consequently do not have the same incentives to maintain the safety and reliability of the infrastructure as utilities themselves would.¹⁸⁴ We see no conflict between the use of contractors as outlined above and the electric utilities' safety and engineering concerns.¹⁸⁵ Nor do we see a conflict with the attachers' desire to use independent contractors. Use of contractors is an appropriate tool to facilitate timely deployment of facilities only when it does not circumvent or diminish the electric utilities' vital role in maintaining the safety, reliability, and sound engineering of the pole infrastructure.

68. In the case of incumbent LEC-owned poles, we propose that: attachers performing surveys and make-ready work using contractors shall invite a representative of the incumbent LEC to accompany and observe the contractor, but the incumbent LEC shall not have final decision-making

¹⁸¹ The National Broadband Plan recommends that contractors should be able to "perform all engineering assessments and communications make-ready work, as well as independent surveys, *under the joint direction and supervision of the pole owner and the new attacher.*" National Broadband Plan at 129 (emphasis added).

¹⁸² See *infra* Section IV.C discussing recommended changes to the Commission's pole attachment enforcement process.

¹⁸³ See, e.g., Alabama Power et al. Comments at 32 (maintaining that utilities seek to retain their statutory right to deny access for reasons of safety, reliability, insufficient capacity, and engineering concerns); Ameren and Virginia Electric Comments at 12 (stating that The Pole Attachments Act provides to pole owners the right to deny access to attaching entities for reasons of safety, reliability and engineering and citing 47 U.S.C. § 224(f)(2)).

¹⁸⁴ See, e.g., EEI/UTC Comments at 38 (maintaining that cable systems and telecommunications carriers care more about quick deployment of attachments than electric safety and reliability); PacifiCorp et al. Comments at 30 (stating that the incentive of an attacher is to have its equipment installed as cheaply and as quickly as possible, which is often incompatible with prudent electric engineering practice).

¹⁸⁵ See, e.g., Alabama Power et al. Comments at 32 (maintaining that utilities seek to retain their statutory right to deny access for reasons of safety, reliability, insufficient capacity, and engineering concerns); Ameren and Virginia Electric Comments at 12 (observing that section 224 provides pole owners the right to deny access to attaching entities for reasons of safety, reliability and engineering and citing 47 U.S.C. § 224(f)(2)); EEI/UTC Comments at 38 (maintaining that cable systems and telecommunications carriers care more about quick deployment of attachments than electric safety and reliability); PacifiCorp et al. Comments at 30 (stating that the incentive of an attacher is to have its equipment installed as cheaply and as quickly as possible, which is often incompatible with prudent electric engineering practice).

power. In the majority of cases, electric power companies and other non-incumbent LECs are typically disinterested parties with only the best interest of the infrastructure at heart; incumbent LECs may make no such claim. In contrast to the vast majority of electric utilities or similar pole owners, as discussed above, incumbent LECs are usually in direct competition with at least one of the new attachers's services, and the incumbent LEC may have strong incentives to frustrate and delay attachment. To allow an incumbent LEC a veto over contractors would provide them with an undue ability to act on that incentive. We believe that our proposal faithfully implements the intent of the statute by balancing the statutory rights of attachment with the statutory obligation to establish and implement just and reasonable terms and conditions of attachment.¹⁸⁶ We also seek comment on alternatives, however, including whether incumbent LECs have other legal responsibilities or obligations under joint use agreements that could counsel in favor of a different approach.

e. Working Among the Electrical Lines

69. We further propose that all utilities may deny access by contractors to work among the electric lines, except where the contractor has special communications-equipment related training or skills that the utility cannot duplicate.¹⁸⁷ In so doing, we clarify that “proximity of electric lines”¹⁸⁸ extends into the safety space between the communications and electrical wires but, not among the lines themselves. The Commission concluded in the *Local Competition Order* that “[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.”¹⁸⁹ Safety, reliability, and engineering concerns are strongest regarding work among energized power lines,¹⁹⁰ and the National Broadband Plan calls for the use of independent contractors to perform “engineering assessments and *communications* make-ready work.”¹⁹¹ In any event, the word “proximity” is ambiguous, and could mean either “up to the electric lines” or “among the electric lines.” We think the former is the more reasonable choice and we believe it is appropriate to remove this ambiguity from our rules. Thus, we propose that, generally, attachers and their contractors may be limited to the communications space and safety space below the electric space on a pole. However, we

¹⁸⁶ 47 U.S.C. §§ 224(b)(1) and (2), (f)(2). We note that section 224(f)(2) gives electric utilities, but not incumbent LECs, specific additional bases to object to an attachment. 47 U.S.C. § 224(f)(2).

¹⁸⁷ Generally, attachments on a pole, from the bottom-up, include traditional communications attachments (including space for attachments by incumbent LECs, cable service providers, and other telecommunications service providers), followed by several feet of safety space separating the communications space from the upper space on a pole, traditionally used for the attachment of energized electrical lines. We do not imply in this discussion that this space is reserved for the use of electric utilities. See, e.g., *Wireless Telecommunications Bureau Reminds Utility Pole Owners of Their Obligations to Provide Wireless Telecommunications Providers with Access to Utility Poles at Reasonable Rates*, 19 FCC Rcd 24930 (Wireless Tel. Bur. 2004); Letter from Jack Richards, Counsel for Allegheny Power et al., to Kevin Martin, Chairman, FCC, WC Docket No. 07-245 (filed June 3, 2008), Attach. 2 (visually depicting the spaces typically allocated on a utility pole).

¹⁸⁸ See *Local Competition Order*, 11 FCC Rcd at 16083, para. 1182 (holding that properly trained persons not hired or pre-designated by the utility may work in proximity of the utilities’ lines); *Local Competition Reconsideration Order*, 14 FCC Rcd at 18079, para. 86-87 (reiterating that utilities must permit use of contract workers with same qualifications, in terms of training, as the utilities’ own workers to work in proximity of electric lines).

¹⁸⁹ See *Local Competition Reconsideration Order*, 14 FCC Rcd at 18079, para. 86-87.

¹⁹⁰ See Coalition of Concerned Utilities May 1, 2009 *Ex Parte* Letter at 9 (arguing that the *Local Competition Order* enables attachers to hire contractors to move communications facilities that are in proximity to electric lines, not to move the energized electric lines themselves, which must be controlled by electric utility pole owners).

¹⁹¹ National Broadband Plan at 111 (emphasis added).

propose that utilities must permit contract personnel with specialized communications-equipment training or skills that the utility cannot duplicate to work among the power lines, such as work with wireless antennae equipment.¹⁹² Because of the heightened safety considerations, any such work shall be performed in concert with the utility's workforce and when the utility deems it safe.¹⁹³ We seek comment on this proposal.

3. Other Options to Expedite Pole Access

70. *Payment for Make-ready Work.* In addition to adopting a formal pole access timeline, we seek to correctly align the incentives to perform make-ready work on schedule. Accordingly, we propose to adopt the Utah rule that applicants pay for make-ready work in stages, and may withhold a portion of the payment until the work is complete. In Utah, applicants trigger initiation of performance by paying one half the estimated cost; pay one quarter of the estimated cost midway through performance; and pay the remainder upon completion.¹⁹⁴ We seek comment on this proposal or alternatives, including what schedule of payment is normal in comparable circumstances in other commercial contexts. Alternatively, should we adopt a general rule permitting payment for make-ready work in stages, and leave the details of the specific payment schedule to negotiation?

71. *Schedule of Charges.* We propose that utilities shall make available to attaching entities a schedule of common make-ready charges. The National Broadband Plan recommended that the Commission "[e]stablish a schedule of charges for the most common categories of work (such as engineering assessments and pole construction)" as an additional way to lower the cost and increase the speed of the pole attachment process.¹⁹⁵ Such a schedule could provide transparency to attachers seeking to deploy their networks and could fortify the "just and reasonable" access standard for pole attachments.¹⁹⁶ We seek comment generally on the benefits and any limitations associated with requiring utilities to prepare such a schedule. Further, we ask whether and how schedules of common make-ready charges are used and implemented by utilities today. We also seek comment on any comparable state requirements. For example, we note that the New York Commission's rules require that make-ready charges be in each pole owner's operating agreement, be posted on its website, with supporting documentation available to attachers on request, and can only be changed annually with notice.¹⁹⁷ We also ask if there are other mechanisms currently in use, such as standardized contract terms, that provide the necessary information and transparency to the make-ready process, without additional government mandate. Finally, we seek comment on whether particular make-ready jobs and charges are the most common, and thus would most easily be applied to a generalized schedule of charges.

72. *Administering Pole Attachments.* We seek comment on ways to simplify the relationship between prospective attachers and utilities when there is joint ownership. The record suggests that, when a pole is jointly owned, a prospective attacher may sometimes be required to obtain permission to attach

¹⁹² We note that some utilities "do not dispute that 'owner-approved contractors' are capable of performing this work safely, including make-ready work in the power space." Florida Investor Owned Utility Comments at 21.

¹⁹³ See EEI/UTC Comments at 31 (stating that electric utility workers generally are not trained to work with wireless equipment).

¹⁹⁴ Utah Rule R746-345-3 (c)(7).

¹⁹⁵ National Broadband Plan at 111.

¹⁹⁶ Section 224(b)(1) of the Act states that "the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable." 47 U.S.C. § 224(b)(1).

¹⁹⁷ New York Order, App. A at 4-5.

from both owners.¹⁹⁸ Consolidating administrative authority in one managing utility would simplify a prospective attachers' request for access, and clarify which utility will interact with the requesting entity and existing attachers during the make-ready process. We therefore propose that, when more than one utility owns a pole, the owners must determine which of them is the managing utility for any jointly-owned pole. We further propose that requesting entities need only deal with the managing utility, and not both utilities. We also propose that both utilities should make publicly available the identity of the managing utility for any given pole, and we seek comments on these proposals. We invite comment on whether the proposed regulations are sufficient to clarify joint owners' rights and responsibilities with regard to the right of access. In addition, we seek comment on joint use agreements, and whether they may inhibit the managing owner from administering the entire pole. If the joint user is an incumbent LEC, how should we address concerns that it might not be inclined to devote its resources to providing access for a competitor? Do joint use agreements sometimes give that user a degree of "control" over access to the pole to the point that the user may have a specific duty to provide access under section 224?¹⁹⁹

73. We also seek comment regarding the managing utility's responsibility to administer the pole during the make-ready process.²⁰⁰ In particular, under section 224, an existing attacher may not be required to bear any of the costs of rearranging its attachment to make room for a new attacher.²⁰¹ As a practical matter, only the utility has privity with both the requesting entity and the existing attachers, and it appears reasonable for the utility to manage the transfer of funds. We are reluctant, however, to entrust this responsibility to the managing utility without standards or guidance. Therefore, we propose to require the utility to collect from existing attachers statements of any costs that are attributable to rearrangement; to bill the new attacher for these costs, plus any expenses the utility incurs in its role as clearinghouse, and to disburse compensatory payment to the existing attachers. We seek comment on this proposal, and any alternatives for managing this process. We also ask whether utilities require any further clarification of their role in managing the pole during the make-ready process. For example, should the managing utility schedule the sequence for attaching entities to move their facilities during make-ready?

74. *Attachment Techniques.* In the Order, we clarified that the Act requires a utility to allow cable operators and telecommunications carriers to use the same pole attachment techniques that the utility itself uses or allows.²⁰² Some commenters state, however, that even if a utility has employed such practices in the past, it should be able to prohibit boxing and bracketing for both itself and other attachers going forward.²⁰³ If a utility changes its practices over time to exclude attachment techniques such as

¹⁹⁸ See, e.g., Letter from Brita D. Standberg, Counsel for Kentucky Data Link, Inc., to Marlene Dortch, Secretary, FCC, WC Docket No. 07-245, GN Docket Nos. 09-29, 09-51 (filed Apr. 23, 2010) at 2 (describing the relationship between a municipality and a utility with regard to pole ownership and control).

¹⁹⁹ 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, duct, conduit, or right-of-way owned or *controlled* by it.") (emphasis added).

²⁰⁰ Under section 224(b)(1) and(2), the Commission has the authority to adopt rules to ensure that terms and conditions of attachment are just and reasonable, which terms and conditions include the specific right of access in section 224(f). Contrary to the claims of some commenters, we believe this provides ample authority for the Commission's proposed rules. See AEP May 5, 2010 *Ex Parte* Letter at 2 (arguing that the Commission lacks authority to require electric utilities to manage the transfer of communications facilities or otherwise function as the "traffic cop" in cases where communications attachers fail to make room for new facilities on utility poles).

²⁰¹ 47 U.S.C. § 224(i).

²⁰² See *supra* Section III.A.

²⁰³ See Coalition of Concerned Utilities May 1, 2009 *Ex Parte* Letter at 20.

boxing, to what extent would the nondiscrimination standard in the statute automatically address this, or are rules necessary? We also seek comment on how standards should apply when a pole is jointly used or owned, and on whether utilities' decisions regarding the use of boxing and bracketing should be made publicly available.

4. Improving the Availability of Data

75. We seek comment on how the Commission can improve the collection and availability of information regarding the location and availability of poles, ducts, conduits, and rights-of-way.²⁰⁴ As the National Broadband Plan points out, there are hundreds of entities that own and use this infrastructure, and accurate information about it is important for the efficient and timely deployment of advanced and competitive communications networks.²⁰⁵ Initially, we ask what data would be beneficial to maintain, such as the ownership of, location of, and attachments on a pole. Should the Commission collect these data itself, or might industry, including third-party entities, be better suited for the task? If the latter, what is the appropriate role for the Commission regarding the establishment of common standards and oversight? We also ask to what extent this information, if collected and maintained by separate entities, could or should be aggregated into a national database.

76. To gain perspective on the scope of this task, we seek comment on the number of poles for which data would need to be gathered, how long it would take to inventory them, and the cost of such an inventory. We also ask what existing methods utilities currently use, such as the National Joint Utilities Notification System (NJUNS) or Alden Systems' Joint Use services.²⁰⁶ How can we ensure participation by all relevant parties, including timely updates of information? For example, is it reasonable for a utility to require all attachers to actively use or populate a system it uses, such as NJUNS, to inventory pole attachments, perhaps as a term of the master agreement? How can we ensure that the costs are shared equitably by pole owners and other users of the data? We also seek comment on the challenges to creating and maintaining such a database, including security issues, access for prospective attachers, and the potential burden to small utilities, as well as on any additional benefits such data would have for maintaining safe and reliable infrastructure.²⁰⁷

77. We also expect that the timeline and related rules proposed above will help expedite pole access, and we propose that the Commission monitor whether those rules, if adopted, achieve the intended results. We seek comment on the most appropriate method for the Commission to use in this regard. Would the other possible improvements to the collection and availability discussed above provide a source of such information? If not, should the Commission otherwise collect such information, either formally, or through a periodic Public Notice or Notice of Inquiry? Similarly, is there other information that the Commission should collect to monitor the effectiveness of any other pole access, enforcement, or pricing rules it might adopt?

²⁰⁴ See National Broadband Plan at 112.

²⁰⁵ *Id.*

²⁰⁶ See National Joint Utilities Notification System—NJUNS, Inc., http://www.njuns.com/NJUNS_Home/default.htm (last visited Apr. 1, 2010); Letter from John T. Sciarabba, Alden Systems, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, GN Docket No. 09-51 (filed Apr. 26, 2010).

²⁰⁷ At least one commenter argues that maps of utilities' networks should not be publicly disclosed because they may contain "Critical Infrastructure Information" under the USA Patriot Act. See EEI/UTC Apr. 16, 2009 *Ex Parte* Letter at 11.

C. Improving the Enforcement Process

1. Revising Pole Attachment Dispute Resolution Procedures

78. In response to the *Pole Attachment Notice*, we received several comments suggesting that the Commission modify its procedures for resolving pole attachment complaints.²⁰⁸ In addition, the National Broadband Plan included recommendations that the Commission implement institutional changes, such as the creation of specialized forums and processes for attachment disputes, and adopt process changes to expedite dispute resolution.²⁰⁹

79. We seek comment on whether the Commission should modify its existing procedural rules governing pole attachment complaints.²¹⁰ Should the Commission adopt additional rules or procedures to address specific issues that arise with wireline or wireless attachments? Do any of the Commission's other procedural rules, such as the rules governing formal complaints under section 208 of the Act,²¹¹ or the rules governing complaints related to cable service,²¹² provide a suitable model in developing new procedural rules for pole attachment complaints? What other issues concerning dispute resolution processes should the Commission consider?

80. If the Commission were to establish specialized forums to handle pole attachment disputes, what form and structure should these forums take? Under what legal authority could the Commission authorize the formation of such forums? How would the forums be formed, managed, and funded? How should forum participants be selected? What specific expertise should staff of these forums have? What role should the Commission or Commission staff play with regard to the forums? What specific role should such forums play in the resolution of pole attachment disputes? Should the forums engage in mediation or other alternative dispute resolution mechanisms? Should the use of the forums for dispute resolution be mandatory or voluntary? Should these specialized forums issue decisions in specific cases? How could the decisions of the forums be challenged, and pursuant to what standard? Should such decisions be appealable to the Commission? What kinds of rules or procedures should govern the work of the specialized forums? How would the forum participants avoid conflicts of interest when engaging in dispute resolution processes with industry participants? Do the Transition Administrator procedures established in the *800 MHz Report and Order* provide a suitable model in developing these forums?²¹³ We invite comment.

²⁰⁸ See, e.g., PCIA Comments at 6 (suggesting use of an "expedited complaint proceeding" where a utility fails to complete make-ready work and issue pole attachment permits within specified time periods); Knology Comments at 20 (suggesting that the Commission modify the pole attachment rule governing Petitions for Temporary Stay so that they may be used in make-ready situations); T-Mobile Comments at 8-9 (proposing accelerated treatment of pole attachment disputes).

²⁰⁹ National Broadband Plan at 112.

²¹⁰ See 47 C.F.R. §§ 1.1401-1.418.

²¹¹ 47 C.F.R. §§ 1.720-1.736.

²¹² 47 C.F.R. § 76.7; see also 47 C.F.R. § 76.1003 (program access complaints).

²¹³ *Improving Public Safety Communications in the 800 MHz Band*, WT Docket No. 02-55, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order, 19 FCC Rcd 14969, 14986, para. 27 (2004) (*800 MHz Report and Order*) (creating an independent third party responsible for mediating certain spectrum reconfiguration disputes and, in the event mediation fails, compiling a record and transmitting it to the Commission for de novo review).

2. Efficient Informal Dispute Resolution Process

81. In the *Pole Attachment Notice*, we noted that the Commission has encouraged parties to participate in staff-supervised, informal dispute resolution processes and that these processes have been successful in resolving pole attachment matters.²¹⁴ If parties are able informally to agree to a resolution of their problems, they can avoid the time and expense attendant to formal litigation. Some attachment disputes may be more quickly or cost-effectively resolved by the companies involved themselves or through other local dispute resolution processes outside the Commission's auspices.²¹⁵ We seek comment on whether the Commission should attempt to encourage this type of local dispute resolution with a set of "best practices," or in other ways.²¹⁶ If the Commission were to develop a set of best practices, what would the likely impact be on the process compared with how disputes are resolved today? Should the best practices or local processes apply to all attachment disputes, safety and engineering issues only, or have some other scope? The New York Commission, for instance, requires some resolution at the company level before a formal complaint can be filed.²¹⁷ Should we encourage similar efforts, suggest that parties seek mediation or arbitration before filing a complaint, or are there other processes that parties have found helpful and can recommend? Are there other ways that the Commission should encourage this type of dispute resolution?

82. The *Pole Attachment Notice* questioned whether rule 1.1404(m)²¹⁸ has had the unintended consequence of discouraging informal resolution of disputes. For that reason, we sought comment on whether the rule should be amended or eliminated.²¹⁹ We received no substantive comment concerning rule 1.1404(m),²²⁰ which provides that potential attachers who are denied access to a pole, duct, or conduit must file a complaint "within 30 days of such denial."²²¹ Our experience handling pole attachment complaints, however, leads us to believe that the rule hinders informal resolution of disputes.

²¹⁴ See *Pole Attachment Notice* at 20210, para. 37 n.110 (citing *Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to be Followed when Formal Complaints are Filed Against Common Carriers*, CC Docket No. 96-238, Report and Order, 12 FCC Rcd 22497, 22507-08, 22540, paras. 20-24, 100-01 (1997), *aff'd on recon.*, Order on Reconsideration, 16 FCC Rcd 5681, 5689, 5697, paras. 17, 36-37 (2001) (*Order on Reconsideration*)).

²¹⁵ See, e.g., Crown Castle Comments at 7-8 (filed Mar. 11, 2008) ("A greater use of mediation should provide attachers the ability to break through the utilities' "benign indifference" and come to some agreement without having to employ the Commission's lengthy and expensive formal complaint process."); National Broadband Plan at 112 ("The FCC also could . . . require utilities to post standards and adopt procedures for resolving safety and engineering disagreements and encourage appropriate state processes for resolving such disputes.")

²¹⁶ The Commission has always encouraged negotiation in pole attachment disputes, and its rules require that complainants include a brief summary of all steps taken to resolve problems prior to the filing of a complaint. See 47 C.F.R. § 1.1404 (k).

²¹⁷ New York Public Service Commission, Case No. 03-M-0432, Order, at 9 (rel. Aug. 6, 2004). Disputes must be "discussed at the intermediate level in a company" for ten days and then considered by a company "Ombudsman" for twelve days before a complaint can be filed. *Id.* at 27.

²¹⁸ 47 C.F.R. § 1.1404(m).

²¹⁹ *Pole Attachment Notice* at 20210, para. 37 n.110. We also sought comment on rule 1.1410(c), 47 C.F.R. § 1.1410(c), discussed below in "Remedies."

²²⁰ *But see* Comcast Comments at 46 (stating, without amplification, that a change to rule 1.1404(m) would be unwarranted because the Commission's rules are "flexible enough to encourage pre-complaint mediation, while ensuring that attachers receive the relief to which they are entitled").

²²¹ 47 C.F.R. § 1.1404(m).

Specifically, the existence of the rule deters attachers from pursuing pre-complaint mediation and has prompted the premature filing of complaints. Indeed, several complainants have indicated to Commission staff that, although they would be interested in mediation, they felt they had no choice but to file a complaint first, because of rule 1.1404(m). Thus, we believe the rule unnecessarily pushes some parties into formal litigation at a stage when informal resolution still is possible. Accordingly, we propose that the 30-day requirement in rule 1.1404(m) be eliminated.²²² We seek comment on this proposal.

3. Remedies

83. Under section 224 of the Act, the Commission is charged with a duty to “regulate the rates, terms, and conditions for pole attachments” and to “adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions.”²²³ The Commission has broad authority to “enforc[e] any determinations resulting from complaint procedures” and to “take such action as it deems appropriate and necessary, including issuing cease and desist orders . . .”²²⁴ In furtherance of these statutory duties, the Commission has adopted procedural rules governing complaints alleging both unreasonable rates, terms, and conditions for pole attachment,²²⁵ and the unlawful denial of pole access.²²⁶

84. Section 1.1410 of the pole attachment rules lists the remedies available in a complaint proceeding where the Commission determines that a challenged rate, term, or condition is not just and reasonable.²²⁷ In such cases, the Commission may terminate the unjust and unreasonable rate, term, or condition,²²⁸ or substitute a just and reasonable rate, term, or condition established by the Commission.²²⁹ Moreover, rule 1.1410(c) also permits a monetary award in the form of a “refund, or payment,” which will “normally be the difference between the amount paid under the unjust and/or unreasonable rate, term, or condition and the amount that would have been paid under the rate, term, or condition established by the Commission from the date that the complaint, as acceptable, was filed, plus interest.”²³⁰ Although the Commission occasionally has departed from the notion that the filing of a pole attachment complaint marks the beginning of a refund period,²³¹ it usually has used the complaint filing date as the starting point for determining refunds.

²²² See Appendix B at para. 4 (proposed amendment to rule 1.1404(m)).

²²³ 47 U.S.C. § 224(b)(1); see also *id.* § 224(e)(1) (directing FCC to establish regulations to govern when “parties fail to resolve a dispute over such charges”).

²²⁴ 47 U.S.C. § 224(b)(1). See, e.g., *Knology, Inc. v. Georgia Power Co.*, Memorandum Opinion and Order, 18 FCC Rcd 24615, 24639, para. 57 (2003) (*Knology v. Georgia Power*) (noting that the Commission has “broad authority to fashion remedies in pole attachment complaint proceedings”).

²²⁵ See, e.g., 47 C.F.R. §§ 1.1404(f), (g), (h).

²²⁶ See, e.g., 47 C.F.R. § 1.1404(m).

²²⁷ 47 C.F.R. § 1.1410.

²²⁸ 47 C.F.R. § 1.1410(a).

²²⁹ 47 C.F.R. § 1.1410(b).

²³⁰ 47 C.F.R. § 1.1410(c).

²³¹ See *Knology v. Georgia Power*, 18 FCC Rcd at 24639, para. 57 (holding that Georgia Power reasonably should have concluded that Knology objected to a lack of billing information and the necessity of certain make-ready work in a letter sent approximately five months prior to the filing of the complaint, and thus ordering refunds from the date of the letter); *Cable Texas, Inc. v. Entergy Serv., Inc.*, File No. PA 97-006, Order, 14 FCC Rcd 6647, 6653-54 (Cab. Servs. Bur. 1999) (ordering refund of the unreasonable portion of a fee for a pole survey that Cable Texas paid, under protest, prior to the filing of its complaint with the Commission).

85. The Commission's rules do not expressly set forth the remedies available where the Commission determines that a utility has wrongfully denied or delayed access to poles in violation of section 224(f) of the Act.²³² In addition, the rules do not provide for an award of compensatory damages in cases where either an unlawful denial or delay of access is established, or a rate, term, or condition is found to be unjust or unreasonable. We propose that section 1.1410 of the Commission's pole attachment complaint rules be amended to enumerate the remedies available to an attachers that proves a utility has unlawfully delayed or denied access to its poles.²³³ We propose that the rule specify that one remedy available for an unlawful denial or delay of access is a Commission order directing that access be granted within a specified time frame, and/or under specific rates, terms, and conditions. Because the Commission already has authority to issue such orders, and has done so in the past, this rule change would simply codify existing precedent.²³⁴

86. We further propose amending section 1.1410 to specify that compensatory damages may be awarded where an unlawful denial or delay of access is established, or a rate, term, or condition is found to be unjust or unreasonable. Because the current rule provides no monetary remedy for a delay or denial of access, utilities have little disincentive to refrain from conduct that obstructs or delays access. Under the current rule, the only consequence a utility engaging in such conduct is likely to face in a complaint proceeding is a Commission order requiring the utility to provide the access it was obligated to grant in the first place. Currently, a utility that competes with the attachers may calculate that the cost of defending an access complaint before the Commission, even if it receives an adverse ruling, may be justified by the advantage the pole owner has gained by delaying a rival's build-out plans. Allowing an award of compensatory damages for unlawful delays or denials of access would provide an important disincentive to pole owners to obstruct access. It would also give the Commission the ability to ensure that the attachers is "made whole" for the delay it has suffered.

87. We also propose that section 1.1410 be amended to provide for an award of compensatory damages where a rate, term, or condition is found to be unjust or unreasonable. Under the current rule, the only monetary remedy specified in such cases is a refund. Although the refund remedy may adequately compensate an attachers who has been charged excessive rental rates or make-ready fees, it does not compensate the attachers for unreasonable terms and conditions of attachment that do not involve payments to the pole owner. For example, a pole owner that unlawfully bars an attachers from using the boxing technique on poles may increase the charges an attachers must pay third parties to attach its facilities to poles.²³⁵ Just compensation in such a case would not involve a refund by the pole owner, but might require it to reimburse the attachers for costs the attachers would not have incurred but for the owner's unreasonable ban on boxing.

88. Finally, as noted above, rule 1.1410(c) also permits a monetary award in the form of a "refund, or payment," measured "from the date that the complaint, as acceptable, was filed, plus

²³² Although the Commission's pole attachment complaint rules do not specify the remedies available for an unlawful delay or denial of access, section 1.1415 broadly provides that the Commission "may issue such other orders and so conduct its proceedings as will best conduce to the proper dispatch of business and the ends of justice." 47 C.F.R. § 1.1415. Further, section 1.1412 states that if a respondent to a pole attachment proceeding fails to obey a Commission order, the Commission may "order the respondent to show cause why it should not cease and desist from violating the Commission's order." 47 C.F.R. § 1.1412.

²³³ See Appendix B at para. 6 (proposed amendment to rule 1.1410).

²³⁴ See, e.g., *Salsgiver Telecom, Inc. v. N. Pittsburgh Tel. Co.*, File No. EB-06-MD-00, Memorandum Opinion and Order, 22 FCC Rcd 9285, 9297-98, paras. 27-28 (Enf. Bur. 2007).

²³⁵ See *infra* Section III.A.

interest.”²³⁶ The Commission adopted rule 1.1410(c) in 1978 to “avoid abuse and encourage early filing when rates are considered objectionable by the CATV operator.”²³⁷ But our experience in handling pole attachment complaints leads us to believe that rule 1.1410(c) fails to make injured attachers whole. Generally speaking, a plaintiff is entitled to recompense going back as far as the applicable statute of limitations allows. There does not appear to be a justification for treating pole attachment disputes differently. Moreover, we find that rule 1.1410(c) discourages private negotiations between parties about the reasonableness of terms and conditions of attachment and instead encourages an attacher first to file a complaint and then to negotiate with the utility.²³⁸ For these reasons, we propose that rule 1.1410(c) be modified by deleting the phrase “from the date that the complaint, as acceptable, was filed.”²³⁹ Additionally, we propose that the phrase “consistent with the applicable statute of limitations” be added to emphasize that any relief sought is governed by the relevant limitations period.²⁴⁰ We seek comment on these proposals.

4. Unauthorized Attachments

89. In the *Pole Attachment Notice*, the Commission sought comment on the prevalence of attachments installed on poles without a lawful agreement with the pole owner (so-called “unauthorized attachments”).²⁴¹ In response, several utilities claim that a significant number of pole attachments on their poles are unauthorized and violate relevant safety codes. For example, Florida Power and Light reports finding 33,350 unauthorized attachments in an audit conducted in 2006.²⁴² EEI and UTC maintain that, for some utilities, unauthorized attachments meet or exceed 30 percent of attachments.²⁴³ AEP submits the results of surveys conducted by five utilities indicating that unauthorized attachment rates in the double-digits are common.²⁴⁴ In contrast, other utilities report percentages that are significantly lower. For instance, Progress Energy, Xcel Energy, and Wheeling Power report unauthorized attachment rates of 6.18 percent, 4.79 percent, and 2 percent, respectively.²⁴⁵

90. Attachers maintain that utilities’ allegations of unauthorized attachments are “overblown.”²⁴⁶ Time Warner Cable, for instance, contends that such assertions often are based on poor recordkeeping (including incorrect system maps), changes in pole ownership (*e.g.*, a utility considers a once-authorized attachment on a pole to be unauthorized after ownership is transferred to the utility), use of novel and inappropriate definitions of attachment that deviate from the parties’ past practices and

²³⁶ 47 C.F.R. § 1.1410(c).

²³⁷ See *Pole Attachments First Report and Order*, 68 FCC 2d 1585, para. 45.

²³⁸ See, *e.g.*, Knology Comments at 9.

²³⁹ Knology Comments at 9.

²⁴⁰ See Appendix B at 6 (proposed amendment to rule 1.1410).

²⁴¹ *Pole Attachment Notice*, 22 FCC Rcd at 20211, para. 38.

²⁴² FPL et al. Comments at 11-12.

²⁴³ EEI/UTC Comments at 34 (34% of attachments unauthorized by CenterPoint Energy; 30% of attachments unauthorized by PPL Electric Utilities).

²⁴⁴ AEP et al. Comments at 9-18 (table 1.1 through table 1.6).

²⁴⁵ AEP et al. Comments at 16, 18, 11.

²⁴⁶ Time Warner Cable Reply Comments at 47.

industry standards, and utilities' offering of financial incentives to their contractors to find unauthorized attachments.²⁴⁷ Other attachers are of a similar mind.²⁴⁸

91. Based on the current record, we are unable to gauge with certainty the extent of the problem of unauthorized attachments. Indeed, the data suggest that the number of unauthorized attachments can vary dramatically from one pole system to another. Nevertheless, we believe the dangers presented by unauthorized attachments transcend the theoretical. True unauthorized attachments can compromise safety because they bypass even the most routine safeguards, such as verifying that the new attachment will not interfere with existing facilities, that adequate clearances are maintained, that the pole can safely bear the additional load, and that the attachment meets the appropriate safety requirements of the utility and the NESC.²⁴⁹ The question becomes, then, how best to address the problem of unauthorized attachments.

92. The Commission sought comment in the *Pole Attachment Notice* on whether existing enforcement mechanisms adequately address alleged unlawful practices by attachers and ensure the safety and reliability of critical electric infrastructure.²⁵⁰ Under current precedent, unauthorized attachment fees imposed by utilities are not “*per se* unreasonable,” and the “penalty may exceed the annual pole attachment rate.”²⁵¹ A “reasonable penalty,” however, cannot “exceed an amount approximately equal to the annual pole attachment fee for the number of years since the most recent inventory or five years, whichever is less, plus interest”²⁵²

93. Pole owners complain that this precedent results in penalties that are not steep enough to deter attachers from mounting facilities for which they have no permit or that fail to comply with relevant safety and engineering standards.²⁵³ In one utility's words, the unauthorized attachment penalty approved by the Commission is “not a penalty at all in most cases,”²⁵⁴ because the attacher ends up having to pay only what it would have owed had it followed appropriate permitting procedures in the first place. In

²⁴⁷ Time Warner Cable Comments at 54; Time Warner Cable Reply Comments at 47-49.

²⁴⁸ See Knology Comments at 18 (unauthorized status of attachments often results from poor recordkeeping or the utility's retroactive enforcement of a change in attachment policies); Verizon Reply Comments (unauthorized attachments result from utilities' changing out poles or adding attachments without notifying attachers and from inaccurate pole records); NCTA Reply Comments at 25 (stating that utilities' unauthorized attachment figures “must be viewed with a healthy dose of skepticism”).

²⁴⁹ See, e.g., Coalition of Concerned Utilities Comments at 73-74.

²⁵⁰ *Pole Attachment Notice*, 22 FCC Rcd at 20211, para. 38.

²⁵¹ *Cable Television Ass'n of Ga. v. Georgia Power Co.*, File No. PA 01-002, Order, 18 FCC Rcd 16333, 16343, para. 22 (Enf. Bur. 2003) (citing *Mile Hi Order*, 15 FCC Rcd at 11457, para. 10).

²⁵² *Mile Hi Order*, 15 FCC Rcd at 11458, para. 14.

²⁵³ See, e.g., FPL et al. Comments at 14 (the Commission's unauthorized attachment policy creates a disincentive for attachers to follow attachment procedures because of the time and money saved by violating the procedures); Oncor Comments at 17 (“When the violating attachers are finally caught, the Commission's policy puts the attachers in no worse a position than had they complied with the process in the first place.”); Empire Comments at 3 (attachers have “made a calculated decision that the competitive advantage they gain is worth the risk of paying back rental charges and modest penalties at some time in the future, if at all”); NREC Reply Comments at 17 (“Allowing attachers to simply pay what they should have been paying all along is a perverse incentive to continue their repeated theft of space on utility poles”); FPL et al. Reply Comments at 6 (the Commission must “move away from the prevailing ‘economic loss only’ paradigm, which creates a disincentive to follow permitting procedures”); Oncor Reply Comments at 14 (“With no real penalty, attaching entities will continue their practices of ‘rolling the dice.’”).

²⁵⁴ EEI/UTC Comments at 77.

contrast, some attachers insist that the current regime is sufficient,²⁵⁵ while others assert that allowing the imposition of penalties would contravene principles of contract law.²⁵⁶

94. Although we make no specific findings today as to whether the Commission should allow stricter penalties for unauthorized attachments, it appears that penalties amounting to little more than back rent may not discourage non-compliance with authorization processes. In other words, competitive pressure to bring services to market may overwhelm the deterrent effect of modest penalties. And so we seek additional comment on practical and lawful means of increasing compliance through the use of more substantial penalties.

95. One potential alternative to the Commission's present penalty regime is a system akin to the one adopted by the Oregon Public Utilities Commission (Oregon Commission).²⁵⁷ The Oregon Commission specifies penalties of \$500 per pole, per year, for attachment of facilities without an agreement, and, for attachments without a permit, \$100 per pole plus five times the current annual rental fee per pole.²⁵⁸ The Oregon system further includes, among other things, a provision for attacher notification,²⁵⁹ opportunity for an attacher to correct violations or submit a plan for correction,²⁶⁰ and a mechanism for resolution of factual disputes.²⁶¹ The Oregon penalties have been tested and refined with assistance from the Oregon Joint Use Association.²⁶²

96. We seek comment on whether the system of penalties instituted by the Oregon Commission has been effective in reducing the incidence of unauthorized attachments in that state.²⁶³ What are the benefits and shortcomings of the Oregon system? Should the Commission adopt the Oregon standards as presumptively reasonable penalties for unauthorized attachments? Would the Commission need to modify the Oregon standards before adopting them as national standards? If so, in what ways? Should there be a threshold number of unauthorized attachments necessary before penalties apply? Should exceptions be made for violations caused or contributed to by the pole owner (e.g., a utility that assumes ownership of a pole formerly owned by another entity, creates a hazard by adding facilities, changes its safety standards, renegotiates an attachment agreement, or otherwise causes a formerly permitted and safe attachment to lose that status)?

97. How could the Oregon standards be enforced – through provisions in pole attachment agreements, through the complaint resolution mechanism in section 224 of the Act, or through both?

²⁵⁵ Verizon Reply Comments at 17-18.

²⁵⁶ TWTC Reply Comments at 31 (the Commission's current treatment of unauthorized attachment penalties is consistent with "sound principles of contract law that prohibit the enforcement of unreasonable penalties for breach of contract" and with the Supreme Court's admonition that punitive damages should only be awarded if a defendant's culpability is "so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence") (citations omitted)).

²⁵⁷ See Oregon Administrative Rules, Division 28, Pole and Conduit Attachments, 860-028-0130 – 0220; http://arcweb.sos.state.or.us/rules/OARS_800/OAR_860/860_028.html.

²⁵⁸ Oregon Administrative Rules, Division 28, Pole and Conduit Attachments, 860-028-0130 and 860-028-0140.

²⁵⁹ See Oregon Administrative Rules, Division 28, Pole and Conduit Attachments, 860-028-0190.

²⁶⁰ See Oregon Administrative Rules, Division 28, Pole and Conduit Attachments, 860-028-0170.

²⁶¹ See Oregon Administrative Rules, Division 28, Pole and Conduit Attachments, 860-028-0220.

²⁶² PGE Comments at 6 (describing the Oregon Joint Use Association as an industry group in which the interests of both attaching entities and utilities are represented).

²⁶³ See PGE Comments at 4-7; UTC Comments at 33.

Would changes to the Commission's pole attachment rules (47 C.F.R. §§ 1.1401-1.1418) be necessary to enable utilities to bring unauthorized attachment complaints?

98. If the Oregon system is not adopted, what are alternative penalty systems that would deter unauthorized attachments? Are there other models the Commission should consider? What are the contours of such alternatives, including notice to attachers, safe harbors, opportunities for correction, exceptions for safety violations caused/contributed to by pole owners, and means of dispute resolution?

5. The "Sign and Sue" Rule

99. Under current Commission rules²⁶⁴ and precedent, an attacher may execute a pole attachment agreement with a utility, and then later file a complaint challenging the lawfulness of a provision of that agreement.²⁶⁵ This process, sometimes called "the sign and sue rule," allows an attacher to seek relief where it claims that a utility has coerced it to accept unreasonable or discriminatory contract terms to gain access to utility poles. In the *Pole Attachment Notice*, we sought comment on the "sign and sue" rule, and asked whether the Commission should adopt some contours to the rule, such as time-frames for raising written concerns about a provision of a pole attachment agreement.²⁶⁶ As discussed below, we propose that the sign and sue "rule" should be retained, but propose that it be modified through an amendment to the Commission's rules that would require an attacher to provide a pole owner with notice, during contract negotiations, of the terms it considers unreasonable or discriminatory.

100. In response to the *Pole Attachment Notice*, a number of attachers filed comments supporting retention of the sign and sue rule in its present form.²⁶⁷ The attachers assert that, because utilities have inherently superior bargaining power in negotiating pole attachment agreements, attachers may be forced to accept unreasonable rates, terms, and conditions in order to gain the prompt access to poles that is vital to their business plans.²⁶⁸ One commenter observes that "cable operators or telecom

²⁶⁴ See, e.g., 47 C.F.R. § 1410(a), (b) (providing that where the Commission determines in a pole attachment complaint proceeding that a rate, term, or condition of attachment is not just and reasonable, it may (a) "[t]erminate the unjust and unreasonable rate, term, or condition; and (b) [s]ubstitute in the pole attachment agreement the just and reasonable rate, term, or condition established by the Commission . . .").

²⁶⁵ See, e.g., *Southern Co. Servs, Inc. v. FCC*, 313 F.3d 574, 582-84 (D.C. Cir. 2002) (*Southern Company II*) ("The agency's limited authority to review negotiated settlements is consistent with the statute and it does not interfere with any of the rights afforded petitioners under the Act.").

²⁶⁶ See *Pole Attachment Notice*, 22 FCC Rcd at 20210, para. 37 n.110 (citing *Southern Company II*, 313 F.3d at 582-84).

²⁶⁷ See NCTA Comments at 22-23; Knology Comments at 10-12; Comcast Comments at 42-45; Time Warner Cable Reply Comments at 59-60; Sunesys Reply Comments at 17-18.

²⁶⁸ See, e.g., Knology Comments at 10 ("The parties to a pole attachment agreement do not approach negotiations with equal bargaining positions. Often, attachers must accept onerous terms and conditions before they are permitted to attach to a pole...."); Time Warner Cable Reply Comments at 59-60 ("[P]arties to pole attachment agreements do not negotiate from equal bargaining positions, and thus cable operators (for whom poles are essential facilities) are frequently required to [accept] onerous and unreasonable utility terms in order to make vital pole attachments."); Sunesys Reply Comments at 17 ("pole attachment agreements are not negotiated - they are take it or leave it ultimatums from the utility"). See also NCTA Comments at 23 (noting that pole owners have "inherent bargaining power" and arguing that, if the Commission were to eliminate or limit the sign and sue rule, "attaching parties would face a Hobson's choice of agreeing to unreasonable terms proposed by a utility or delaying construction pending resolution of any negotiation and litigation to resolve disputes"); Comcast Comments at 42 ("the rule ensures that, notwithstanding a utility's unequal bargaining position in pole attachment agreement negotiations, attachers are not forced to choose between timely access to poles on the one hand, for example, while accepting unreasonable rates, terms and condition [sic] on the other").

providers may need to sign an unreasonable pole attachment agreement while they are undergoing time-sensitive build-outs or plant upgrades and cannot afford to be delayed by protracted negotiations or litigation before the Commission.²⁶⁹ The Commission's willingness to review the reasonableness of contract provisions, in the view of some attachers, has served to check the utilities' abuse of their superior bargaining and encourage them to negotiate in good faith, thus reducing the incidence of disputes.²⁷⁰

101. Attachers oppose amending the Commission's rules to impose time limits on the right to challenge the provisions in a pole attachment agreement.²⁷¹ They argue that such time limits are inappropriate because a given term in a pole attachment agreement may not be unreasonable on its face, but may only become so through a utility's later interpretation or application.²⁷² They predict that imposing time limits on challenges to the reasonableness of terms would lead to unnecessary pole attachment litigation because attachers would be forced immediately to challenge terms that may, hypothetically, be unreasonably applied or interpreted in the future.²⁷³

102. Several utilities filed comments opposing the sign and sue rule and suggesting that it be modified or eliminated.²⁷⁴ They contend that the rule has engendered distrust between pole-owning

²⁶⁹ Comcast Comments at 44.

²⁷⁰ See, e.g., Comcast Comments at 42-43; Time Warner Cable Reply Comments at 60.

²⁷¹ See, e.g., Comcast Comments at 45; Knology Comments at 11; Time Warner Cable Reply Comments at 60. Two commenters questioned whether the Commission has authority to impose temporal or other limitations on the filing of pole attachment complaints. They assert that the Commission has an obligation under section 224 to eliminate unjust and unreasonable terms and conditions of pole attachment, whether or not a pole attachment agreement permits the practice. Knology Comments at 11-12; Time Warner Cable Reply Comments at 60. Another commenter disagreed, asserting that the sign and sue rule is not mandated by section 224 and is entirely within the Commission's discretion to eliminate or revise. PacifiCorp et al. Comments at 33. See generally 47 C.F.R. § 1404(m) (imposing temporal limits on the filing of a pole attachment complaint by providing that, where a cable television system operator or telecommunications carrier claims it has been denied access to a pole in violation of section 224(f) of the Act, "the complaint shall be filed within 30 days of such denial").

²⁷² See, e.g., Comcast Comments at 45 (arguing that imposing time limits on challenges to a pole attachment agreement would undermine effective regulation, because "an attacher must often sign an agreement containing a rate, term or condition that the utility will not adequately explain. In the event the utility eventually implements the rate, term or condition in an unreasonable manner, the attacher has some protection from the utility because the attacher retains recourse at the Commission"); Knology Comments at 11 ("Attachers do not know, in advance, whether unreasonable provisions in an agreement will be enforced or triggered."); Time Warner Cable Reply Comments at 60 (arguing that "imposing arbitrary time limits to challenge a pole attachment term or condition is inappropriate because a given term may not be unreasonable on its face, but become so through a utility's later interpretation or application.").

²⁷³ See, e.g., Time Warner Cable Reply Comments at 60 ("[A]n artificial deadline to challenge unreasonable terms would lead to greater litigation over pole attachment license agreement terms, because cable operators would be forced to litigate over terms that may not even be enforced simply because they may, in some hypothetical future applications, be unreasonably applied or interpreted."); Knology Comments at 11 ("Attachers do not know, in advance, whether unreasonable provisions in an agreement will be enforced or triggered. In light of this risk, ... an attacher would be forced to file a complaint against the utility to modify the agreement."); Comcast Comments at 45 ("If utilities knew all they had to do was wait out a specific time-frame before imposing/interpreting the unreasonable conditions, monopoly abuses would be rampant. The only way attachers could avoid such consistent abuses would be to file a complaint following the execution of virtually every new pole attachment agreement ...").

²⁷⁴ See, e.g., PacifiCorp et al. Comments at 23; EEI/UTC Comments at 109-10; FPL et al. Reply Comments at 13.

utilities and attaching entities.²⁷⁵ According to these utilities, attachers are willing to sign virtually any pole attachment agreement as a matter of expediency, knowing they can use the Commission's complaint process "to forestall or upset the utility's ability to enforce the agreement."²⁷⁶ The Commission's willingness to entertain pole attachment complaints at any time, they argue, undermines a pole owner's confidence "that it will realize the bargain it has struck with an attaching entity."²⁷⁷ As one commenter put it, the sign and sue rule "allows attachers to 'cherry pick' contractual provisions that they would like to disavow, while not extending the same privilege to utilities."²⁷⁸

103. Utilities have proposed a number of fixes to these perceived problems with the sign and sue rule. One commenter urged the Commission to adopt a presumption that an executed pole attachment agreement is just and reasonable.²⁷⁹ Similarly, another commenter asked the Commission to make explicit that both parties to a pole attachment agreement are subject to a duty to negotiate in good faith, and bar complaints as to the reasonableness of executed pole attachment agreements, absent extrinsic evidence of coercion or undue influence as would be sufficient to make the agreement void or voidable under the common law.²⁸⁰ Another utility asked the Commission to require that any challenges to pole attachment agreements be brought in state court under well-defined state law standards of unconscionability.²⁸¹

104. The Commission adopted the sign and sue rule in recognition that utilities have monopoly power over pole access.²⁸² The Commission was concerned that a utility could nullify the statutory rights of a cable system or a telecommunications carrier by making "take it or leave it demand[s]" that it relinquish valuable rights under section 224 "without any *quid pro quo* other than the ability to attach its wires on unreasonable or discriminatory terms."²⁸³ The record does not demonstrate that the potential for utilities to exert such coercive pressure in pole attachment agreement negotiations is less significant today than when the Commission first adopted the sign and sue rule. Because there remains a real possibility that utilities may abuse their monopoly power during the negotiating process, we propose that the sign and sue rule should be retained in some form. For similar reasons, we propose

²⁷⁵ See, e.g., PacifiCorp et al. Comments at 32-34; FPL et al. Reply Comments at 12-14.

²⁷⁶ PacifiCorp et al. Reply Comments at 23. See FPL et al. Reply Comments at 13 ("The Commission's sign and sue rule allows attachers to make an illusory commitment to a bargain until they decide to abandon the bargain in search of a better deal.").

²⁷⁷ PacifiCorp et al. Reply Comments at 22. See FPL et al. Reply Comments at 13 (arguing that the sign and sue rule "places utilities in a commercially tenuous 'wait and see' position, never knowing when any given attacher may decide that it wants to scrap certain terms of an existing, bargained-for agreement").

²⁷⁸ FPL et al. Reply Comments at 13.

²⁷⁹ EEI/UTC Comments at 109-10.

²⁸⁰ PacifiCorp et al. Comments at 34. PacifiCorp further proposed that an attacher who "raises a complaint with respect to a fully-executed agreement without such evidence [of coercion or undue influence] ... should be deemed to have breached its duty to negotiate in good faith, and the complaint should be summarily dismissed with prejudice." *Id.*

²⁸¹ FPL et al. Reply Comments at 13-14. Alternatively, FPL et al. argue that if the Commission retains the sign and sue rule, it should require attachers to show that the contract as a whole was negotiated in bad faith. If an attacher makes this showing, its remedy would be re-negotiation of the entire contract. *Id.* at 14.

²⁸² See, e.g., *Southern Company II*, 313 F.3d at 583.

²⁸³ *Southern Company II*, 313 F.3d at 583 (quoting the Commission's brief with approval) (internal quotes omitted).

that the record does not support adoption of a presumption that executed pole attachment agreements are just and reasonable.²⁸⁴

105. To be sure, utilities have raised valid concerns about the need to ensure that both parties to a pole attachment agreement negotiate in good faith. Their suggestion, however, that the Commission's review of pole attachment agreements be limited to determining whether the agreement would be deemed unconscionable or voidable under state contract law appears inconsistent with the Commission's statutory mandate under section 224.²⁸⁵ Section 224 grants cable systems and telecommunications carriers rights to pole access, and to reasonable rates, terms, and conditions for pole attachment, that are independent and distinct from rights granted under contract law. The Commission has a duty under section 224 to "adopt procedures necessary and appropriate to hear and resolve complaints concerning . . . rates, terms, and conditions" of pole attachment pursuant to the requirements of section 224.²⁸⁶ The Commission would not be fulfilling that duty if it were to substitute the requirements of contract law for the dictates of section 224.

106. It is important to note, however, that section 224 does not grant attachers an unfettered right to "cherry pick" contractual terms they wish to disavow, while retaining the benefits of more favorable terms. An attacher is entitled to relief under the sign and sue rule only if it can show that a rate, term, or condition is unlawful under section 224, not merely unfavorable to the attacher.²⁸⁷ Further, the Commission has recognized that in some circumstances, a utility "may give a valuable concession in exchange for the provision the attacher subsequently challenges as unreasonable."²⁸⁸ Where such a *quid pro quo* is established, the Commission will not disturb the bargained-for package of provisions.²⁸⁹

107. As the Commission has previously stated, we "encourage, support and fully expect that mutually beneficial exchanges will take place between the utility and the attaching entity."²⁹⁰ We want to promote efforts by attachers and utilities to negotiate innovative and mutually beneficial solutions to contested contract issues. In furtherance of that goal, we propose that the Commission amend section 1.1404(d) of the rules to add a requirement that an attacher provide a utility with written notice of objections to a provision in a proposed pole attachment agreement, during contract negotiations, as a prerequisite for later bringing a complaint challenging that provision.²⁹¹

²⁸⁴ EEI/UTC Comments at 109-10.

²⁸⁵ PacifiCorp et al. Comments at 33-34; FPL et al. Reply Comments at 13-14.

²⁸⁶ 47 U.S.C. § 224(b)(1). See § 224(e)(1) (directing the Commission to establish regulations to govern when "parties fail to resolve a dispute over such charges").

²⁸⁷ See *Southern Company II*, 313 F.3d at 583.

²⁸⁸ *Southern Company II*, 313 F.3d at 583 (quoting the Commission's brief with approval) (internal quotes omitted).

²⁸⁹ See *id.* Evidence of such a *quid pro quo* could come from several sources, including communications between the parties during contract negotiations showing the parties engaged in an exchange of concessions on disputed terms.

²⁹⁰ *Amendment of Commission's Rules And Policies Governing Pole Attachments*, CS Docket Nos. 97-98, 97-151, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12113, para. 14 (2001) (*Pole Attachments Reconsideration Order*).

²⁹¹ See Appendix B at para. 4 (proposed amendment to rule 1.1404(d)). We note that the Commission previously rejected arguments that attaching parties should be required to take exception to terms or conditions when the pole attachment agreement is negotiated or be estopped from filing a complaint about those issues. See *Pole Attachments Reconsideration Order*, 16 FCC Rcd at 12112-13, para. 13. The Commission did not, however, explain its reasons for rejecting this proposed requirement, and we believe comments from utilities in this proceeding raising questions (continued....)

108. We further propose that the amended rule include an exception addressing attachers' concerns that a given contract provision may not be unreasonable on its face, but only become so through a utility's later interpretation or application.²⁹² We thus propose to include language in amended rule 1.1404(d) allowing the attacher to challenge the lawfulness of a rate, term, or condition in an executed agreement, without prior notice to the utility during contract negotiations, where the attacher establishes that the rate, term, or condition was not unjust and unreasonable on its face, but only as later applied by the utility, and the attacher could not reasonably have anticipated that the utility would apply the challenged rate, term, or condition in such an unjust and unreasonable manner.²⁹³ We believe that this amendment to rule 1.1404(d) will prevent utilities from being blind-sided by an attacher's post-execution challenge to the lawfulness of contract provisions, and will encourage the parties to reach mutually acceptable compromises on disputed terms, before the agreement is executed. We seek comment on this proposed amendment.

109. Finally, we ask for comment on when an attacher's cause of action challenging a rate, term, or condition in a pole attachment agreement accrues for purposes of applying the appropriate statute of limitations. We propose that the cause of action be deemed to accrue at the time the challenged contract provision is first applied against the attacher in an unlawful manner—regardless of whether the provision is facially invalid—because that is the point in time when the attacher suffers an injury. By contrast, if the cause of action were instead deemed to accrue at the time the agreement was executed, attachers might feel compelled to bring a complaint challenging a contract provision that may never be applied against them, merely to avoid having their claims extinguished by the statute of limitations. We seek comment on this proposed rule of accrual. Further, with respect to other claims involving pole attachments, we seek comment on whether the Commission should continue to follow common law principles in determining the time of accrual, or adopt other, alternative approaches.

D. Pole Rental Rates

110. Telecommunications carriers and cable operators generally pay for access to utility poles in two separate ways. First, as noted above, attachers pay nonrecurring charges to cover the costs of "make-ready" work—that is, rearranging existing pole attachments or installing new poles as needed to enable the provider to attach to the pole. Second, attachers generally also pay an annual pole rental fee, which currently is designed to recover a portion of the utility's operating and capital costs attributable to the pole. Both of these costs can impact communications service providers' investment decisions. In a prior section, this Further Notice seeks comment on ways to reduce make-ready costs.²⁹⁴ Below, we seek comment on ways to minimize the distortionary effects arising from the differences in current pole rental rates, consistent with the objectives of the National Broadband Plan and the existing statutory framework.

1. Background

111. As discussed above, Congress first directed the Commission to ensure that the rates, terms, and conditions for pole attachments by cable television systems were just and reasonable in 1978 when it added section 224 to the Act.²⁹⁵ In a series of orders, the Commission implemented a formula

(Continued from previous page) _____
about attachers' incentives to engage in *bona fide*, good faith negotiations warrant re-visiting the issue. *See, e.g.,* PacifiCorp et al. Reply Comments at 22-23; FPL et al. Reply Comments at 13.

²⁹² *See, e.g.,* Time Warner Cable Reply Comments at 60.

²⁹³ *See* Appendix B at 4 (proposed amendment to rule 1.1404(d)).

²⁹⁴ *See generally* Section IV.B.

²⁹⁵ Pole Attachment Act of 1978, Pub. L. No. 95-234, 92 Stat. 33 (1978). Congress reacted to an apparent need in the cable television industry to resolve conflicts between such providers, then known as "CATV systems," and (continued....)

that cable television system attachers and utilities could use to determine a just and reasonable rate, and procedures for resolving rate complaints.²⁹⁶ In 1987, the U.S. Supreme Court found that the formula the Commission devised for pole attachments by cable television systems (the cable rate formula) provides pole owners with adequate compensation, and thus did not result in an unconstitutional “taking.”²⁹⁷

112. Congress expanded the reach of section 224 in the 1996 Act. Among other things, Congress added “telecommunications carrier” as a category of attacher entitled to pole attachments on just and reasonable rates, terms, and conditions under section 224.²⁹⁸ For purposes of section 224, Congress excluded incumbent LECs from the definition of “telecommunications carriers.”²⁹⁹ In prior orders, the Commission interpreted the exclusion of incumbent LECs from the term “telecommunications carrier” (and from the corresponding statutory right to attach to utility poles) to mean that section 224 does not apply to attachment rates paid by incumbent LECs,³⁰⁰ which own many poles themselves, and historically have obtained access to other utilities’ poles within their incumbent LEC service territory through “joint use” or other agreements.³⁰¹

113. By virtue of the 1996 Act revisions, section 224 of the Act now sets forth two separate formulas to determine the maximum rates for pole attachments—one applies to pole attachments used by providers of telecommunications services (the telecom rate formula), and the other to pole attachments

(Continued from previous page) _____

utility pole, duct, and conduit owners over the charges for use of such facilities. *See generally* S. Rep. No. 95-580, 95th Cong., 1st Sess. (1977).

²⁹⁶ *See, e.g., Pole Attachments First Report and Order*, CC Docket No. 78-144, 68 FCC 2d 1585 (adopting complaint procedures); *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, CC Docket No. 78-144, Memorandum Opinion and Order, 77 FCC 2d 187 (1980) (defining, *e.g.*, safety space, average usable space, attachment as occupying 12 inches of space, make-ready as non-recurring cost); *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, CC Docket No. 86-212, Report and Order, 2 FCC Rcd 4387 (1987) (*1987 Rate Order*), *rev'd, Florida Power Corp. v. FCC*, 772 F.2d 1537 (11th Cir. 1985) (*Florida Power Corp. v. FCC*), *rev'd, FCC v. Florida Power Corp.*, 480 U.S. 245 (1987).

²⁹⁷ *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987); *see also Alabama Cable Telecomm. Ass'n v. Alabama Power Co.*, File No. PA 00-003, Order, 16 FCC Rcd 12209 (2001).

²⁹⁸ 47 U.S.C. § 224(a)(4).

²⁹⁹ 47 U.S.C. § 224(a)(5).

³⁰⁰ *See, e.g., Local Competition Order*, 11 FCC Rcd at 16103-04, para. 16103; *1998 Implementation Order*, 13 FCC Rcd at 6781, para. 5 (“Because, for purposes of Section 224, an ILEC is a utility but is not a telecommunications carrier, an ILEC must grant other telecommunications carriers and cable television systems access to its poles, even though the ILEC has no rights under Section 224 with respect to the poles of other utilities.”); 47 U.S.C. § 224(f)(1) (stating that “[a] utility shall provide . . . any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it”); 47 U.S.C. § 224(a)(5) (stating that “[f]or purposes of this section, the term ‘telecommunications carrier’ . . . does not include any incumbent local exchange carrier.”); 47 C.F.R. § 1.1401 (“Purpose: The rules and regulations contained in . . . this part provide complaint and enforcement procedures to ensure that telecommunications carriers and cable system operators have nondiscriminatory access to utility poles, ducts, conduits, and rights-of-way on rates, terms, and conditions that are just and reasonable.”).

³⁰¹ Outside of the carrier’s incumbent LEC service territory, it would be subject to the same pole attachment regulations as any other telecommunications carrier. *See* 47 U.S.C. § 224(a)(5) (excluding from the definition of “telecommunications carrier” for purposes of section 224 “any incumbent local exchange carrier as defined in section 251(h)”; 47 U.S.C. § 251(h)(1) (defining “incumbent local exchange carriers” in terms of their status with respect to a particular area).

used “solely to provide cable service” (the cable rate formula).³⁰² As the Commission has implemented these statutory formulas, the telecom rate formula generally results in higher pole rental rates than the cable rate formula. The difference between the two formulas under current Commission rules is the manner in which they allocate the costs associated with the unusable portion of the pole³⁰³—that is, the space on the pole that cannot be used for attachments.³⁰⁴ The cable rate formula and the telecom rate formula both allocate the costs of usable space on a pole based on the fraction of the usable space that an attachment occupies.³⁰⁵ Under the cable rate formula, the costs of unusable space on a pole are allocated in the same way, i.e., based on the portion of usable space an attachment occupies.³⁰⁶ Under the telecom rate formula, however, two-thirds of the costs of the unusable space is allocated equally among the number of attachers, including the owner, and the remaining one third of these costs is allocated solely to the pole owner.³⁰⁷

114. At the same time that the Commission adopted a rule implementing the telecom rate formula, it addressed the issues of cable attachments used to offer commingled cable and Internet access services. In particular, the Commission held that cable television systems that offer commingled cable and Internet access service should continue to pay the cable rate.³⁰⁸ In 2000, the Supreme Court upheld this decision, finding that section 224(b) gives the Commission authority to adopt just and reasonable rates for attachments within the general scope of section 224 of the Act, but outside the “self-described scope” of the telecom rate formula or cable rate formula as specified under sections 224(d) and (e).³⁰⁹

2. Effects of Current Pole Rental Rates

115. The National Broadband Plan recommends that the Commission “establish rental rates for pole attachments that are as low and close to uniform as possible, consistent with [s]ection 224 of the [Act], to promote broadband deployment.”³¹⁰ In particular, the Plan observes that “[a]pplying different

³⁰² 47 U.S.C. §§ 224(d), (e). In recognition of these differences, Congress provided that rates under the telecom rate formula—which also apply to cable television systems that offer telecommunications services—would be phased in over a five-year period. 47 U.S.C. § 224(e)(4).

³⁰³ See *Amendment of Commission’s Rules and Policies Governing Pole Attachments; Implementation of Section 703(e) of the Telecommunications Act, Amendment of the Commission’s Rules and Policies Governing Pole Attachments*, CS Docket Nos. 97-98, 97-151, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12131-32, para. 55 (2001) (*2001 Order on Reconsideration*). Explained another way, the “space factor” is calculated differently in each of the formulas. Compare 47 C.F.R. § 1.1409(e)(1) with 47 C.F.R. § 1.1409(e)(2). The Space Factor in the cable rate formula = Space Occupied by an Attachment/Total Usable Space. The Space Factor in the telecom rate formula = ((Space Occupied by an Attachment) + (2/3 x (Unusable Space/Number of Attachers)))/Pole Height.

³⁰⁴ More specifically, as defined by the Commission’s rules, the term unusable space “means the space on a utility pole below the usable space, including the amount required to set the depth of the pole.” 47 C.F.R. § 1.1402(l). Usable space, in turn, “means the space on a utility pole above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment, and which includes space occupied by the utility.” 47 C.F.R. § 1.1402(c).

³⁰⁵ 47 U.S.C. § 224(d); 47 U.S.C. § 224(e).

³⁰⁶ See *2001 Order on Reconsideration*, 16 FCC Rcd at 12131, para. 53.

³⁰⁷ See *2001 Order on Reconsideration*, 16 FCC Rcd at 12131-32, para. 55 (citing *1989 Implementation Order*, 13 FCC Rcd at 6799-800, paras. 43-44).

³⁰⁸ See *1998 Implementation Order*, 13 FCC Rcd at 6796, para. 34.

³⁰⁹ *Gulf Power*, 534 U.S. at 335-36, 338-39.

³¹⁰ National Broadband Plan at 110.

rates based on whether the attachers is classified as a ‘cable’ or a ‘telecommunications’ company distorts attachers’ deployment decisions.”³¹¹ There have been many disputes about the applicability of “cable” or “telecommunications” rates to broadband, voice over Internet protocol and wireless services, among others.³¹² The Plan found that “[t]his uncertainty may be deterring broadband providers that pay lower pole rates from extending their networks or adding capabilities (such as high-capacity links to wireless towers),” based on the risk that, by doing so, a higher pole rental rate might be applied for their entire network.³¹³

116. The record here likewise bears out these concerns. A number of cable operators confirm that they have been deterred from offering new, advanced services, such as to anchor institutions or wireless towers, based on the possible financial impact if, as a result, they were required to pay the current telecom rate for all their poles.³¹⁴ The National Broadband Plan estimated an average annual difference between the telecom rate and cable rate of approximately \$3 today.³¹⁵ Although that difference in rates might not seem significant in isolation, it could amount to approximately \$90 million to \$120 million annually, given the estimated 30-40 million poles subject to Commission-regulated rates used by the cable industry.³¹⁶ Cable commenters estimate an even greater difference between the two rates of \$208 million to \$672 million for the cable industry as a whole.³¹⁷ Moreover, the Commission anticipated that rate differences could deter cable operators from offering new services when it applied the cable rate to cable operators’ attachments used for both video and Internet services, concluding that:

³¹¹ *Id.* The Plan further notes that “[t]he impact of these rates can be particularly acute in rural areas, where there often are more poles per mile than households.” *Id.* (citing, e.g., ACA Comments in re National Broadband Plan NOI, at 8-9 (filed June 8, 2009); Amendment of the Commission’s Rules and Policies Governing Pole Attachments, WC Docket No. 07-245, Report and Order, 15 FCC Rcd 6453, 6507-08, para. 118 (2000) (*2000 Fee Order*) (“The Commission has recognized that small systems serve areas that are far less densely populated areas than the areas served by large operators. A small rural operator might serve half of the homes along a road with only 20 homes per mile, but might need 30 poles to reach those 10 subscribers.”)).

³¹² See, e.g., Ameren and Virginia Electric Comments at 17; Bright House Reply Comments at 9-11. See also, e.g., *Gulf Power*, 534 U.S. at 327.

³¹³ National Broadband Plan at 110-11.

³¹⁴ See, e.g., Letter from Daniel L. Brenner, Counsel, Bright House Networks, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 09-47, 09-51, 09-137 (Feb. 16, 2010) Attach. (Affidavit of Nick Lenochi) (providing example of how application of higher telecommunications rate for poles would increase expense of deploying Fast Ethernet connections to a large school district by \$220,000 annually); NCTA Comments at 17 (filed Sept. 24, 2009) (“The fact that pole attachment costs are just one of many challenges facing rural operators in deploying broadband obviously provides no basis for rate increases that would make it even more difficult to justify future investment in, or continued operation of, broadband facilities”); Letter from Jill M. Valenstein, Counsel for the Arkansas Cable Telecommunications Association, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 07-245 at 1-2 (filed July 11, 2008) (noting the potential impact of an increase in pole rental rates on possible future broadband deployment).

³¹⁵ National Broadband Plan at 110.

³¹⁶ NCTA Comments, Pelcovits Decl. at para. 13 (filed Sept. 24, 2009).

³¹⁷ NCTA’s study estimated a larger difference between the current telecom and cable rates, and estimated that the aggregate difference across the entire cable industry of paying the higher telecom rate would be between \$208 million and \$672 million. *Id.*, Pelcovits Decl. at para. 22. Likewise, in the case of just one state—West Virginia—a rate difference of approximately \$4 million between the current cable and telecom rates was estimated. *Id.*, Attach. Gregg Decl. at para. 14 & Table 2.

In specifying [the cable] rate, we intend to encourage cable operators to make Internet services available to their customers. We believe that specifying a higher rate might deter an operator from providing non-traditional services. Such a result would not serve the public interest. Rather, we believe that specifying the [cable rate] will encourage greater competition in the provision of Internet service and greater benefits to consumers.³¹⁸

117. Previously, the *Pole Attachment Notice* sought comment on, among other things, the difference in pole attachment rates paid by cable systems, incumbent LECs, and competing telecommunications carriers that provide the same or similar services.³¹⁹ The Commission likewise recognized “the importance of promoting broadband deployment and the importance of technological neutrality,” and thus “tentatively conclude[d] that all categories of providers should pay the same pole attachment rate for all attachments used for broadband Internet access service.”³²⁰ The *Pole Attachment Notice* went on to tentatively conclude, however, that “the [uniform] rate should be higher than the current cable rate, yet no greater than the telecommunications rate.”³²¹

118. We decline to pursue the approach proposed by the *Pole Attachment Notice* for several reasons. We believe that pursuing uniformity by increasing cable operators’ pole rental rates—potentially up to the level yielded by the current telecom formula—would come at the cost of increased broadband prices and reduced incentives for deployment. Instead, by seeking to limit the distortions present in the current pole rental rates by reinterpreting the telecom rate to a lower level consistent with the Act, we expect to increase the availability of, and competition for, advanced services to anchor institutions and as middle-mile inputs to wireless services and other broadband services.

3. USTelecom and AT&T/Verizon Broadband Rate Proposals

119. As an initial matter, we seek comment on two alternatives, filed after the comment cycle closed in the *Pole Attachment Notice*, to establish a uniform rate for all pole attachments used to provide broadband Internet access services, including those by telecommunications carriers. As described below, both the USTelecom and AT&T/Verizon proposals would allocate costs among attachers differently than they are allocated today based on different assumptions about numbers of attachers and the space each occupies on a pole.³²² Presently, under the cable rate formula, attachers (other than a pole owner) pay an average of 7.4 percent of the annual costs of a pole.³²³ Under the current telecom rate formula, each attacher (other than a pole owner), pays an average of 11.2 percent of the annual costs of a pole in urban areas and 16.89 percent in non-urban areas.³²⁴ Under USTelecom’s rate proposal, by contrast, any

³¹⁸ 1998 Implementation Order, 13 FCC Rcd at 6794, para. 32.

³¹⁹ *Pole Attachment Notice*, 22 FCC Rcd at 20200, 20206, paras.13, 26.

³²⁰ *Pole Attachment Notice*, 22 FCC Rcd at 20209, para. 36.

³²¹ *Pole Attachment Notice*, 22 FCC Rcd at 20209, para. 36.

³²² Letter from Robert W. Quinn, Jr., AT&T Senior Vice President – Federal Regulatory and Suzanne A. Guyer, Verizon Senior Vice President – Federal Regulatory Affairs, to Marlene Dortch, Secretary, FCC, WC Docket No. 07-245, RM-11293, RM-11303 (filed Oct. 21, 2008) (AT&T/Verizon Oct. 21, 2008 *Ex Parte* Letter); Letter from Jonathan Banks, Senior Vice President, Law and Policy, United States Telecom Association, to Marlene Dortch, Secretary, FCC, WC Docket No. 07-245 (filed Oct. 27, 2008) (USTelecom Oct. 27, 2008 *Ex Parte* Letter).

³²³ See 47 U.S.C. § 224(d).

³²⁴ See 47 U.S.C. § 224(e). Calculations under the Commission’s rules for the cable and telecom formulas are based on the rebuttable presumptions of one foot for space occupied by an attachment and 37.5 feet for pole height, including 13.5 feet of usable space and 24 feet of unusable space. 47 C.F.R. § 1.1418. Calculations under the (continued....)

attacher (other than a pole owner) would pay 11 percent of the annual cost of a pole, regardless of the number of attachers or amount of space each attacher uses.³²⁵ Under the AT&T/Verizon proposal, it appears that each attacher (other than the pole owner) would pay 18.67 percent of the annual costs of the pole.³²⁶

120. Both rate proposals consist of formulas that are different from those prescribed in section 224 of the Act.³²⁷ USTelecom and AT&T/Verizon argue that the Commission “is not limited to the particular rate formulas incorporating factors such as usable space set forth in [s]ection 224(d) and (e) for pole attachments of non-incumbent telecommunications carriers and cable television systems.”³²⁸ Thus, USTelecom asserts that the Commission “has broad authority, within the bounds of reasonableness, ‘to derive its own view of just and reasonable rates’ . . . regardless of conventional considerations such as usable space.”³²⁹ We seek comment on this view of the Commission’s authority. Although the Supreme Court has confirmed that the Commission can rely on its general section 224(b) authority to ensure “just and reasonable rates” to regulate pole rental rates, under that holding the Commission would appear to be bound by the statutory rate formulas within their “self-described scope.”³³⁰ To the extent that Congress intended a particular rate formula to apply only when a provider was *exclusively* providing a particular type of service, it clearly knew how to do so. Thus, the statute provides that the section 224(d) cable rate formula applies to “any pole attachment used by a cable television system *solely* to provide cable service.”³³¹ The section 224(e) telecom rate formula is not limited in this manner, and thus the “self-described scope” of that formula would seem to encompass any attachments by telecommunications carriers so long as they are being used to provide telecommunications services—whether exclusively or in combination with other services.³³² However, we seek comment on whether alternative interpretations of the statute would be reasonable. Alternatively, is there a way in which the USTelecom or AT&T/Verizon proposals could be reconciled with the pole rental rate formulas specified in sections 224(d) and (e) of the Act?

121. We also seek comment on whether the USTelecom or AT&T/Verizon proposals are in the public interest. In particular, we note that, under the USTelecom proposal, the rates paid by telecom

(Continued from previous page) _____

Commission’s rules for the telecom formula also are based on the Commission’s rebuttable presumption of an average of five attaching entities in urban areas and three in non-urban areas.

³²⁵ USTelecom Oct. 27, 2008 *Ex Parte* Letter at 4.

³²⁶ See AT&T/Verizon Oct. 27, 2008 *Ex Parte* Letter at 2-4. The space factor used to allocate costs in the AT&T/Verizon formula is $((\text{space occupied by an attachment}) + (\text{unusable space}/4 \text{ attachers}))/\text{pole height}$. To determine the percentage of the pole costs that an attacher (other than the pole owner) would pay, assume the use of the Commission’s rebuttable presumptions of 1 foot of space occupied by an attachment, 24 feet of unusable space, and 37.5 feet for the height of a pole. Substituting these values into the space factor yields the following: $(1 + (24/4))/37.5$, or .1867, which equals 18.67 percent.

³²⁷ See 47 U.S.C. § 224(d) (cable rate formula); 47 U.S.C. § 224(e) (telecom rate formula).

³²⁸ USTelecom Oct. 27, 2008 *Ex Parte* Letter at 9; see also AT&T/Verizon Oct. 21, 2008 *Ex Parte* Letter at 4 (citing 47 U.S.C. § 224(b)(1) (“[T]he Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable.”)).

³²⁹ USTelecom Oct. 27, 2008 *Ex Parte* Letter at 9-10.

³³⁰ *Gulf Power*, 534 U.S. at 335-36, 338-39.

³³¹ 47 U.S.C. § 224(d)(3) (emphasis added).

³³² 47 U.S.C. § 224(e)(1). See also, e.g., FPL and Tampa Electric Comments at 13-14 (arguing that, under section 224, telecommunications carriers are required to pay no less than the telecommunications rate regardless of any other services they may provide); EEI/UTC Comments at 98 (same).

attachers generally would be lower than those rates are today, but the rates paid by cable attachers would be higher. With respect to the AT&T/Verizon proposal, we note that it appears that both telecommunications carriers and cable operators generally would pay higher pole rental rates than yielded by the current telecom rate formula. While those outcomes would provide uniformity of rates, would they undermine investment incentives or otherwise increase the cost of or reduce competition for communications services?

4. Reinterpreting the Telecom Rate

122. Rather than deviating from the statutory telecom rate formula, we seek comment on ways to reinterpret the section 224(e) telecom rate formula so as to yield pole rental rates that reduce disputes and investment disincentives which can arise from the disparate rates yielded by the Commission's current rules. As the National Broadband Plan recognizes, this disparity largely results from the existing statutory framework, as implemented by the Commission. Although the National Broadband Plan recommended that Congress "consider amending [s]ection 224 of the Act to establish a harmonized access policy for all poles, ducts, conduits and rights-of-way," it also recommended that the Commission take what actions it can to address these rate disparities within the existing statutory framework.³³³ We seek comment below on alternatives for reinterpreting the telecom rate formula, our proposal based in part on one of those alternatives, as well as other alternative approaches to reinterpreting the telecom rate formula within the existing statutory framework.

a. TWTC Proposal

123. TWTC submitted a proposal to revise the interpretation of the telecom rate formula to "eliminate or dramatically reduce the differential in pole attachment rates."³³⁴ The Commission sought comment on this proposal in the *Pole Attachment Notice* in the context of the somewhat different focus and proposals considered there.³³⁵ We revisit this proposal in light of the pole rate recommendation of the National Broadband Plan. In addition to the specific comment sought below, we ask commenters to refresh the record regarding the questions raised about the TWTC proposal in the *Pole Attachment Notice* in the context of the issues under consideration here.

124. Specifically, TWTC asserts that, despite the textual differences between section 224(d) and section 224(e) regarding the costs to be included in the cable rate formula and the telecom rate formula, "the FCC currently includes the same cost categories in its implementing regulations" reflected in the two formulas.³³⁶ In particular, TWTC contends that the telecom rate includes costs not mentioned in section 224(e),³³⁷ citing: (1) rate of return; (2) depreciation; and (3) taxes.³³⁸ TWTC alleges that such costs "bear no relation" to the cost of providing space for an attachment and are not necessitated by the language of section 224(e). In particular, TWTC contends that "none of these 'costs' has anything to do

³³³ National Broadband Plan at 110-12.

³³⁴ See TWTC White Paper, RM-11293, at 3, 20.

³³⁵ Among other things, the *Pole Attachment Notice* tentatively concluded that there should be a uniform rate for pole attachments used to provide broadband Internet access service, and that rate should be higher than the rate produced by the current cable rate formula, but no higher than the rate produced by the current telecom rate formula. *Pole Attachment Notice*, 22 FCC Rcd at 20196, para. 3. Following from the National Broadband Plan, our focus here, however, is to consider ways to reinterpret the telecom rate formula to yield rates as low and close to uniform as possible. See National Broadband Plan at 110.

³³⁶ See TWTC White Paper, RM-11293, at 19.

³³⁷ See TWTC White Paper, RM-11293, at 18.

³³⁸ See TWTC White Paper, RM-11293, at 19.