- The opportunity for resolution of factual disputes via settlement conferences before an alternative dispute resolution forum.[362]

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

117. The comments evidenced significant support for the Oregon PUC's sanctions.[363] The record shows that the system of fines instituted by the Oregon PUC has been effective in reducing substantially the incidence of unauthorized attachments in that state.[364] The Oregon penalties have been tested and refined with assistance from the Oregon Joint Use Association.[365]

118. We do not adopt the Oregon system as federal law, but rather continue to favor agreements negotiated between utilities and attaching entities.[366] We simply conclude that we have examined Oregon's rules and find them to be reasonable, and that we would expect to find reasonable any unauthorized attachment provisions contained in agreements that do not exceed the Oregon penalties. As noted above, however, the Oregon sanctions are part of a larger system that also affords protections to attachers that operate in good faith. Consequently, we anticipate that, like the Oregon system, a reasonable pole attachment agreement also will contain provisions that provide notice to attachers, a fair opportunity to remedy violations, and a reasonable process for resolving factual disputes that may arise.

E. The "Sign and Sue" Rule

119. The *Further Notice* reviewed the Commission's long-standing "sign and sue" rule, which allows an attacher to challenge the lawfulness of terms in an executed pole attachment agreement that the attacher claims it was coerced to accept in order to gain access to utility poles.[367] Finding that utilities continue to have the potential to abuse their monopoly power in negotiating pole attachment agreements, the Commission proposed to retain the "sign and sue" rule, but sought comment on whether to add a notice requirement to the rule.[368] Specifically, the Commission proposed that rule 1.1404(d) be amended

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[362] The Oregon rules provide for dispute resolution before a Joint-Use Association, which is comprised of pole owners, pole occupants, and government entities. Oregon Administrative Rules, Division 28, Pole and Conduit Attachments, 860-028-0200, 860-028-0220. We encourage stakeholders to develop dispute resolution fora that would function in a manner similar to the Joint-Use Association in Oregon.

[363] Alliant Comments at 7; NRECA Comments at 20; Coalition Comments at 100–01; CPS Energy Comments at 15; Verizon Comments at 45–46; Alliance Comments at 72–75; APPA Reply at 36. Of course, the comments were not unanimous. Some believe the Oregon system is not sufficiently stringent. Idaho Power Comments at 15; APPA Comments at 30–31; Oncor Comments at 51–52. Others believe the Oregon system is unworkable or that it results in penalties that are too harsh. Charter Comments at 26–32; TWC Comments at 30–36.

[364] *See* Coalition Comments at 101 and Exh. C.

[365] Portland General Electric *NPRM* 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).

[366] *See 1998 Implementation Order*, 13 FCC Rcd at 6783–84, para. 10 (preference for negotiated agreements).

[367] *Further Notice*, 25 FCC Rcd at 11905–09, paras. 99–108.

[368] Some commenters continue to urge the Commission to eliminate the "sign and sue" rule entirely. *See, e.g.*, EEI/UTC Comments at 59–63; Idaho Power Comments at 15–16. We decline to do so, for the reasons stated in the *Further Notice*, 25 FCC Rcd at 11907–08, paragraphs 104–05. *See, e.g.*, AT&T Comments at 25 (attachers might feel economic pressure to accept a less than satisfactory agreement in order to get into business or to serve a specific (continued....)

to require an attacher to provide a utility with written notice of its objections to provisions of a proposed pole attachment agreement, during contract negotiations, as a prerequisite for later bringing a complaint challenging those provisions.[369] We also sought comment on whether such a notice requirement should include an exception for circumstances where a challenged provision was not unjust and unreasonable on its face, but only as later applied, and the attacher could not reasonably have anticipated the unreasonable application.[370]

120. A few commenters expressed support for the proposed notice requirement.[371] A number of other commenters, however, advocated retaining the "sign and sue" rule without modification, and raised various objections to the proposed notice requirement.[372] After reviewing these comments, we conclude that the Commission should not amend rule 1.1404(d) to add a notice requirement to the "sign and sue" rule. As discussed below, we find that such a requirement poses a significant risk of unduly delaying the negotiation process and adding unnecessary complexity to the adjudication of pole attachment disputes before the Commission. Moreover, we find that a number of the intended benefits of the proposed notice provision will be realized through the amendment to rule 1.1404(k) that we adopt elsewhere in this order.

121. Commenters both for and against the notice requirement raised valid concerns that the requirement would prompt attachers to be over-inclusive in identifying potentially problematic contract terms in correspondence with the utility during the negotiation process.[373] One commenter opined that the notice requirement would cause attachers to make "blanket" objections to contract terms that would provide utilities with no notice of which provisions the attachers actually consider to be objectionable (as

(Continued from previous page)
customer by a certain time frame); Level 3 Comments at 14–16 (attaching parties often do not sign the agreements because they have reached accord on significant provisions, but because they can no longer delay their construction while negotiations drag on); TWC Comments at 23–26 (utilities, relying on superior bargaining power, often present attachers with one-sided boilerplate agreements, and have little or no incentive to make concessions other than removing facially illegal terms); NCTA Comments at 37–42 (the "sign and sue" rule is virtually the only leverage attachers have when negotiating contracts with utilities).

[369] *Further Notice*, 25 FCC Rcd at 11905, 11908–09, paras. 99, 107–08.

[370] *Id.* at 11909, para. 108.

[371] *See, e.g.*, Coalition Comments at 104–05; Florida IOUs Comments at 53–55; AT&T Comments at 25; APPA Comments at 30. Some commenters expressed only weak support for the proposed notice requirement. *See, e.g.*, Oncor Comments at 52–54 (Oncor does not oppose the notice requirement); EEI/UTC Reply at 51–54 (although the proposed revision to the sign and sue rule is a step in the right direction, it does not go far enough in providing assurance a pole attachment agreement was negotiated in good faith by an attaching entity). One commenter who advocates eliminating the sign and sue rule in its entirety, opposed the proposed notice requirement. Idaho Power Comments at 15–16 (the proposed notice requirement is "not likely to remedy or improve the negotiation process and could increase the potential for adverse impacts for all parties.").

[372] *See, e.g.*, NCTA Comments at 37–42; TWC Comments at 23–26; MetroPCS Comments at 22–26; Level 3 Comments at 14–16; Comcast Comments at 25–30; Charter Comments at 16–21; CenturyLink Comments at 35–37; CTIA Comments at 15–15; ACA Comments at 10–11. The proposed exception to the notice requirement for circumstances where rates, terms, and conditions are not unjust and unreasonable on their face was criticized by both supporters and opponents of the notice requirement. *See, e.g.*, AT&T Comments at 26–27; NCTA Comments at 40–41; Oncor Comments at 53. *But see* CTIA Comments at 15–16 (supporting the exception); Sunesys Comments at 28 (same).

[373] *See, e.g.*, Florida IOUs Comments at 53–55 (proposed notice requirement will encourage attachers to word all correspondence in negotiations to include language that could later be deemed "notice" under the rule). *See also* NCTA Comments at 40; Charter Comments at 16–21; Oncor Comments at 53. To address this potential problem, the Florida IOUs, who support the notice requirement, suggested that the Commission require an attacher to designate, immediately before the agreement is executed, the specific provisions of the final agreement it contends are unjust and unreasonable. Florida IOUs Comments at 53–55.

distinguished from those the attacher included merely to ensure it did not waive any rights to later object).[374] This effort to memorialize all conceivably objectionable terms, some feared, would set off time-consuming exchanges of correspondence between the attacher and the utility, and thus increase the time and expense involved in negotiating a pole attachment agreement.[375]

122. Some commenters also predicted that the proposed notice requirement would prematurely ignite a host of unnecessary disputes during the negotiation process over contract provisions that may never be implemented or enforced by the utility.[376] Further, some commenters raised credible concerns that the notice requirement would complicate and prolong complaint proceedings before the Commission by requiring the Commission, as a threshold matter, to review the parties' negotiating history to determine whether the attacher provided the utility with notice of its objections to disputed contract terms during negotiations, and, if not, whether the attacher could have reasonably anticipated that the challenged term would be applied in an allegedly unreasonable manner.[377]

123. Comments from both utilities and attachers emphasized the need for parties to engage in good faith negotiations to resolve disputes over contract terms before claims are raised at the Commission.[378] Indeed, we affirm, pursuant to our authority under section 224(b) of the Act, that both attachers and utilities have a duty to negotiate the rates, terms, and conditions of attachment in good faith, and to make a good faith effort to resolve disputes prior to seeking relief from the Commission. We thus reject the position of commenters who contend that the sign and sue rule effectively relieves attachers of any obligation to negotiate pole agreements in good faith.[379] At the same time, however, we note that the sign and sue rule was adopted in recognition that in some situations, despite good faith efforts to reach agreement, an attacher may be forced to execute a pole attachment agreement containing what it believes to be unjust and unreasonable terms in order to gain timely access to the utility's poles.[380] Although the sign and sue rule exists to address these situations, based on the relatively few complaints the

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[374] Oncor Comments at 53–54.

[375] *See, e.g.*, Comcast Comments at 25–30; NCTA Comments at 40; Charter Comments at 16–21; TWC Comments at 23–26; TWC Reply at 41.

[376] *See* Comcast Comments at 25–30 (although utilities routinely salt their pole agreements with boilerplate terms that violate numerous provisions of pole attachment law and policy, many of these provisions are never implemented or enforced by the utility, in part because the provisions are known to be unenforceable); TWC Comments at 23–26 (the proposed notice requirement may lead attachers to litigate over terms that may never be enforced by a utility); Charter Comments at 16–21 (memorializing every conceivable basis for complaint, as attachers will feel compelled to do, will most likely be unnecessary).

[377] *See* Charter Comments at 16–20; Florida IOUs Comments at 53–55.

[378] *See, e.g.*, Coalition Comments at 105; EEI/UTC Comments at 59–63; EEI/UTC Reply at 51–54; Comcast Comments at 25–30; TWC Comments at 23–26.

[379] *See, e.g.*, EEI/UTC Reply at 51–54.

[380] *See Further Notice*, 25 FCC Rcd at 11905–07, paras. 100, 104. Such a coercive situation may arise, for example, where "the attacher acquiesces in a utility's 'take it or leave it' demand that it pay more than the statutory maximum or relinquish some other valuable right — without any *quid pro quo* other than the ability to attach its wires on unreasonable or discriminatory terms." *See Southern Co. Servs., Inc. v. FCC*, 313 F.3d 574, 583 (D.C. Cir. 2002) (*Southern Co. II*) (quoting the Commission's brief with approval). As we discussed in the *Further Notice*, a utility may successfully defend a complaint challenging the reasonableness of a term in a pole attachment agreement by showing that the term was adopted as part of a *quid pro quo* for which the utility provided a valuable concession. *See Further Notice*, 25 FCC Rcd at 11908, para. 106. *See also* NCTA Comments at 41 (if a pole owner wishes to demonstrate that an attacher bargained away the precise term or condition that it subsequently challenges in a complaint, it can do so under the existing regulatory regime); Comcast Comments at 25–30 (utilities are protected by the Commission's policy of not disturbing bargained-for package of provisions where a *quid pro quo* has been established). *Accord*, Level 3 Comments at 14–16; Charter Comments at 16–21.

Commission has received challenging the terms of executed pole attachment agreements, it appears that in most instances, parties are able to achieve an agreement that is acceptable to both sides.[381]

124. Our proposal to include a notice requirement in rule 1.1404(d) was designed to promote efforts by attachers and utilities to negotiate innovative and mutually beneficial solutions to contested contract issues.[382] After reviewing comments on that proposal, however, we have concluded that it carries a significant risk of unduly complicating and delaying the negotiation of pole attachments agreements and the adjudication of disputes over such agreements. Moreover, we find that the modifications to rule 1.1404(k) adopted elsewhere in this order,[383] including the requirement for good faith, executive-level negotiations, will provide a number of the benefits we originally envisioned for the amendment to rule 1.1404(d). Amended rule 1.1404(k) should encourage the negotiated resolution of disputes over the terms of pole attachment agreements by providing utilities with notice of those provisions in a pole attachment agreement that an attacher finds so unreasonable that it is prepared to seek relief at the Commission. Moreover, because application of amended rule 1.1404(k) — unlike the proposed amendment to rule 1.1404(d) — carries no risk that an attacher's right to challenge unreasonable contract provisions will be waived through incomplete notice, attachers will have little incentive to be over-inclusive in designating issues for pre-complaint resolution. Similarly, relying on a pre-complaint notice requirement, instead of a requirement for notice during contract negotiations, will decrease the likelihood that parties will spend valuable time and resources wrangling over terms that a utility may never seek to enforce.

125. Rule 1.1404(k), as modified, will thus provide a number of the dispute resolution benefits that the notice requirement was intended to offer. Further, it does not pose the complications and potential delays to the negotiation and adjudication process that many commenters feared would result from the proposal addition of a notice requirement to rule 1.1404(d). Accordingly, we decline to amend rule 1.1404(d) to add a provision requiring an attacher to provide a utility with written notice of its objections to provisions of a proposed pole attachment agreement, during contract negotiations, as a prerequisite for later bringing a complaint challenging those provisions.

V. POLE RENTAL RATES

126. As discussed below, the record developed in response to the *Further Notice* persuades us to adopt a form of the proposed new telecommunications rate formula, which we believe strikes the right balance between promoting broadband and providing continued incentives for investment by pole owners consistent with section 224 of the Act.[384] In addition, the new formula will minimize the difference in rental rates paid for attachments that are used to provide voice, data, and video services, and thus will help remove market distortions that affect attachers' deployment decisions. Removing these barriers to telecommunications and cable deployment will enable consumers to benefit through increased competition, affordability, and availability of advanced communications services, including broadband. Increasing competitive neutrality also improves the ability of different providers to compete with each other on an equal footing, better enabling efficient competition.

A. Background

127. *1978 Pole Attachment Act.* 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

[381] *See* TWC Reply at 40 (noting the "relative dearth of pole attachment complaints filed with the Commission); NCTA Comments at 37–40 (if attachers were simply signing virtually any pole attachment agreement and filing complaints later, significantly more complaints would have been filed to date).

[382] *See Further Notice*, 25 FCC Rcd at 11908, para. 107.

[383] *See supra* para. 100.

[384] *Further Notice,* 25 FCC Rcd at 11917–24, paras. 128–41.

1978 when it added section 224 to the Communications Act.[385] Although section 224 relied on "cost" as the foundation for determining just and reasonable attachment rates, it recognized the range of ways that "cost" could be interpreted. In particular, section 224(d)(1) defines a just and reasonable rate as ranging from a statutory minimum based on the additional costs of providing pole attachments to a statutory maximum based on fully allocated costs.[386]

128. The additional, or incremental, costs that form the basis for the statutory minimum are the costs that would not be incurred by the utility "but for" the pole attachments.[387] These costs include pre-construction survey, engineering, make-ready, and change-out costs incurred in preparing the pole for attachments.[388] Congress expected a pole attachment rate based on incremental costs to be minimal since most of those costs would have been fully recovered in the make-ready charges already paid by the attacher.[389] The maximum rate for attachments under section 224(d)(1), identified as a percentage of fully allocated costs, reflects a portion of operating expenses and capital costs that a utility incurs in owning and maintaining poles; the percentage is equal to the portion of space on a pole occupied by an attacher.[390]

129. In a series of orders, the Commission implemented a formula that cable television system attachers and utilities could use to determine a maximum allowable just and reasonable pole attachment rate – referred to as the cable rate formula – and procedures for resolving rate complaints.[391] In 1987, the U.S. Supreme Court found that the cable rate formula adopted by the Commission provides pole owners with adequate compensation, and thus did not result in an unconstitutional "taking."[392]

130. *Telecommunications Act of 1996.* Congress expanded the reach of section 224 in the 1996 Act to promote infrastructure investment and competition. Among other things, Congress added "provider[s] of telecommunications service[s]" as a category of attacher entitled to pole attachments at just and reasonable rates, terms and conditions under section 224,[393] and added section 224(e), which provides a methodology "to govern the charges for pole attachments used by telecommunications carriers

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[385] Pole Attachment Act of 1978, Pub. L. No. 95-234, 92 Stat. 33, codified at Communications Act of 1934, as amended; 47 U.S.C. § 224. Congress reacted to an apparent need in the cable television industry to resolve conflicts between such providers, then known as "CATV systems," and utility pole, duct, and conduit owners over the charges for use of such facilities. *See generally* 1977 Senate Report, *reprinted in* 1978 U.S.C.C.A.N. 109.

[386] 47 U.S.C. §§ 224(d)(1); *see also* 1977 Senate Report at 19–21, *reprinted in* 1978 U.S.C.C.A.N. at 127–28.

[387] 1977 Senate Report at 19, *reprinted in* 1978 U.S.C.C.A.N. at 127.

[388] "Make-ready" generally refers to the modification of poles or lines or the installation of guys and anchors to accommodate additional facilities. *See* 1977 Senate Report at 19, *reprinted in* 1978 U.S.C.C.A.N. at 127. A pole change-out is the replacement of a pole to accommodate additional users. *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, 4388, para. 6 n.3 (1987) (*1987 Rate Order*), *recon. denied*, 4 FCC Rcd 468 (1989).

[389] *See* 1977 Senate Report at 19, *reprinted in* 1978 U.S.C.C.A.N. at 127; *1987 Rate Order*, 2 FCC Rcd at 4388, para. 4.

[390] 1977 Senate Report at 19–20, *reprinted in* 1978 U.S.C.C.A.N. at 127–28.

[391] *See, e.g.*, *First Report and Order*, 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, and make-ready as non-recurring cost); *1987 Rate Order*, 2 FCC Rcd 4387. The cable rate formula was codified in the *1998 Implementation Order*, 13 FCC Rcd 6777 at 47 C.F.R. § 1.1409(e)(1).

[392] *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987); *see Alabama Cable Telecomm. Ass'n v. Alabama Power Co., Application for Review*, File No. PA 00-003, Order, 16 FCC Rcd 12209 (2001) (*Alabama Cable Order*), *review denied sub. nom. Alabama Power Co. v. FCC*, 311 F.3d 1357 (11th Cir. 2002), *cert. denied*, *Alabama Power Co. v. FCC*, 540 U.S. 937 (2003).

[393] 47 U.S.C. §§ 224(a)(4), (b)(1).

to provide telecommunications services."[394] Section 224(e) provides for the determination of pole attachment rates based on "the cost of providing space on a pole."[395] The statute explains how the costs should be divided, or allocated, between the pole owner and attacher.[396]

131. By virtue of the 1996 Act revisions, section 224 of the Act now sets forth two separate methodologies to determine the maximum rates for pole attachments – one applies to pole attachments used by telecommunications carriers (the telecom rate formula), and the other to pole attachments used "solely to provide cable service" (the cable rate formula).[397] Under section 224, pole attachments for telecommunications carriers initially were established under the cable rate formula, and were transitioned to the telecom rate formula over a five-year period.[398] As the Commission implemented these statutory formulas, the telecom rate formula generally resulted in higher pole rental rates than the cable rate formula.[399]

132. *Subsequent Proceedings.* 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.[400] In 2002, 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).[401]

133. On November 20, 2007, the Commission released the *Pole Attachment Notice*, which 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.[402] The Commission likewise recognized "the importance of promoting broadband deployment and the

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[394] 47 U.S.C. § 224(e)(1)–(4). For purposes of section 224, however, Congress excluded incumbent LECs from the definition of "telecommunications carrier." 47 U.S.C. § 224(a)(5). We discuss below issues relating to the treatment of pole attachments by incumbent LECs for purposes of section 224. *See infra* Part V.C.

[395] 47 U.S.C. § 224(e)(2).

[396] 47 U.S.C. § 224(e)(2)–(3).

[397] 47 U.S.C. §§ 224(d), (e). The difference between the cable and existing telecom rate formulas is the way they allocate the costs associated with the unusable portion of the pole — the space on a pole that cannot be used for attachments. *Compare* 47 C.F.R. § 1.1409(e)(1) *with* 47 C.F.R. § 1.1409(e)(2). The cable and telecom rate formulas both allocate the costs of usable space on a pole based on the fraction of the usable space that an attachment occupies. Under the cable rate formula, the costs of unusable space are allocated in the same way. 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.

[398] 47 U.S.C. § 224(e)(4).

[399] Under the cable formula, each attacher, other than the pole owner, pays about 7.4% of the annual cost of a pole. *See* 47 U.S.C. §§ 224(d). Under the telecom rate formula, each attacher, other than the pole owner, pays between about 11.2% of the annual cost of a pole in urban areas to about 16.9% in non-urban areas. *See Further Notice*, 25 FCC Rcd at 11913–14, para. 11. These rates are based on the Commission's rebuttable presumptions of 37.5 feet for the height of a pole, 24 feet for the unusable space on a pole, 13.5 feet for the usable space, 1 foot for the space occupied by an attachment, 3 attachers in non-urban areas, and 5 attachers in urban areas. *See* 47 C.F.R. §§ 1.1417–18.

[400] *See 1998 Implementation Order*, 13 FCC Rcd at 6796, para. 34.

[401] *Gulf Power*, 534 U.S. at 335–36, 338–39.

[402] *Pole Attachment Notice*, 22 FCC Rcd at 20200, 20206, paras. 13, 26.

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."[403] 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."[404]

134. In the 2010 *Further Notice*, however, the Commission declined to pursue that approach for several reasons. The Commission explained 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."[405] Instead, the Commission sought to limit the distortions present in the current pole rental rates "to increase the availability of, and competition for, advanced services to anchor institutions and as middle-mile inputs to wireless services and other broadband services," some of which potentially could be classified as telecommunications services.[406] Accordingly, in the *Further Notice*, the Commission sought comment on alternative approaches for reinterpreting the telecom rate formula within the existing statutory framework, including a specific Commission proposal based on elements proposed by TWTC. As the Commission noted, this approach was consistent with the National Broadband Plan's recommendation to establish rates "as low and close to uniform as possible" based on evidence that the uncertainty regarding the applicable rate "may be deterring broadband providers that pay lower pole rates from extending their networks or adding capabilities (such as high-capacity links to wireless towers)."[407] This uncertainty results from the risk that, by offering services that potentially could be classified as "telecommunications services," a higher telecom rental rate might then be applied to the broadband provider's entire network.[408] The *Further Notice* explained that the record likewise bears out these concerns.[409]

B. The New Telecom Pole Rental Rate

135. After review of the extensive filings in this proceeding, we adopt a modified form of the *Further Notice*'s proposal as the new telecom rate. Under this new approach, explained in detail below, we revise the section 224(e) rental rate for pole attachments used by telecommunications carriers to provide telecommunications services. As we explain in detail below in Part V.B.2, Congress gave the Commission authority to interpret section 224(e), including the ambiguous phrases "cost of providing space . . . other than the usable space" in section 224(e)(2) and "cost of providing usable space" in section 224(e)(3). Exercising that authority, we identify a range of possible rates, from the current application of the telecom rate formula at the upper end, to an alternative application of the telecom rate formula based on cost causation principles at the lower end. Within that range, we seek to balance the goals of promoting broadband and other communications services with the historical role that pole rental rates have played in supporting the investment in pole infrastructure, and thus define the "cost of providing space" on that basis.

136. As explained below, we believe the telecom rate should be lowered to more effectively achieve Congress' goals under the 1996 Act to promote competition and "advanced telecommunications

[403] *Id.* 20209, para. 36.

[404] *Id.*

[405] *Further Notice*, 25 FCC Rcd at 11913, para. 118.

[406] *Id.*

[407] NATIONAL BROADBAND PLAN at 110–11 & n.11 (citing a filing with the Commission by Bright House explaining the deterrent effect of higher pole attachment rates on offering new, advanced services to anchor institutions like school districts).

[408] *Id.*

[409] *Further Notice*, 25 FCC Rcd at 11912, para. 116 (noting examples cited by cable operators of the negative effects that a higher pole attachment rate would have on deploying new, advanced services).

capability" by both wired and wireless providers by "remov[ing] barriers to infrastructure investment," and the broader pro-competitive goals and policies that Congress directed the Commission to carry out under the 1996 Act.[410] Indeed, the *Sixth Broadband Deployment Report* identified reform of the Commission's pole attachment rules as a means to advance the deployment of broadband.[411] Additionally, this rate is readily administrable and consistent with the "simple and expeditious" regulatory framework Congress intended. Most importantly from a consumer standpoint, the new rate methodology that we implement will better serve the public interest by making broadband and other advanced services more widely available.

137. We also find this approach consistent with the specific statutory framework governing pole attachments. For one, as a matter of law, the new telecom rate reflects a reasonable interpretation of the ambiguous statutory language of section 224(e) and remains true to the statutory requirements for allocating cost between attachers and pole owners. The rate is just, reasonable, and fully compensatory, and our new methodology is grounded in sound economic policies.

1. Description of the New Telecom Rate

138. *Overall Approach.* The new telecom rate we adopt today originates from an initial proposal by TWTC.[412] Fundamentally, TWTC asserts that the Commission's prior telecom rate included costs that "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 with actually providing 'space' on a pole for pole attachments because a utility would incur these costs 'regardless of the presence of pole attachments.'"[413] Thus, TWTC proposes that those costs should be eliminated from the telecom rate.[414] TWTC suggests instead that utilities should determine "how much *extra* a utility must incur to provide non-usable and usable space on poles for pole attachments (in both construction and maintenance costs) and then fully allocate those costs based on the cost-apportionment formulas under Section 224(e)(2) and (3)."[415] Drawing upon this conceptual framework, the *Further Notice* sought comment on a modified proposal designed to ensure consistency with the statutory framework of section 224. Based upon the record received in response to the *Further Notice*, we adopt a revised form of that proposal, as described below.

139. As a threshold matter, we note that the Commission recognizes that "[r]ather than insisting upon a single regulatory method for determining whether rates are just and reasonable, courts and other federal agencies with rate authority similar to our own evaluate whether an established regulatory scheme produces rates that fall within a 'zone of reasonableness.' For rates to fall within the zone of

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[410] 47 U.S.C. § 1302(a); Telecommunications Act of 1996, Public Law No. 104-104, 110 Stat. 56.

[411] *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act; A National Broadband Plan for Our Future*, GN Docket Nos. 09-51, 09-137, Sixth Broadband Deployment Report, 25 FCC Rcd 9556, 9560–61, 9575, para. 7 & n.26, para. 29 & n.125 (2010) (*Sixth Broadband Deployment Report*) (citing the 2010 *Further Notice*). Such actions also were recommended by the National Broadband Plan. NATIONAL BROADBAND PLAN at 109–11.

[412] *Further Notice*, 25 FCC Rcd at 11915–17, paras. 123–128 (discussing Letter from Thomas Jones, Counsel for Time Warner Telecom Inc., to Marlene H. Dortch, Secretary, FCC, RM-11293, RM-11303, Attach. (filed Jan. 16, 2007) (TWTC White Paper)).

[413] *See* TWTC White Paper, RM-11293, at 20 (comparing 47 U.S.C. §§ 224(e)(2)–(3) with *Amendment of the Commission's Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, Report and Order, 15 FCC Rcd 6453, 6477–91, paras. 44–76 (2000) (*2000 Fee Order*)).

[414] *See* TWTC White Paper, RM-11293, at 19–20.

[415] *Id.* at 20.

reasonableness, the agency rate order must undertake a 'reasonable balancing' of the 'investor interest in maintaining financial integrity and access to capital markets and the consumer interest in being charged non-exploitative rates.'"[416]

140. We employ this approach and establish an upper-bound and lower-bound telecom rate under section 224(e). Specifically, depending upon the relative magnitude of costs included, the telecom rate formula will yield relatively higher or lower rates. Identifying reasonable, albeit different interpretations of the ambiguous term "cost" that are consistent with the statute thus provides an upper and lower limit on the possible telecom rates that would be consistent with section 224(e). Although any of the definitions of cost within that range potentially could be adopted by the Commission, and would therefore yield the "just and reasonable" rate for purposes of section 224(e), as discussed below we adopt an approach that seeks to balance the goals of increased broadband competition and availability with the historical role that pole rental rates have played in supporting the cost of pole infrastructure consistent with the framework of section 224(e).

141. *Upper-Bound Rate.* To begin identifying the range of reasonable rates that could result from the telecom rate formula, we first identify the present telecom rate as a reasonable upper bound. The Commission's current telecom rate formula is based on a fully allocated cost methodology,[417] which recovers costs that the pole owner incurs regardless of the presence of attachments.[418] It includes a full range of costs, some of which, as TWTC points out, do not directly relate to or vary with the presence of pole attachments.[419] For this reason, this interpretation of the statutory telecom rate formula serves as the upper end of the range of reasonable rates.

142. *Lower-Bound Rate.* As the Commission observed in the *Further Notice*, "a rate that covers the pole owners' incremental cost associated with attachment would, in principle, provide a reasonable lower limit."[420] The Eleventh Circuit, in addressing a takings challenge, has held that a pole attachment rate above marginal cost can provide just compensation,[421] and marginal or incremental cost

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[416] *Long-Term Number Portability Tariff Filings*, CC Docket No. 99-35, Memorandum Opinion and Order, 14 FCC Rcd 11983, 12026–27, para. 98 (1999) (citing *FERC v. Pennzoil Producing Co.*, 439 U.S. 508, 517 (1979); *AT&T v. FCC*, 836 F.2d 1386, 1390 (D.C. Cir. 1988) (*quoting Jersey Cent. Power & Light v. FERC*, 810 F.2d 1168, 1177 (D.C. Cir. 1987); *Wisconsin v. FPC*, 373 U.S. 294, 309 (1963); *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 585–86 (1942)).

[417] *See, e.g., Amendment of Commission's Rules and Policies Governing Pole Attachments; Implementation of Section 703(e) of the Communications Act, Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket Nos. 97-97, 97-151, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12131–32, para. 55 (2001) (*2001 Order on Reconsideration*). The term "fully allocated cost methodology" is also sometimes referred to as "fully distributed costs."

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

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

[420] *Further Notice*, 25 FCC Rcd at 11919, para. 133.

[421] Legal precedent has established that a pole attachment rate above marginal cost provides just compensation, and marginal or incremental cost pricing can be an appropriate approach to setting regulated rates. *Alabama Power Co.* (continued....)

pricing can be an appropriate approach to setting regulated rates more generally.[422] Indeed, section 224(d) establishes such an approach as the low end of permissible rates under the cable rate formula.[423] However, the section 224(e) formulas allocate the relevant costs in such a way that simply defining "cost" as equal to incremental cost, as TWTC initially proposed, would result in pole rental rates *below* incremental cost.[424]

143. Thus, to identify a lower-bound rate that is consistent with this statutory framework – and enables costs to be allocated based on the prescribed cost-apportionment formulas – we rely on the basic principles of cost causation that would underlie a marginal cost rate without defining "cost" as equivalent to marginal or incremental cost *per se*. Under cost causation principles, if a customer is causally responsible for the incurrence of a cost, then that customer – the cost causer – pays a rate that covers this cost.[425] This is consistent with the Commission's existing approach in the make-ready context, where a pole owner recovers the entire associated capital costs through make-ready fees.[426] For example, if rearrangement or bracketing is performed to accommodate a new attachment, the new attacher is responsible for those costs.[427] Likewise, a pole owner recovers the entire capital cost of a new pole through make-ready charges from the new attacher when a new pole is installed to enable the attachment.

144. Under this approach, we apply cost causation principles to each category of a pole owner's costs – broadly consisting of capital and operating costs – for purposes of the pole rental rate, as well.[428] We recognize that, under traditional ratemaking principles that we have applied in the past, the

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v. FCC, 311 F.3d at 1370. ("In some cases, then, marginal cost will be sufficient to compensate the pole owner."); *id.* at 1370–71 ("In short, before a power company can seek compensation above marginal cost, it must show with regard to each pole that (1) the pole is at full capacity and (2) either (a) another buyer of the space is waiting in the wings or (b) the power company is able to put the space to a higher-valued use with its own operations. Without such proof, any implementation of the Cable Rate (which provides for much more than marginal cost) necessarily provides just compensation."). In this regard, we note that the statute identifies a rate that allows the utility to recover its marginal costs as the lowest permissible just and reasonable rate under section 224(d). 47 U.S.C. § 224(d).

[422] *See, e.g.*, ALFRED E. KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS 65–122 (vol. 1, 1970); CHARLES F. PHILLIPS, JR., THE REGULATION OF PUBLIC UTILITIES 443–49 (1993).

[423] *See* 47 U.S.C. § 224(d)(1). Explaining the cable rate formula, the Supreme Court stated, "The minimum measure is thus equivalent to the marginal cost of attachments, while the statutory maximum measure is determined by the fully allocated cost of the construction and operation of the pole to which cable is attached." *FCC v. Florida Power Corp.*, 480 U.S. at 253; *see also* 1977 Senate Report at 2, *reprinted in* 1978 U.S.C.C.A.N. at 110 ("The formula describes a range between marginal and a proportionate share of fully allocated costs within which pole rates are to fall.").

[424] *See* 47 U.S.C. § 224(e)(2)–(3).

[425] That is to say, prices based on cost-causation principles enable an allocation or a mix of goods to be produced that buyers desire and are willing to pay for and so are socially efficient, and enable an efficient firm to recover its costs. *See, e.g.*, Greg Houston and Hayden Green, NERA Economic Consulting, Treatment of Operating Costs: A Report for Meridian 65–75 (Aug. 6, 2010). The allocation of goods is optimal in a perfectly competitive market. That is, no buyer can be made better off by reallocating resources to produce a different mix of goods without making other buyers worse-off. *See, e.g.*, WALTER NICHOLSON, MICROECONOMIC THEORY, BASIC PRINCIPLES AND EXTENSIONS 512–13 (2d ed. 1978).

[426] *See, e.g.*, *Second Report and Order*, 72 FCC 2d at 62–63, 72–73, paras. 8–9, 28–30 (defining make-ready cost). These capital costs would not have been incurred "but for" the pole attachment demand and the attacher—the cost causer—pays for these costs.

[427] The circumstances where bracketing is required are discussed in greater detail below. *See infra* Parts VI.A, D, F.

[428] Specifically, as discussed below, given the section 224(e) framework and Congress' expectations regarding the administrability of pole rental rate calculations, we cannot, and do not, seek to define precisely the marginal costs associated with pole attachments. Rather, in establishing the lower bound telecom rate, we adopt an approach that (continued....)

telecom rate for pole attachments recovered both operating expenses and capital costs, including a rate of return, taxes, and depreciation.[429] For purposes of identifying a lower bound for the telecom pole rental rate, however, we exclude capital costs from the definition of "cost of providing space."[430] As an initial matter, we note that if capital costs arise from the make-ready process, our existing rules are designed to require attachers to bear the entire amount of those costs.[431] With respect to other capital costs, as we explain more fully below, the record demonstrates that the attacher is not the "cost causer" of these costs.[432] In the case here of applying cost-causation principles to identify the lower-bound telecom rate, the record includes findings by economists and analysts that capital costs are justifiably excluded from the lower-bound rate because the attachers cause none or no more than a *de minimis* amount of these costs, other than those that are recovered up front through the make-ready fees.[433] Past investment in an existing pole would have been incurred regardless of the demand for attachments other than the owner's attachments. As a result, under a cost causation theory, where there is space available on a pole, an attacher would be required to pay for none of the capital costs of that pole. Thus, we exclude capital costs from the lower-bound telecom rate.

145. By contrast, we continue to include certain operating expenses – namely maintenance and administrative expenses – in the definition of "cost" for purposes of the lower bound telecom rate formula.[434] This is generally consistent with cost causation principles because it is likely that an attacher is causally responsible for some of the ongoing maintenance and administrative expenses relating to use of the pole. Although the attacher might not be the cost causer with respect to all the operating costs that

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seeks to define "cost" in a manner that fully compensates the utility for the marginal costs of attachment once the statutory apportionments are applied.

[429] *See, e.g.*, CHARLES F. PHILLIPS, JR., THE REGULATION OF PUBLIC UTILITIES 176–80 (1993).

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

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

[432] *See infra* Part V.B.4.

[433] Comcast Comments Attach. 1, Decl. of Timothy S. Pecaro at 9, para. 15 (Comcast Pecaro Decl.); Comcast Comments at 13 (citing Comcast *NPRM* Comments Exh. 1, Report of Patricia D. Kravtin at para. 79 (Comcast Kravtin Report)). *See infra* Part V.B.4. (addressing contrary comments filed by economists representing EEI/UTC). We agree with Pecaro, as explained below, that it would typically not be economically rational for utilities to build taller poles solely for the possibility of accommodating attachers and therefore incur unreimbursed capital costs: "[I]nstalling a pole that is taller than necessary is strictly speculative and contrary to efficient capital management. . . . Therefore, it would be wholly irrational for the utility, as well as inconsistent with a utility's capital preservation obligations, to risk non-recovery of these costs absent a direct economic benefit." Comcast Pecaro Decl. at para. 17. Further, as discussed below, in the comparatively few instances where a pole is replaced to accommodate a new attachment, the attacher's make-ready fees are designed to recover those costs even though the utility will own the pole. *Id.* Moreover, the utilities did not submit data demonstrating unreimbursed capital costs.

[434] The Commission's cost methodology under its current application of the telecom rate formula requires an attacher to pay for a portion of the operating expenses, specifically a portion of the maintenance and administrative expenses. *See, e.g.*, *2000 Fee Order*, 15 FCC Rcd at 6479–83, paras. 46–54. As noted above, for purposes of the lower-bound telecom rate, we likewise include operating expenses in the pole rental rate, which recovers the recurring costs of the pole, as opposed to the non-recurring costs recovered through make-ready charges. *See generally Second Report and Order*, 72 FCC 2d at 59 (distinguishing between non-recurring costs that are designed to be fully recovered through make-ready charges and ongoing, routine expenses incurred by the utility to maintain existing attachment facilities, which could be recovered through the pole rental rate).

would be included in the lower bound telecom rate, Congress' intention was that the Commission not "embark upon a large-scale ratemaking proceeding in each case brought before it, or by general order" to establish pole rental rates.[435] Thus, under our methodology to determine the lower-bound telecom rate, we include maintenance and administrative expenses.[436]

146. *Determining the New Just and Reasonable Telecom Rate.* From within the range of possible interpretations of the term "cost" for purposes of section 224(e), we adopt a particular definition of cost, and therefore a particular rate as the appropriate just and reasonable telecom rate. The definition of cost we select is based on a balancing of policy goals. As discussed in greater detail below, we seek to ensure that the Commission's policies promote the availability of broadband services and efficient competition for those services.[437] We also recognize, however, that pole rental rates historically have helped support the investment utilities make in their pole infrastructure, and acknowledge utilities' policy concerns about shifting that burden to utility ratepayers.[438]

147. We agree with commenters who explain that today, the telecom rate is sufficiently high that it hinders important statutory objectives. For example, commenters explain that reducing the telecom rate would improve the business case for providing advanced services, because it will reduce the expected incremental cash outflows of providing such services, thereby increasing the likelihood that the present value of the expected incremental cash inflows will exceed the present value of the expected incremental cash outflows.[439] In addition to reducing barriers to the provision of new services, reducing the telecom rate can expand opportunities for communications network investment, as discussed in greater detail below.[440] We thus conclude that lowering the telecom rates will better enable providers to compete on a level playing field, will eliminate distortions in end-user choices between technologies, and lead to provider behavior being driven more by underlying economic costs than arbitrary price differentials.[441] We also find persuasive the views of consumer advocates in this respect. Notably, "NASUCA members are interested in keeping the costs of pole attachments down, so as to keep the costs of the[se] services . . .

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[435] *See* 1977 Senate Report at 22, *reprinted in* 1978 U.S.C.C.A.N. at 130. The pole attachment methodology does not purport to be a precise ratemaking tool. Congress recognized there would be "difficulties . . . in determining some cost components associated with erecting and maintaining pole line plant, and allocating those costs," and understood that the considerable flexibility it gave to the Commission in making its "best estimate" of some costs for determining just and reasonable pole attachment rates also carries with it an element of imprecision. *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, CC Docket No. 78-144, Notice of Proposed Rulemaking, 68 FCC2d 3, 9, 11, paras. 15, 20 (1978) (*1978 Pole Attachment NPRM*). In keeping with Congress's directive, our policy has been that not every detail of pole attachment cost must be accounted for, nor every detail of non-pole attachment cost eliminated from every account used. *See, e.g., 2000 Fee Order*, 15 FCC Rcd at 6463–64, para. 12.

[436] *See* 1977 Senate Report at 22, *reprinted in* 1978 U.S.C.C.A.N. at 130.

[437] *See infra* Part V.B.3.

[438] *See, e.g.*, Coalition Reply at 22; Letter from Aryeh B. Fishman, Director, Regulatory Legal Affairs, and John Caldwell, Director of Economics, EEI, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, GN Docket No. 09-51, Supp. Decl. of Jonathan Orszag and Allan Shampine, at paras. 10–11 (filed Dec. 14, 2010) (EEI Orszag, Shampine Supp. Decl.).

[439] *See infra* paras. 174–177 (discussing commenters' evidence in this regard). Based on well-established economic principles, investment in offering a product or service is likely to be undertaken if the present value of the expected incremental cash inflows exceeds the present value of the expected incremental cash outflows, with present values calculated using a discount rate equal to a cost of capital that reflects the risk of the venture. *See, e.g.*, JAMES C. VANHORNE, FINANCIAL MANAGEMENT AND POLICY 123–26, 131–39 (2d ed. 1971); THOMAS E. COPELAND AND J. FRED WESTON, FINANCIAL THEORY AND CORPORATE POLICY 25–41 (3d ed. 1988).

[440] *See infra* Part V.B.3.

[441] *See generally infra* Part V.B.3.

down. But NASUCA members also . . . are interested in ensuring that pole attachment rates appropriately compensate the owners of the poles, so that other services are not required to subsidize the attachments."[442] Balancing these concerns, NASUCA recommends that the cable rate "should be used for all pole attachments."[443]

148. We also observe that pole owners have the opportunity to recover through make-ready fees all of the capital costs actually caused by third-party attachers.[444] As a result, the pole owner need not bear any significant risk of unrecovered pole investment undertaken to accommodate a third-party attacher. Thus, permitting recovery of 100 percent of apportioned, fully-allocated costs through the pole rental rate seems unwarranted under the statute and could undermine furtherance of important statutory objectives.

149. Although we do not permit utilities to recover 100 percent of apportioned, fully-allocated costs through the new telecom rate, we find it appropriate to allow the pole owner to charge a monthly pole rental rate that reflects some contribution to capital costs, aside from those recovered through make-ready fees. As noted above, for example, regulated pole attachment rates historically have included such a contribution, and we are concerned that adopting a telecom rate that no longer permits utilities to recover such capital costs would unduly burden their ratepayers. We are also mindful of the possible adverse impact of other pole attachment reforms. For one, our regulation of rates for attachments by incumbent LECs could reduce the amount of costs that utilities are able to recover from other sources.[445] Moreover, in conjunction with the pole access reforms adopted above,[446] we are mindful of Congress' expectation that the priority afforded an attacher's access to poles would relate to its sharing in the costs of that infrastructure.[447] We balance these considerations by adopting, in most cases, the following definition of "cost" for purposes of section 224(e): (a) in urban areas, 66 percent of the fully allocated costs[448] used for purposes of the pre-existing telecom rate; and (b) in non-urban areas, 44 percent of the fully allocated costs used for purposes of the pre-existing telecom rate.[449] Defining cost in terms of a percentage of the fully allocated costs previously used for purposes of the telecom rate is a readily administrable approach, and consistent with Congress' direction that the Commission's pole attachment rate regulations be "simple and expeditious" to implement.[450] Further, the specific percentages we select

[442] NASUCA *NPRM* Reply at 2. NASUCA is a voluntary, national association of consumer advocates in more than 40 states and the District of Columbia. *Id.* at 1.

[443] *Id.* at 5. Based on these same policy considerations, we are unpersuaded by claims that consideration of the interests of utility ratepayers—who also stand to benefit from reductions in excessive costs of providing broadband and other communications services—requires a different outcome. *See, e.g.*, Coalition Comments at 9.

[444] As noted below, parties can seek Commission review of make-ready charges to the extent that they believe they are unjust or unreasonable. *See infra* note 572.

[445] *See infra* Part V.C.

[446] *See supra* Part III.

[447] 1977 Senate Report at 19, *reprinted in* 1978 U.S.C.C.A.N. at 127–28.

[448] As specified in the pre-existing telecom rate formula, this is the net cost of a bare pole times the carrying charge rate. 47 C.F.R. § 1.1409(e)(2).

[449] An urbanized service area has 50,000 or higher population, while a non-urbanized service area has under 50,000 population. 47 C.F.R. § 1.1417(c). "If any part of the utility's service area within the state has a designation of urbanized (50,000 or higher population) by the Bureau of Census, United States Department of Commerce, then all of that service area shall be designated as urbanized for purposes of determining the presumptive average number of attaching entities." *Id.* The *Further Notice* referred to these areas colloquially as "urban" and "non-urban" areas, and we do so again here. *See, e.g.*, *Further Notice*, 25 FCC Rcd at 11913–14, para. 119.

[450] 1977 Senate Report at 21, *reprinted in* 1978 U.S.C.C.A.N. at 129; *see also 1978 Pole Attachment NPRM*, 68 FCC 2d at 4, para. 4 ("The supplemental regulation envisioned by the [Senate Committee] Report is to be simple and expeditious, necessitating a minimum of staff, paperwork and procedures consistent with fair and efficient (continued....)

provide a reduction in the telecom rate, and will, in general, approximate the cable rate, advancing the Commission policies identified above.[451]

150. We adopt a different definition of cost in non-urban areas—namely, 44 percent of fully allocated costs—to address the fact that there typically are fewer attachers on poles in non-urban areas, as reflected by the Commission's presumptions. Given the operation of section 224(e), using the same definition of cost in both types of areas would increase the burden pole attachment rates pose for providers of broadband and other communications services in non-urban areas, as compared to urban areas. Such an outcome would be problematic given the increased challenges already faced in non-urban areas, where cost characteristics can be different and where the availability of, and competition for, broadband services tends to be less today than in urban areas.[452] By defining cost in non-urban areas as 44 percent of the fully allocated costs we largely mitigate that concern, particularly under the Commission's presumptions.[453]

151. We observe that these definitions of cost, when applied pursuant to the cost apportionment formula in section 224(e), generally will recover a portion of the pole costs that is equal to the portion of costs recovered in the cable rate. In this regard, we note that for many years the majority of third-party pole attachments subject to Commission regulation have been priced at the cable rate, and there is nothing in the record to suggest that there is, or ever has been, a shortage of pole capacity arising from the utilities' cost recovery at that level. In addition, because there are far more attachments by cable operators than by telecommunications carriers paying the telecom rate,[454] the number of attachments for which there is an actual change in utilities' current pole attachment cost recovery by virtue of the new telecom rate is likely to be relatively modest. Accordingly, we conclude that the pole owner will have appropriate incentives to invest in poles and provide attachments to third-party attachers, carrying forward under our new approach to the telecom rate. Moreover, this approach will significantly reduce the marketplace distortions and barriers to the availability of new broadband facilities and services that arose from disparate rates.[455]

152. The Commission's calculations show that the costs for urban and non-urban areas typically will be within the higher- and lower-bound range permissible under section 224(e), and in those circumstances, we adopt that definition of cost for establishing the just and reasonable telecom rate.[456]

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regulations. That regulation could be uniquely applicable to pole attachment matters . . . . Tariff filings and other aspects of the full panoply of Title II common carrier regulation need not apply, and the Commission is afforded discretion to select regulatory tools.").

[451] *See supra* para. 147; *see also infra* paras. 174–177.

[452] *See infra* Part V.B.3; *see also, e.g.*, SBA Comments, GN Docket No. 10-188 (filed Oct. 15, 2010) (discussing preliminary findings in an SBA report of a "rural-urban divide in broadband services" and recommending, among other things, that "the Commission [] examine the impact that increasing pole attachment rates for small cable broadband providers of comingled video and broadband services would have on these providers' ability to compete and deploy broadband, especially in underserved areas").

[453] Under the telecom rate formula, each attacher, other than the pole owner, pays approximately 11.2% of the relevant "cost" of a pole in urbanized service areas and about 16.9% in non-urban areas. *See Further Notice*, 25 FCC Rcd at 11913–14, para. 119. Under the definition of "cost" as 66% of fully allocated costs in urban areas, the new telecom rate recovers approximately 7.4% of the fully allocated costs of the pole. By defining "cost" as 44% of fully allocated costs in non-urban areas, the new telecom rate likewise recovers approximately 7.4% of the fully allocated costs of the pole in those areas.

[454] *See, e.g.*, Coalition *NPRM* Comments at 17 (citing data on the aggregate number of poles with cable and competitive LEC attachments for certain utilities).

[455] *See generally infra* Part V.B.3

[456] *See Further Notice*, 25 FCC Rcd at 11923, paras. 140–41; *id.* at App. A. Nothing in the record here demonstrates that this expectation is incorrect. (We note that, although there was an error in the computation of the rates for (continued....)

However, if scenarios arise where the costs identified above would be *lower* than the 100 percent of administrative and operating expenses that serves as a lower bound for the zone of reasonableness, we adopt the higher definition of cost in those circumstances. In sum, the applicable cost for purposes of section 224(e) will be the costs identified above or 100 percent of administrative and operating expenses, whichever is higher.

153. *Wireless.* We also reaffirm that wireless carriers are entitled to the benefits and protection of section 224, including the right to the telecom rate under section 224(e). We do so in response to reports by the wireless industry of cases where wireless providers were not afforded the regulated rate.[457] Specifically, in the *1998 Implementation Order,* the Commission explained that it has authority under section 224(e)(1) to prescribe rules governing wireless attachments used by telecommunications carriers to provide telecommunications services.[458] The Commission also stated that Congress did not intend to distinguish between wired and wireless attachments and that there was no basis to limit the definition of telecommunications carriers under the statute only to wireline providers.[459] The Commission noted that, despite the "potential difficulties in applying the Commission's rules to wireless pole attachments, as opponents of attachment rights have argued," it did not see any need for separate rules.[460] Instead, it explained that "[w]hen an attachment requires more than the presumptive one-foot of usable space on the pole," the presumption can be rebutted.[461] Accordingly, wireless attachments are entitled to the telecom rate formula, and where parties are unable to reach agreement through good faith negotiations, they may bring a complaint before the Commission.[462]

154. *Commingled Services.* We also address the role of the new telecom rate in the context of commingled services. Some cable operators[463] express concern that pole owners will seek to impose rates higher than both the cable rate and the new telecom rate where cable operators or telecommunications

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Georgia Power Co. in the *Further Notice*, the cable rate still exceeded the lower-bound telecom rate. *Id.* From top of the column to bottom in the chart, the correct rates for Georgia Power should be as follows: $5.77, $8.72, $13.15, $2.68, and $4.04.).

[457] DAS Forum Comments at 20 ("DAS Forum members report that they are . . . forced to pay monopoly rates for their attachments with complete disregard for the Commission's formula."); *id.* at iii, 22 (contending that, "[w]hile a wireless attachment may occupy more space than a wired attachment[,] . . . the wireless attachment rate should be equal to the telecom rate times that amount of usable space occupied above one foot," and noting that "one DAS Forum member is paying . . . $2,875 per pole per year to a utility" and others are being charged "from two to twenty times greater than the utility's regulated telecommunications rate"); CTIA Comments at 16 ("To the extent that the Commission [adjusts] the Telecommunications rate, it should make clear that the adjustments apply to both wireline *and* wireless attachments.").

[458] *1998 Implementation Order*, 13 FCC Rcd at 6798–99, para. 40 (citing 47 U.S.C. §§ 153(43), (44), (46); 224(a)(4), (d)(3), (e)(1)); *see also Gulf Power*, 534 U.S. 327; *Wireless Telecommunications Bureau Reminds Utility Pole Owners of Their Obligations to Provide Wireless Telecommunications Providers with Access to Utility Poles at Reasonable Rates*, Public Notice, 19 FCC Rcd 24930 (WTB 2004).

[459] *1998 Implementation Order*, 13 FCC Rcd at 6798–99, para. 40 (citing 47 U.S.C. §§ 153(43), (44), (46); 224(a)(4), (d)(3), (e)(1)). The Commission also noted that it had already recognized that cellular telephone, mobile radio, and PCS are telecommunications services. *1998 Implementation Order*, 13 FCC Rcd at 6799, para. 40 (citing *Universal Service Order*, 12 FCC Rcd at 9175; *Local Competition Order*, 11 FCC Rcd at 15997).

[460] *1998 Implementation Order*, 13 FCC Rcd at 6799, para. 41 (noting that electric utilities argued then that wireless attachments have different kinds of equipment, which is similar to their arguments in this proceeding).

[461] *Id.* at 6799, para. 42.

[462] *Id.*

[463] *See, e.g.*, Bright House Comments at 2, 12–14; Bright House Reply at 3–5.

carriers also provide services, such as VoIP, that have not been classified.[464] We agree that this outcome would be contrary to our policy goals, discussed below, of reducing the disparity in pole rental rates among providers of competing services and of minimizing disputes.[465] Consequently, we make clear that the use of pole attachments by providers of telecommunications services or cable operators to provide commingled services does not remove them from the pole attachment rate regulation framework under section 224. Rather, we will not consider rates for pole attachments by telecommunications carriers or cable operators providing commingled services to be "just and reasonable" if they exceed the new telecom rate.[466] This action does not disturb prior Commission decisions addressing particular scenarios regarding commingled services.[467]

2. The New Telecom Rate Is Consistent with the Act and Congressional Intent

155. We believe that section 224(e) provides the Commission sufficient latitude to adopt our definition of costs underlying the new telecom rate, as discussed in greater detail below. We note that from the earliest days of pole attachment regulation, Congress intended to give the Commission considerable flexibility in determining just and reasonable rates.[468] Indeed, Congress instructed the Commission to develop a "simple and expeditious" pole attachment program consistent with fair and efficient regulation, and "afford[ed] the Commission discretion to select the regulatory tools necessary to carry out" its responsibilities.[469] The Commission's revised telecom rate formula gives full effect to the

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[464] The Commission only has addressed two situations regarding the statutory classification of IP-enabled services. *Petition for Declaratory Ruling that Pulver.com's Free World Dialup is Neither Telecommunications nor a Telecommunications Service*, WC Docket No. 03-45, Memorandum Order and Opinion, 19 FCC Rcd 3307 (2004) (*Pulver.com Order*) (classifying as an "information service" Pulver.com's free service that did not provide transmission and offers a number of computing capabilities); *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, Order, 19 FCC Rcd 7457 (2004) (*IP-in-the-Middle Order*) (finding certain "IP-in-the-middle" services to be "telecommunications services"); *Regulation of Prepaid Calling Card Services*, WC Docket No. 05-68, Declaratory Ruling and Report and Order, 21 FCC Rcd 7290 (2006) (*Prepaid Calling Card Order*) (same). Otherwise, the Commission thus far has expressly declined to address the statutory classification of VoIP services. *See, e.g., Connect America Fund et al.*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109; CC Docket No. 01-92; GN Docket No. 09-51, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, FCC 11-13, para. 73 (rel. Feb. 9, 2011).

[465] *See infra* paras. 173–174.

[466] To the extent that a telecommunications carrier or cable operator provides particular services that the Commission has not expressly classified, but which ultimately are telecommunications services, the attachments would be subject to section 224(e) and the new telecom rate adopted in this order. Except as discussed below, see *infra* note 467 and accompanying text, we do not determine more precisely the specific rate (new telecom rate or cable rate) that should apply in the context of any particular commingled services scenario.

[467] *See, e.g.*, Comcast Comments at 4 (noting that the Commission previously specified that the cable rate would apply to commingled video and Internet access services); ACA Reply at 3–6 (noting the same and arguing that the Commission should not increase the rates that apply in such circumstances). *See also Gulf Power*, 534 U.S. at 339. To the extent that there are disputes about the application of pre-existing law to particular scenarios regarding commingled services that were not already addressed by the Commission, we do not address them here.

[468] *See 1978 Pole Attachment NPRM*, 68 FCC 2d at 11, para. 20 (referring to Congress's approach to using the best estimate of less readily identifiable costs) ("Novelty, however, is not reason enough to find an approach incompatible with determining just and reasonable rates. In this regard, we also note that the considerable flexibility which Congress intended to give us in determining just and reasonable pole attachment rates also carries with it an element of imprecision.").

[469] 1977 Senate Report at 21, *reprinted in* 1978 U.S.C.C.A.N. at 129; *see also 1978 Pole Attachment NPRM*, 68 FCC 2d at 4, para. 4 ("The supplemental regulation envisioned by the [Senate Committee] Report is to be simple and expeditious, necessitating a minimum of staff, paperwork and procedures consistent with fair and efficient regulations. That regulation could be uniquely applicable to pole attachment matters . . . . Tariff filings and other (continued....)

statutory requirements established in section 224(e) of the Act, including the specific cost apportionment provisions applicable to attachers.

156. *"Cost" Is Not Defined in Section 224(e).* Our new telecom rate reflects a reasonable interpretation of the ambiguous statutory language of section 224(e). Congress established a rate formula for charges for pole attachments used by telecommunications carriers to provide telecommunications services in section 224(e) based on the "cost of providing space on a pole."[470] Although section 224(e) specifies how the pole space costs are to be allocated between the owner and attacher, it does not specify a cost methodology. Specifically, section 224(e)(1) states that the Commission shall prescribe regulations "in accordance with this subsection to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services," and that "[s]uch regulations shall ensure that a utility charges just, reasonable, and nondiscriminatory rates."[471] In particular, section 224(e)(2) and (3) describe how "[a] utility shall apportion the cost of providing space" on a pole – whether usable or unusable – but does not define the term "cost." We therefore find the term "the cost of providing space" to be ambiguous."[472] By contrast, under section 224(d)(1) of the cable formula, Congress established a specific range of rates. This zone of reasonableness for cable attachment rates ranges from "the additional costs of providing pole attachments," known as the incremental cost, to a percentage (based on usable space) of "the sum of the operating expenses and capital costs of the utility attributable to the entire pole," known as fully allocated costs.[473]

157. The Commission initially implemented section 224(e) by interpreting "cost" to include the same cost categories that it was using in the cable rate formula, relying on a fully-allocated cost approach. This initial approach was reasonable since, when the 1996 Act was enacted, it was consistent with – and allowed the Commission to continue – the traditional cost methodology that had been in effect at the time for the cable rate formula.[474] Experience has shown, however, that this approach has resulted in higher rates than necessary, as well as rate disparities and disputes over whether the cable or telecom formula applies, negatively impacting communications service providers' investment decisions to expand their networks and services.[475] As discussed below, that outcome has proved to be inconsistent with Congress' policies underlying the 1996 Act to encourage the widest deployment possible of advanced

(Continued from previous page)
aspects of the full panoply of Title II common carrier regulation need not apply, and the Commission is afforded *discretion* to select regulatory tools.") (emphasis added).

[470] 47 U.S.C. § 224(e)(2).

[471] 47 U.S.C. § 224(e)(2).

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

[473] 47 U.S.C. § 224(d)(1).

[474] *See 1998 Implementation Order*, 13 FCC Rcd at 6800, para. 43 n.160; *Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, Notice of Proposed Rule Making, 12 FCC Rcd 11725, 11737, para. 33 (1997) (*Telecom Rate NPRM*).

[475] *See infra* para. 174.

communications services, such as broadband Internet access, by promoting competition and removing barriers to infrastructure investment.[476]

158. At the same time, our new interpretation of section 224(e), described above, recognizes the limitations of the statutory framework Congress created when it delegated the authority to the Commission to interpret and apply the telecom rate formula. We agree with commenters that the Commission has discretion to reinterpret the undefined term "cost" and the ambiguous phrase "cost of providing space" in section 224(e) in the manner proposed.[477] As the Supreme Court has recognized in other contexts, "without any better indication of meaning than the unadorned term, the word 'cost' . . . is 'a chameleon' . . . a 'virtually meaningless' term . . . . As Justice Breyer put it in *Iowa Utilities Bd.*, words like 'cost' 'give ratesetting commissions broad methodological leeway; they say little about the 'method employed' to determine a particular rate.'"[478] Courts have granted agencies like the Commission substantial leeway in defining the term "cost" in other contexts, as well.[479] As a result, we reconsider the "fully allocated cost" methodology previously used to implement the telecom attachment rate formula in section 224(e). Instead, we conclude that we have flexibility to adopt a new pricing approach that complies with the statute's requirements, yet also produces efficient pricing signals for infrastructure investment and new service deployment by providers. Our decision to adopt a new methodology recognizes the bounds Congress set in section 224(e), but also the Commission's duty to continually review its rules and policies in light of changing circumstances, and make reasonable changes that in our experience will better serve the pro-competitive goals Congress established in the Act.

159. It is readily apparent from other provisions of section 224 that when Congress wanted to limit the Commission's discretion, it explicitly did so. For example, Congress specifically included "operating expenses and actual capital costs" in the carrying charges for the cable rate formula (thus incorporating a fully allocated cost methodology) in the upper limit of just and reasonable rates for section 224(d).[480] The statute also sets forth how the costs of usable and unusable space (however defined) should be allocated among pole owners and attachers in the section 224(e) telecom formula.[481] Congress, however, did not establish in section 224(e) any other parameters for the Commission to follow in defining "cost" or determining the "cost of providing space" on a pole. In the face of statutory ambiguity, the Commission, therefore, has the authority – and responsibility – to fill in any "gaps" with

[476] *See id.*

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

[478] *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 500–01 (2002) (citations omitted).

[479] *See, e.g.*, *Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968) ("[C]ourts are without authority to set aside any rate selected by the [Federal Power] Commission which is within a 'zone of reasonableness.'" (citing *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 585 (1942) ("No other rule would be consonant with the broad responsibility given to the Commission by Congress; it must be free, within the limitations imposed by pertinent constitutional and statutory commands, to devise methods of regulation capable of equitably reconciling diverse and conflicting interests.")).

[480] 47 U.S.C. § 224(d). Likewise, as the lower bound of just and reasonable pole rental rates under section 224(d), the Act defines cost as the "additional costs of providing pole attachments." *Id.*

[481] 47 U.S.C. § 224(e).

its own interpretation of the meaning of "cost" in Section 224(e), and we do so in a manner that is consistent with the statutory framework and the broader purposes of the Act.[482]

160. We reject certain electric utilities' argument that because section 224(e) does not expressly define "cost" as the "additional costs of providing space" – as was done in defining the lower limit of reasonable rates under section 224(d) – the Commission is precluded from adopting a definition of cost that yields a rate more closely approximating the "additional" or incremental cost of a pole attachment.[483] Although section 224(e) does not expressly define cost as "additional" or "incremental" cost, it also does not otherwise constrain the definition of the ambiguous term "cost," as discussed above. Likewise, given the Commission's flexibility in interpreting the ambiguous term "cost," we are unpersuaded by arguments that the "cost of providing space" under section 224(e) must be defined as fully allocated costs, as was done in defining the upper limit of reasonable rates under section 224(d).[484]

161. Nor does the Commission's alternative approach fail to give meaning to the methodology for allocating costs under sections 224(e)(2) and (e)(3), as some allege.[485] Congress left it up to the Commission to define "costs" and required that the allocators in section 224(e) be used to allocate the costs. The Commission's approach does both. As discussed above, in the majority of cases, the relevant costs will be defined as 66 percent of fully allocated costs in urban areas, and 44 percent in non-urban areas.[486] However, if scenarios arise where those costs would be lower than the 100 percent of

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[482] *See, e.g.*, *Chevron*, 467 U.S. at 843–44; *see also Iowa Utilities Board*, 525 U.S. 366, 397 (1999) (reviewing Commission statutory interpretations) ("[T]he 1996 Act is not a model of clarity. It is in many important respects a model of ambiguity or indeed even self-contradiction . . . . But Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency."); *Gulf Power*, 534 U.S. at 339 ("[T]he subject matter here is technical, complex and dynamic, and as a general rule, agencies have authority to fill gaps where the statutes are silent."). Section 224(b)(1), itself, is framed as a grant of ratemaking authority to the Commission. It provides a general mandate to set just and reasonable rates for pole attachments. 47 U.S.C. § 224(b)(1). Similarly, section 224(e) requires the Commission to prescribe regulations "to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services" and to "ensure that a utility charges just, reasonable, and nondiscriminatory rates." 47 U.S.C. § 224(e)(1).

[483] *See, e.g.*, EEI/UTC Comments at 65 n.113. Although EEI and UTC assert that "it makes very little sense to 'apportion' the incremental costs between the amount of space occupied by an attacher or by the number of attachers," *id.*, that is not how we define "cost" for purposes of the lower end of the range of permissible rates under section 224(e). Rather, we find that defining "cost" as "incremental cost" is a shortcoming of TWTC's original rate proposal, and thus define cost in a manner that—once apportioned pursuant to the section 224(e) methodologies—yields a rate that comes closer to approaching the incremental costs of attachment (although the actual rate charged under the new telecom rate typically will be higher than that). *See supra* paras. 142–145; *Further Notice*, 25 FCC Rcd at 11916–17, para. 126.

[484] *See, e.g.*, EEI/UTC Comments at 65. Similarly, other commenters argue more generally that the Commission must interpret the "cost of providing space" under section 224(e) to mean the costs associated with the pole itself, rather than just those costs caused by the presence of a pole attachment. *See, e.g.*, Florida IOUs Comments at 62; Alliance Reply at 23–24. Moreover, if the provisions of section 224(d) were to bind the Commission's adoption of a telecom rate under section 224(e) at all, certain cable commenters argue that they should be read to establish the limits for *all* pole attachment rates regulated under section 224, effectively capping all rates at the level of the cable rate. *See, e.g.*, TWC Comments at 13–14 (arguing that section 224(d)(1) defines the range of "just and reasonable" pole attachment rates for all attachments regulated under section 224(b)(1) and thus constrains the maximum telecom rate that could be imposed under section 224(e)); Letter from Daniel L. Brenner on behalf of Bright House to Marlene Dortch, Secretary, FCC, WC Docket No. 07-245, Attach. 2 at 4–5 (same) (filed Dec. 9, 2010) (Bright House Dec. 9, 2010 *Ex Parte* Letter). The new telecom rate clearly is more consistent with that interpretation than either the prior telecom rate or the electric utilities' proposals.

[485] *See, e.g.*, Alliance Reply at 23–24.

[486] *See supra* para. 149.

administrative and operating expenses, we adopt the higher definition of cost in those circumstances.[487] In each scenario, the section 224(e) allocators are then applied to the Commission's definition of cost. As a result, the Commission's approach gives meaning to section 224(e) of the Act.

162. *Legislative History Does Not Require Fully Allocated Costs.* Beyond the terms of section 224 of the Act itself, electric utilities argue that section 224(e) must be read in a manner that mandates use of a fully allocated cost methodology based on the legislative history of section 224.[488] Primarily, they cite to language in the legislative history of the House bill endorsing a fully allocated cost methodology and other discussions in the legislative history attempting to link the benefits attachers receive from pole attachments to pole rental rates. We are not persuaded that the legislative history precludes the Commission's approach, however. Indeed, commenters here express contradictory interpretations of the Conference Report's discussion of the provisions amending Section 224 at issue here.[489]

163. To the extent that we draw any conclusions from the Conference Report, we find that it undercuts the electric utilities' argument that Congress intended to require the use of fully allocated costs. As the electric utilities note, the legislative history of the House bill amending section 224 would have directed "the Commission to regulate pole attachment rates based on a 'fully allocated cost' formula."[490] The conference agreement did not adopt the House version, however; instead it adopted "the Senate version with modifications."[491] The formula itself and the basis for Congress' selection of the two-thirds allocator for unusable space are not explained in the legislative history; rather it appears to be the unexplained result of a political compromise.[492] Moreover, the "fully allocated cost" language, which is at the heart of the controversy, was not in the summary of the Senate bill, nor in the language of the conference agreement itself.[493] Indeed, most telling is that no express language requiring fully allocated costs was made part of the final statute.

164. Certain utilities contend that the legislative history of the House bill, although not adopted, is still relevant in determining Congress's intent because it contains language describing cost terminology that is similar to that used in the Senate version, and the final statute and "the ultimate

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[487] *See supra* para. 152.

[488] *See, e.g.*, APPA Comments at 8–9; Oncor Comments at 62.

[489] *See, e.g.*, Florida IOUs Comments at 61, Bright House Comments at 18–19 (both discussing H.R. Rep. No. 104-458, 104th Cong., 2nd Sess. at 205–07 (section on pole attachments) (1996), ***reprinted in*** 1996 U.S.C.C.A.N. 10, 220–21 (Conference Report)). The Conference Report, which accompanied S. 652, is identical to S. Rep. No. 104-230.

[490] H.R. Rep. No. 104-458 at 206, *reprinted in* 1996 U.S.C.C.A.N. at 220 (stating "[t]he new provision directs the Commission to regulate pole attachment rates based on a 'fully allocated cost' formula.").

[491] H.R. Rep. No. 104-458 at 207, *reprinted in* 1996 U.S.C.C.A.N. at 221 (briefly explaining new subsections 224(e)(1)–(2), (g), (h), and (i)) ("The conference agreement adopts the Senate provision with modifications. The conference agreement amends section 224 of the Communications Act by adding new subsection (e)(1) to allow parties to negotiate the rates, terms, and conditions for attaching to poles . . . New subsection 224(e)(2) establishes a new rate formula charged to telecommunications carriers for the non-useable space of each pole. Such rate shall be based upon the number of attaching entities.").

[492] Coalition *NPRM* Comments at 35–36 & nn.78–79 (citing Telecommunications Act of 1996 conference report S. Rep. 104-230 at 89–90 (Feb. 1, 1996) and explaining that the U.S. House of Representatives had voted to adopt a pole attachment rate methodology but that "it was rejected without explanation by the House-Senate Conference Committee in favor of the existing FCC Telecom Rate" when the 1996 Act was passed) (citing *TCI Cablevision of Washington, Inc. v. City of Seattle*, No. 97-2-02395-5SEA (May 20, 1998)). The Coalition stated "the court concluded that Congress's final adoption of the FCC Telecom Rate allocation was 'primarily a political compromise, and not based on cost accounting issues.'" Coalition *NPRM* Comments at 36 n.79 (citing findings of fact).

[493] H.R. Rep. No. 104-458 at 205–07, *reprinted in* 1996 U.S.C.C.A.N. at 220–21.

meaning remained the same" in the various versions of the bill.[494] These parties also argue that legislative history shows that Congress intended the formula to be based on who benefits from the pole.[495] For example, the Florida IOUs assert that "[t]he legislative history shows that the various versions of the bill embodied a variety of positions on which entities benefit, and how much they benefit. But all versions focused on the beneficiary-based approach."[496] These utilities believe that this means Congress intended fully allocated costs to be used.[497] By contrast, certain cable commenters' interpretation of the legislative history is that there were significant differences in the "cost" and "beneficiary" language of the various bills, and that, "[i]n contrast to the House, the Senate's telecom rate formula never required 'fully allocated costs.'"[498]

165. We are not persuaded that the legislative history shows that the House's interpretation of "costs" for purposes of its proposed amendments applied equally to the interpretation of language in the Senate bill – let alone the final language adopted in the conference agreement. In contrast to the legislative history of the House bill, which expressly provided that "[t]he new provision directs the Commission to regulate pole attachment rates based on a 'fully allocated cost' formula," legislative history of the Senate bill was silent on the definition of the "costs" at issue. We also note that the House's interpretation of "costs" is summarized among "the differences between the Senate bill, the House amendment, and the substitute agreed to in conference" in the Conference Report.[499] In any event, the statutory language describing the costs at issue was different in the conference agreement than in either the House or Senate versions. In particular, the House and Senate versions referred to pole rate setting based on "the cost of space,"[500] whereas the adopted language of section 224(e) refers to "the cost of *providing* space."[501] As discussed above, in defining the lower end of the range of reasonable rates under section 224(e), we focus on those costs arising from the actual provision of space for pole attachments, as opposed to costs that arise regardless of the absence or presence of attachments.[502] We find our approach consistent with the statutory language actually adopted, regardless of the House's interpretation of "cost" for purposes of its unadopted amendments to section 224.

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[494] Florida IOUs Reply at 44–45; Letter from Eric B. Langley on behalf of Florida IOUs to Ms. Marlene Dortch, Secretary, FCC, WC Docket No. 07-245, at 3–6 nn.12 & 13 (filed Nov. 8, 2010) (Florida IOUs Nov. 8, 2010 *Ex Parte* Letter). Florida IOUs also argue that, "Importantly, *every* version of section 224(e) . . . used the term 'space' to modify 'cost' and included unusable space in the formula." *Id.* at 3 (emphasis in original).

[495] *See, e.g.*, Florida IOUs Nov. 8, 2010 *Ex Parte* Letter at 4–5 ("Congress intended the formula to be based on who was *benefiting* from the pole, not based on who *caused* the incremental cost of attachment.") (emphasis in original).

[496] Florida IOUs Nov. 8, 2010 *Ex Parte* Letter at 4.

[497] *See, e.g.*, Florida IOUs Nov. 8, 2010 *Ex Parte* Letter at 4–5.

[498] Comcast Reply at 9 ("In fact, S. 652 initially recognized 'that the entire pole . . . other than the usable space is of *equal benefit* to all attachments of entities *that hold an ownership interest in the pole*. . . and therefore [the Commission must] apportion the *cost of the space* other than the usable space equally *among all such attachments*.'") (emphasis in original) (citing S. 652, § 205(b)(2)(A)). Comcast also points to another version of the Senate bill that references an allocation based on "cost of providing space" and "cost of space" without defining either, which Comcast contends, indicates the bill did not equate the two phrases. Comcast Reply at 10 n.26.

[499] H.R. Rep. No. 104-458 at 113, *reprinted in* 1996 U.S.C.C.A.N. at 124 (Joint Explanatory Statement of the Committee of Conference) ("The differences between the Senate bill, the House amendment, and the substitute agreed to in conference are noted below, except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clerical changes.").

[500] *See* Communications Act of 1995, H.R. Rep. No. 104-204, 104th Cong. 1st Session, at 24 (1995); Telecommunications Competition and Deregulation Act of 1995, S. Rep. No. 104-23, 104th Cong. 1st Session, at 87 (1995).

[501] 47 U.S.C. §§ 224(e)(2), (e)(3) (emphasis added).

[502] *See supra* para. 161.

166. Likewise, the legislative history does not demonstrate that the Commission's rate setting must focus on the "benefits" parties receive from attachments, rather than on the costs associated with attachment. For one, the discussion of "benefits" in the House and Senate bills focused on how to allocate costs among pole owners and attachers, rather than the meaning of the "costs" to be allocated, as even some utilities concede.[503] Further, the House and Senate bills took starkly different approaches, with the House bill requiring third-party attachers to bear a greater share of the unusable space on the pole than required under the Senate bill.[504] Ultimately, moreover, we note that none of the "benefit" language from either the House or Senate bills was adopted in the conference agreement's amendments to section 224.

167. *Telecom Rate Relative to Cable Rate.* Contrary to certain utilities' arguments, neither differences in the text of section 224(d) and (e) nor legislative history require that the telecom rate be higher than the cable rate.[505] For example, some commenters cite the fact that section 224(e) does specify a methodology for allocating costs that is not present in section 224(d).[506] Others argue that the temporary, initial use of section 224(d) to establish pole rental rates for telecom carriers pending Commission implementation of section 224(e) implies that those rates must be different, or that the telecom rate must be higher than the cable rate.[507] Section 224(e) gave the Commission two years to adopt regulations "to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services,"[508] and in the interim, pole rental rates for telecom carriers would be based on section 224(d).[509] Section 224(e) further provided that, following the adoption of implementing regulations, "[a]ny increase in the rates for pole attachments that result from the adoption of the regulations . . . shall be phased in equal annual increments over a period of five years."[510]

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[503] *See, e.g.*, Florida IOUs Nov. 8, 2010 *Ex Parte* Letter at 4–5 & n.18 (arguing that "the early legislative history indicates that the general understanding of 'costs' included both capital and O&M costs, and the disagreement was over *apportionment* of those 'costs.'") (emphasis in original). Insofar as those arguments reflect an underlying assumption that the costs at issue must be fully allocated costs, we reject the view that the legislative history compels us to adopt such an interpretation of "costs" under section 224(e). *See supra* paras. 162–165. Nor does Florida IOUs citation to certain statements of Sen. Hollings lead us to reach a different conclusion. Although Florida IOUs cite Sen. Hollings's comment in S. Rep. 104-23 that "utilities . . . continue to express concern that the revised formula will not compensate them adequately for their *costs of building and maintaining the poles*") (emphasis in original), he also said that "The current law sets the rates charged to cable companies for using these poles. The new language in the bill expands the scope of the provisions to include other providers of telecommunications services. The purpose of the provisions is to ensure that all users pay the same amount." Telecommunications Competition and Deregulation Act of 1995, S. Rep. No. 23, 104th Cong. 1st Session at 65 (1995). Thus, we do not view Sen. Hollings's statements, taken as a whole, to demonstrate a clear view on the "costs" (or "benefits") to be used in setting pole rental rates, particularly because they reflect the views of a single Senator.

[504] Comcast Reply at 9 n. 24 ("Thus, from the outset, the Senate view was that the 'cost' of unusable space was of equal benefit to the *pole owners'* attachments (not third party attachments as the House bill provided) and directs that the cost of that pole space be divided equally among 'such attachments' (i.e., the pole owner attachments, *not* third party attachments). This early version of the Senate bill went on to explain that a third party attacher benefits from the unusable space on a pole 'in the same proportion as it benefits from the usable space'—directly contrary to the House approach.").

[505] *See, e.g.*, Alliance Comments at 83–85; EEI/UTC Comments at 71–73 (citing section 224(e)(4), (d)(3)); Oncor Comments at 61.

[506] *See, e.g.*, Alliance Reply at 23.

[507] *See, e.g.*, Alliance Comments at 85; EEI/UTC Comments at 71–74; Oncor Comments at 60.

[508] 47 U.S.C. § 224(e)(1).

[509] *Id.* at § 224(d)(3).

[510] *Id.* at § 224(e)(4) (emphasis added).

168. These provisions suggest that the telecom rate and cable rate could be different, but not that they must always be different or that the telecom rate necessarily must be higher.[511] For example, section 224(e) provided for the gradual phase-in of "*[a]ny* increase" in pole rental rates for telecom carriers following the implementation of section 224(e), indicating that there might not be such an increase.[512] In fact, the rules originally adopted by the Commission recognized that the telecom rate could go down as well as up, and thus provided that "[t]he five-year phase-in is to apply to rate increases only. Rate reductions are to be implemented immediately."[513] Likewise, the new telecom rate we adopt in this order could, in some circumstances, be higher than the cable rate,[514] and in other circumstances, lower.[515]

169. Further, the use of a transition mechanism to phase-in section 224(e) rates is consistent with our recognition that section 224(e) is ambiguous and could result in a range of permissible rates because the "cost" at issue is subject to a range of interpretations.[516] In addition, other factors also create uncertainty regarding the potential difference (if any) between the rates yielded under section 224(d) and section 224(e), including the number of attachers that might emerge over time (which affects the allocation of costs under section 224(e))[517] and the potential for section 224(d) rates themselves to fall anywhere within a range (rather than only at the upper bound).[518] By providing that section 224(d) rates initially be used for telecommunications attachments, section 224 can reasonably be interpreted as responding to the variability in the Commission's possible implementation of section 224(e) by minimizing the administrative burden and providing greater certainty during the transition.

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[511] For the same reasons, we reject assumptions made by utilities that, if Congress had intended for the telecom rate to be equal to or lower than the cable rate, there would have been no need for Congress in section 224(d)(3) to provide that the cable formula be used for attachments "solely to provide cable service." *See* EEI/UTC Comments at 71–74.

[512] 47 U.S.C. § 224(e)(4) (emphasis added).

[513] 47 C.F.R. § 1.1409(f).

[514] *See supra* paras. 146–152.

[515] The rate could be lower if, for example, the attacher demonstrated that there were more attachers on the relevant poles than reflected by the Commission's presumptions.

[516] *See supra* paras. 140–145.

[517] Both pole owners and attachers appear to agree that everyone expected the number of facilities-based competitors to increase over time. *See, e.g.*, Alliance Reply at 12; Comcast Comments at 7. Although the number of new facilities-based competitors was uncertain, the clear impact of such entry was that the telecom rate would decline as the number of attachers increased. *1998 Implementation Order*, 13 FCC Rcd at 6800, para. 45 ("Under Section 224(e)(2), the number of attaching entities is significant because the costs of unusable space assessed to each entity decreases as the number of entities increases."). The Coalition asserts "that the Commission expected no more than five attaching entities for urbanized areas and three for non-urbanized areas, since these are the presumptions" it made. Coalition Reply at 26. First, the Commission established these numbers as *rebuttable* presumptions, recognizing that they could vary. It did so in large part for administrative reasons to "expedite the process," establish a degree of certainty, and give utilities the option of avoiding expenses for studies to develop their own location-specific averages. *2001 Order on Reconsideration*, 16 FCC Rcd at 12134–40, paras. 62–72. The Commission also established the right of attaching entities to challenge the average number of attaching entities set by utilities and expected a good faith effort by a utility to modify its presumptive average if the number of attachers increased. *Id.* at 12135, para. 63 n.211.

[518] The Commission has discretion under section 224(d) to determine the cable rate within a range between the additional cost and fully allocated cost of an attachment. *See* 47 U.S.C. § 224(d). The difference between the telecom rate and the cable rate would be impacted by how the Commission exercised its ratemaking discretion in implementing the two rates.

170. Nor does section 224's legislative history demonstrate that the telecom rate must always be higher than the cable rate.[519] The utilities principally rely on statements drawn from the legislative history of the House proposal to amend section 224.[520] As discussed above, however, it was the Senate version that formed the basis for the conference agreement, and even that language was subject to revision in relevant respects.[521] We are not persuaded that certain isolated statements by individual Senators compel a different result.[522] Rather, as explained above, we find the legislative history taken as a whole does not clarify Congress's intent, nor does it compel an interpretation of section 224(e) that is contrary to the one we adopt here.[523]

171. Finally, utility references to Commission and court decisions acknowledging that the telecom rate is higher than the cable rate do not establish that section 224(e) *required* a higher telecom rate.[524] In 1998, the Commission selected a fully allocated cost approach, which was one of the permissible outcomes under section 224(e).[525] The subsequent Commission and court statements thus were simply accurate characterizations of the mathematical result of the Commission's initial decision to use fully allocated costs in the telecom rate formula.[526] To the extent that there is any *dicta* in prior Commission decisions to the contrary, we reject such statements in light of the statutory interpretation we adopt here, and because they were at odds with the Commission's contemporaneous recognition in the text of its rules that, even as initially implemented, the telecom rate theoretically could be higher *or lower* than the cable rate.[527]

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[519] *See, e.g.*, Oncor Comments at 60–61 (arguing "legislative intent to create a separate and distinct rate that would yield a higher rate than the pre-existing Cable Rate") (citing H. Rep. No. 104-204 at 92 and H. Conf. Rep. No. 104-458 at 206 (1966)).

[520] *See, e.g.*, Alliance Comments at 86; Alliance Reply at 20, 34; Oncor Comments at 60–61; APPA Reply at 9.

[521] *See supra* paras. 162–166.

[522] The Florida IOUs cite a statement by Senator Hollings suggesting his view that the telecom rate would be higher than the cable rate. *See* Florida IOUs Nov. 8, 2010 *Ex Parte* Letter at 6 (citing 142 Cong. Rec. S. 689) (Feb. 1, 1996) (quoting Sen. Hollings's statement that "[c]able companies may continue to pay the same [pole attachment] rate as long as they provide only cable service; once cable companies start to provide telephone service, a higher rate will phase in over ten years").

[523] *See supra* paras. 162–166.

[524] *See, e.g.*, Florida IOUs Comments at 61.

[525] *See 1998 Implementation Order*, 13 FCC Rcd at 6800 n.160; *Telecom Rate NPRM*, 12 FCC Rcd at 11737, para. 33.

[526] Thus, contrary to the Florida IOUs assertion, the following statement in a Commission order does not mean that fully allocated costs are *required*: "The end result of the application of the telecommunications pole attachment formula is a rate which reflects the fully allocated costs of the pole-related expenses." *Alabama Cable Order*, 16 FCC Rcd at 12231, para. 49.

[527] *See* 47 C.F.R. § 1.1409(f). In particular, utilities argue that some Commission decisions stated that section 224(e) requires "fully allocated costs" be used in the telecom rate. *See, e.g.*, Florida IOUs Nov. 8, 2010 *Ex Parte* Letter at 2–3 (citing *Implementation of Section 703 of the Telecommunications Act of 1996*, CS Docket No. 96-166, Order, 11 FCC Rcd 9541, 9544, para. 6 (1996)). The statement at issue, however, was made in passing in the background discussion of an item that did not involve the implementation of the telecom rate formula or any meaningful statutory analysis in that regard. Similarly, Commission statements in the *1998 Implementation Order* anticipating that the telecom rate would be higher than the cable rate were not based on any actual statutory analysis there, and are more properly understood as flowing simply from the fact that, as the Commission initially had implemented 224(e), it generally resulted in a higher rate. *See 1998 Implementation Order*, 13 FCC Rcd at 6795–96, para. 34; *see also Alabama Cable Order*, 16 FCC Rcd at 12231, para. 49. We also disagree with an assertion by Alliance that a prior Commission statement regarding the use of historical costs necessarily implies an intent by Congress to "use a capital cost-based methodology for calculating the telecom rate." Alliance Reply at 18 (citing *2001 Order on Reconsideration*, 16 FCC Rcd at 12117, para. 22). There was no mention of capital costs by the Commission there. (continued....)

3. New Telecom Rate Promotes Broadband Competition and Availability

172. The record here demonstrates that pole rental rates play a significant role in the deployment and availability of voice, video, and data networks. Several commenters recognize the value of the Commission's approach to lower and make more uniform pole attachment rates to "eliminate barriers to broadband deployment,"[528] provide "regulatory certainty,"[529] "promote broadband deployment and competition,"[530] "spur investment,"[531] and "reduc[e] significant indirect costs caused by the existing differences between" the rates paid by competitors.[532] At the same time, the revised telecom rate methodology remains readily administrable,[533] consistent with Congress' instruction to develop a regulatory framework that may be applied in a "simple and expeditious" manner with "a minimum of staff, paperwork and procedures consistent with fair and efficient regulation."[534] We are unpersuaded by electric utilities' claims that the new telecom rate will not promote broadband deployment and is not good public policy.[535]

173. *New Telecom Rate Promotes Act's Goals.* Specifically, the action we take will advance the pro-competitive policies underlying the Act.[536] Under section 706 of the 1996 Act, Congress directed the Commission to "encourage the deployment . . . of advanced telecommunications capability to all Americans by utilizing, in a manner consistent with the public interest . . . measures that promote

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In rejecting utility arguments that the Commission should "abandon our use of regulatory accounts based on historical costs" in favor of a forward-looking cost methodology, the Commission noted that Congress did not 'instruct the Commission to deviate from the use of historical costs when it amended the Pole Attachment Act in 1966." *2001 Order on Reconsideration*, 16 FCC Rcd at 12114, 12117, paras. 16, 22. Contrary to Alliance's assertion, the new telecom rate uses a historic cost methodology based on the same regulatory accounts the Commission has used in the past.

[528] Charter Comments at v.

[529] NCTA Comments at 9.

[530] Comcast Comments at 25.

[531] CTIA Comments at 16.

[532] TWC Comments at 4–5 (arguing the existing rate differences cause litigation costs by utilities seeking to impose the existing telecom rate on new and innovative services that are introduced by cable operators and also administrative costs of separately tracking pole attachments used to provide telecom services, which is "incredibly complex . . . in an integrated voice, video and data network").

[533] For example, it uses publicly filed cost data, such as FERC 1 data, that are verifiable and comply with the uniform system of accounts of the Commission and FERC. We note that AT&T, Qwest, and Verizon committed to continue filing pole attachment data publicly and annually that had been in ARMIS Report 43-01 as a condition of the Commission's forbearance from ARMIS financial reports. *Petition of Qwest Corporation for Forbearance from Enforcement of the Commission's ARMIS and 492A Reporting Requirements Pursuant to 47 U.S.C. § 160(c); Petition of Verizon for Forbearance Under 47 U.S.C. § 160(c) From Enforcement of Certain of the Commission's Recordkeeping and Reporting Requirements;* WC Docket Nos. 07-204, 07-273, Memorandum Opinion and Order, 23 FCC Rcd 18483, 18490, para. 13 (2008), *pet. for recon. pending, pet. for review pending NASUCA v. FCC*, Case No. 08-1353 (D.C. Cir. filed Nov. 4, 2008).

[534] S. Rep. No. 95-580, *reprinted in* 1978 U.S.C.C.A.N. 109, at 21. *See also* TWTC/Comptel Reply App. A, Decl. of Don J. Wood at 24 (TWTC/Comptel Wood Decl.) (describing the Commission new methodology as a "refinement of, not a radical departure from" the present methodology and "would not require the utilities to undertake radically new calculations or to change their data collection and accounting methods.").

[535] *See, e.g.*, Alliance Reply at 11; APPA Reply at 15–16.

[536] A major impetus of the 1996 Act was "to accelerate private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition." Preamble to the 1996 Act. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

competition . . . or other regulatory methods that remove barriers to infrastructure investment."[537] Further, Congress declared in the Act that "[i]t is the policy of the United States . . . to promote the continued development of the Internet and other interactive computer services and other interactive media."[538] Consistent with those goals, the telecom rate we adopt today helps to ensure that our policies regarding pole attachment rates promote competitive and technological neutrality, and hence more effective competition, resulting in more efficient investment, innovation, and service provision.

174. As the *Further Notice* explained, cable operators have been arbitrarily deterred from offering new, advanced services that potentially could be classified as telecommunications services, such as high-capacity connections to anchor institutions or wireless towers, based on the possible financial impact of having to pay the currently higher telecom rate for all their pole attachments.[539] The record here likewise confirms that a low and more uniform rate will reduce disputes and costly litigation about the applicability of "cable" or "telecommunications" rates to broadband, voice over Internet protocol, and wireless services that distort attachers' deployment decisions.[540] Narrowing the range of potential prices attachers face reduces the gains each party can obtain through winning a dispute. This benefits the parties and economic efficiency by reducing risk (the range of potential outcomes due to a dispute are narrowed). Economic efficiency is further improved because there are fewer rents to be fought over and hence rent seeking, which results in efficiency losses, also is reduced. Further, several commenters argue that reducing the current disparity in cable and telecom rates, which distort investment decisions for telecommunications carriers and cable operators, represents "the most effective means of promoting broadband deployment."[541]

175. This approach also is consistent with prior Commission policy regarding pole rental rates. In the *1998 Implementation Order*, the Commission anticipated that rates higher than the cable rate

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[537] 47 U.S.C. § 1302(a). Advanced telecommunications capability is defined as "high speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology." 47 U.S.C. § 1302 (d)(1).

[538] 47 U.S.C. § 230.

[539] *See, e.g.*, *Further Notice*, 25 FCC Rcd at 11912, para. 116 (citing Letter from Daniel L. Brenner, Counsel, Bright House Networks, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 09-47, 09-51, 09-137 (filed 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); Letter from Jill M. Valenstein, Counsel for the Arkansas Cable Telecommunications Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, at 1–2 (filed July 11, 2008)).

[540] *See, e.g.*, Charter Comments at iii, 5 (explaining that disputes and litigation with pole owners about whether the telecom rate is applicable negatively affect deployment of integrated voice, data, and video services, and waste "critical resources that could have been spent on deploying advanced services to consumers," and noting that "[a]pplication of the telecom rate to Charter's attachments is especially disadvantageous because Charter typically serves areas that are more rural and non-urbanized with fewer attachers (the lower the number of attaching entities, the higher the telecom rate)"); *see also* Bright House Comments at 3–7 (explaining that it is attached to more than one million poles across its service areas, pays more than $11 million in annual pole rents, has incurred litigation expenses during the past four years over the characterization of its attachments, and that a higher rate can frustrate competitive entry in new, innovative services); Comments of the Office of Advocacy, U.S. Small Business Association, GN Docket No. 10-188 at 8 (filed Oct. 15, 2010) (observing that "small cable broadband providers are concerned about possible increases in rates for comingled Internet and video services," and that the Office of Advocacy "encourages the Commission to examine the impact that increasing pole attachment rates for small cable broadband providers of comingled video and broadband services would have on these providers' ability to compete and deploy broadband, especially in underserved areas").

[541] *See* TWTC/Comptel Wood Decl. at 5 ("In addition to being compensatory, a rate based on a proper calculation of incremental costs would provide the clearest signals to the marketplace (thereby minimizing any distortion to carrier deployment decisions) and would represent the most effective means of promoting broadband deployment.").