
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 18-72689 (L), 19-70490

AMERICAN ELECTRIC POWER SERVICE CORPORATION, ET AL.,
PETITIONERS,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
RESPONDENTS.

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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VOLUME ONE
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**BEFORE THE
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WASHINGTON, DC 20554**

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)	

**COMMENTS OF THE AMERICAN CABLE ASSOCIATION
ON THE NOTICES OF PROPOSED RULEMAKING**



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EXECUTIVE SUMMARY

The American Cable Association (“ACA”)¹ herein comments on the pole attachment issues raised in the Notice of Proposed Rulemaking *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barrier to Infrastructure Investment*, WC Docket No. 17-84, 32 FCC Rcd 3266 (2017).² ACA members are cable, telecommunications, and broadband providers that invest in and deploy high-performance networks to millions of residential and business consumers, community anchor institutions, and other communications providers. While their investments are significant, these providers would invest significantly more if many of the utilities subject to Section 224 of the Communications Act of 1934, as amended,³ did not hinder attachments to poles, ducts, and conduit and thereby raise the cost of deployments by delaying approvals or levying unreasonable fees.

Attachers face problems in obtaining access to poles, ducts, and conduit for two primary reasons. First, many utilities oppose mandated access to these facilities and have little, if any, incentive to provide access on a reasonable basis. As a result and as discussed at length in these comments, attachers confront a series of barriers in obtaining access to utility poles, including:

1. Utilities may require attachers to file attachment applications to overlash and install drops to customers;
2. Utilities may not provide ready access to relevant and sufficient information about the location and availability of poles;

¹ ACA represents approximately 750 smaller cable operators and other local providers of broadband Internet access, voice, and video programming services to residential and commercial customers. These providers pass approximately 18.2 million households of which 7 million are served. Many of these providers offer service in rural communities and more remote areas.

² Because pole attachment issues affect wireless deployments, ACA also is filing its comments *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, 32 FCC Rcd 3330 (2017).

³ 47 U.S.C. § 224.

3. Utilities may not comply with the Commission's timelines for the attachment process;
4. Utilities and existing attachers may take too long to complete make-ready and may charge unreasonable fees.

The second problem attachers face is that the Commission's complaint process has proven to be of little value to attachers, especially smaller entities, in addressing all but the most serious and substantial attachment problems. Thus, despite the Commission engaging in a series of pole attachment proceedings over the past 40 years to "patch" major problems, old problems unresolved by the Commission continue and new problems have emerged. ACA believes this proceeding provides an opportunity for the Commission to adopt additional and more enduring solutions that serve the public interest by facilitating attachments with reasonable fees and recognizing the safety and reliability interests of utilities.

To address the many pole attachment problems identified in these comments, ACA proposes a series of remedies, among which are the following:

Master Agreements

The Commission should adopt rules requiring that applicants are entitled to receive provisions in their pole attachment Master Agreements that:

1. Enable attachers to "Notify and Attach" when overlashing and "Attach and Notify" when installing drops to connect customers;
2. Permit attachers to receive compensatory damages and legal fees when a utility unreasonably delays or denies pole access or charges unjust, unreasonable, or discriminatory fees;
3. Provide for symmetrical indemnification provisions between attachers and utilities;
and
4. Limit penalties for unauthorized attachments to an amount no greater than that provided for under the recent Oregon Public Utility Commission's ruling.

Access to Pole Data

The Commission should require utilities to:

1. Develop and maintain a searchable electronic database of the location and availability of poles, ducts, and conduit that are installed, replaced, or upgraded after the order in the *Wireline NPRM* proceeding takes effect, and make available this database and any other relevant paper or electronic information that the utility possesses regarding its poles to existing and potential attachers, subject to appropriate confidentiality and security protections; and
2. Make available to attachers a web-based ticket management system for ease of tracking applications and make-ready works.

Application and Survey Requirements

The Commission should:

1. Require every utility to make publicly available, including on its website, its process for accepting and evaluating applications for pole attachments, including the information required and application format;
2. Require utilities to participate in joint surveys of their poles upon an applicant's request;
3. Prohibit utilities from requiring an applicant to pay for engineering design where a visual inspection (or inspection using an electronic database) indicates no work is required; and
4. Prohibit a utility from requiring an applicant to pay for a pole loading analysis where there are two or fewer existing attachers on the pole.

Application to Make-Ready Timeline

The Commission should impose a 90-day timeframe for applications involving 20 or fewer attachments.

Make-Ready by Applicant

The Commission should:

1. Enable attachers, using utility-approved contractors, to undertake all necessary make-ready, including work in the electric space, if a utility or an existing attacher fails to complete make-ready within the Commission's timeframe; and
2. Require a utility to make publicly available, including on its website, a list of at least five approved contractors to undertake make-ready.

Make-Ready Fees

The Commission should:

1. Prohibit utilities and existing attachers from charging for make-ready that is not directly related to the new attachment, including for work to fix existing attachment violations or replace poles determined to be inadequate for existing attachers or scheduled for replacement;
2. Require utilities and existing attachers to provide make-ready cost estimates and final invoices to attachers with itemized details for work on a per-pole basis; and
3. Place the burden on utilities to justify as reasonable final invoice charges that are greater than 20 percent of the estimated charges.

Enforcement

The Commission should:

1. Adopt its proposed 180-day shot clock for resolution of pole-related complaints filed with the Commission; and
2. Impose significant penalties on utilities for pole attachment violations.

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**COMMENTS OF THE AMERICAN CABLE ASSOCIATION
ON THE NOTICES OF PROPOSED RULEMAKING**



I. INTRODUCTION

The American Cable Association (“ACA”) hereby provides comments in response to the Federal Communications Commission’s (“Commission’s”) Notices of Proposed Rulemaking in the above-referenced proceedings.¹ ACA supports the Commission’s aim “to better enable broadband providers to build, maintain, and upgrade their networks” by removing “regulatory barriers to infrastructure investment” and reforming “Commission regulations that increase costs and slow broadband deployment.”² Most importantly, by addressing and remedying key and

¹ *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, 32 FCC Rcd 3260 (2017) (“*Wireline NPRM*”); *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, Notice of Proposed Rulemaking and Notice of Inquiry, 32 FCC Rcd 3330 (2017) (“*Wireless NPRM*”).

² *Wireline NPRM*, 32 FCC Rcd at 3267, para. 2. See *Wireless NPRM*, 32 FCC Rcd at 3331, para. 2 (“[T]here is an urgent need to remove any unnecessary barriers to such deployment.”).

often long-festering problems concerning access to poles, the Commission can “move the needle” significantly to facilitate broadband investments and deployments. In these comments, which are focused on pole attachment issues raised in the *Wireline NPRM*, ACA seeks to buttress Commission action by describing in detail material problems its members continue to face in gaining access to poles and the impact of these barriers on deployments. ACA then provides solutions to address these problems, including by discussing the pros and cons of the “poles” solutions raised in the *Wireline NPRM*.

ACA’s over 700 members are investing in and building “broadband America,” especially in smaller communities and rural areas, but also in urban areas as competitors to larger providers. ACA members are cable operators, rural telephone companies, and municipal providers that own and operate wireline networks over which they offer voice, video, and broadband services to, among others, residential and commercial consumers and institutions. In the residential market, ACA members’ networks pass 18.2 million homes (nearly 19 percent of the homes in the US), almost half of which are in smaller cities and rural areas.³ In the commercial market, ACA members have and are continuing to expand their networks to provide packet-based Ethernet services to commercial and institutional customers as well as mobile wireless providers.⁴

ACA members have spent more than \$10 billion in recent years building out their networks and, spanning the largest to the smallest, ACA members currently are investing approximately \$1 billion annually in aggregate to upgrade and extend their facilities.⁵ While

³ American Cable Association, “Connecting Hometown America, How the Small Operators of ACA are Having a Big Impact” (March 2014), available at <http://www.americancable.org/node/4728> (last visited June 13, 2017).

⁴ See *Wireline Competition Bureau Releases List of Special Access Data Collection Respondents*, WC Docket No. 05-25, RM-10593, Public Notice, 30 FCC Rcd 4462, Attachment A (WTB 2015).

⁵ For example, Mediacom Communications, which already deployed more than 600,000 strand miles of fiber, announced “Project Gigabit” in 2016, an additional \$1 billion capital investment program to build high-performance broadband facilities in the 1,500 communities within its 22-State footprint. See

these investments are significant – and ACA expects them to continue – these numbers mask the reality that ACA members would invest significantly more if many entities that own or control poles, ducts, and conduit did not hinder and raise the cost of deployments by delaying approvals or levying unreasonable fees.⁶ In these comments, ACA describes a series of significant problems that occur throughout the pole attachment process – from negotiating agreements to filing applications to completing make-ready – all of which warrant immediate action by the Commission. These problems arise – and unless the Commission acts, will continue to exist and arise – for two primary reasons. First, many utilities⁷ oppose mandated access and have little, if any, incentive to provide access on a reasonable basis. Second, as discussed herein, the Commission’s complaint process has proven to be of little value to attachers, especially smaller entities, in addressing all but the most major attachment problems. Despite the Commission engaging in a series of pole attachment proceedings over the past 40 years to “patch” major problems, old problems unresolved by the Commission continue and new problems have emerged. Additionally, in some cases, existing Commission regulatory directives are skirted by some pole owners. ACA believes this proceeding provides an opportunity for the Commission to adopt additional and more enduring solutions, and reinforce

Mediacom, “Entire Mediacom Communications Broadband Network to be Gigabit-Ready by Year End” (Dec. 7, 2016), available at <https://www.mediacomcable.com/about/news/gigabit-ready> (last visited June 13, 2017).

⁶ *Ex Parte* Filing of the American Cable Association on Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84, and Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies, WT Docket No. 16-421 (Apr. 13, 2017). ACA members also have informed the Commission that their investment in infrastructure has been deterred by the 2015 Open Internet rules. See Letter from Barbara S. Esbin, Counsel for the American Cable Association, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 17-108 (May 12, 2017).

⁷ In these comments, ACA uses the term “utility” in the same sense as the Pole Act to mean “any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications.” See 47 U.S.C. § 224.

earlier determinations, that serve the public interest by facilitating attachments with reasonable fees while recognizing the safety and reliability interests of utilities.

II. NOTICE OF PROPOSED RULEMAKING: REFORMING POLE ATTACHMENTS

In the *2011 Pole Attachment Order*, the Commission continued to move away from relying on private negotiations between attachers and utilities, and revised comprehensively its pole attachment rules in response to barriers imposed by utilities and existing attachers that prevented “reliable, timely, and affordable access.”⁸ The Commission, in recognition of the “unique economic characteristics that shape relationships between utilities and attachers,”⁹ made several significant changes to its rules, including the following:

1. Established a four-stage timeline, with a 148-day maximum timeframe from submission of a complete pole attachment application to completion of the attachment process, although the Commission encouraged more expeditious action;¹⁰
2. Enabled attachers to engage independent contractors approved by the utility to undertake the survey and make-ready when the work is not completed within the maximum timeframe;¹¹

⁸ *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5241, para. 3 (2011) (“*2011 Pole Attachment Order*”).

⁹ *Id.* at 5242, para. 4. The Commission also cited report language accompanying the legislation enacting Section 224, which found that a “local monopoly in ownership or control of poles” exists, enabling public utilities to “extract monopoly rents,” and that “there is often no practical alternative [for network deployment] except to utilize available space on existing poles.” *Id.* (citing S. Rep. No. 580, 95th Congress, 1st Sess. at 13 (1977), reported in U.S.C.C.A.N. 109).

¹⁰ *Id.* at 5252, para. 23 (“Although we establish this timeline as a maximum, we recognize that the necessary work can often proceed more rapidly, especially at the estimate and acceptance stages, or for relatively routine requests. It would not be reasonable behavior for a utility to take longer to fulfill any requests simply because a timeline with maximum timeframes is being adopted.”).

¹¹ *Id.* at 5265, para. 49.

3. Required electric utilities, when rejecting an attachment request, to explain in detail the basis for such decision;¹²
4. Adopted a new telecommunications rate formula, which reduced the disparity between telecommunications and cable rates;¹³ and
5. Encouraged negotiated resolutions to attachment disputes.¹⁴

ACA members found the reforms adopted in the *2011 Pole Attachment Order* beneficial in enabling reasonable access to poles. Many utilities comply not only with the letter but the spirit of the law and regulations, which translates into lower costs for buildouts and more extensive deployments. However, as discussed below, other utilities continue their rent-seeking behavior by unreasonably delaying pole attachment requests or charging unwarranted fees. ACA describes these problems in detail below, based on the attached declarations and numerous discussions with its membership who attach to poles of utilities subject to Section 224. These members detailed the significant problems they encounter when seeking pole attachments, including:

1. Utilities seek to impose unreasonable provisions in Master Agreements;
2. Utilities have inadequate or incorrect pole inventory databases;
3. Utilities do not have a transparent, efficient, and reasonable attachment application process, which leads to delays and the imposition of additional fees;
4. Utilities and existing attachers take too long to complete make-ready and attachers have inadequate recourse either to force action or undertake work when timeframes expire;

¹² *Id.* at 5254, para. 24.

¹³ *Id.* at 5295, para. 126. See *Implementation of Section 224 of the Act: A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No 09-51, Order on Reconsideration, 30 FCC Rcd 13731 (2015) (revising rate formula to further reduce this disparity).

¹⁴ *2011 Pole Attachment Order*, 26 FCC Rcd at 5286, para. 100.

5. Utilities fail to provide itemized cost estimates for make-ready and seek to charge for work unrelated to new attachments; and
6. The Commission's pole attachment complaint process is ineffective.

These and other concerns described herein warrant the Commission's attention for several reasons. First, the "bad actor" utilities control access to a vast number of poles. Second, these problems are significant and cause harm today, as ACA members rush to deploy network facilities to residential consumers that want higher-speed broadband Internet access service and commercial users that want 100 Mbps+ Ethernet service. Finally, and of real concern for users in sparsely populated communities and rural areas, these problems are more severe for ACA's smaller provider members, which have fewer resources to fight back against utilities many times their size. ACA thus urges the Commission to act promptly to address these problems and offers specific remedies later in these comments.

A. Providers Continue to Face Significant Problems in Attaching to Poles Owned by Utilities Subject to Section 224

Despite the reforms adopted in the *2011 Pole Attachment Order*, cable, telecommunications, and broadband service providers continue to face significant problems at each step of the process to attach to poles owned by utilities subject to Section 224. Notwithstanding these problems, attachers generally favor using utility poles, if they are available at a reasonable cost and without unreasonable delay, because digging trenches and burying conduit can be up to eight times as expensive as hanging wires on poles, depending on the terrain and housing density.¹⁵

¹⁵ See ctc technology & energy, "A Model for Understanding the Cost to Connect Schools and Libraries with Fiber Optics" (October 2014), available at <http://www.ctcnet.us/wp-content/uploads/2014/10/Connecting-Schools-and-Libraries-20141017.pdf> (last visited June 13, 2017). ctc estimates the typical total cost per mile for new aerial construction is \$51,188 versus up to \$428,794 for new underground construction. *Id.* at 18, 21, 25.

If the attacher does not have an existing agreement with the utility, the first step is for the potential attacher to negotiate a Master Agreement with the utility that owns the poles, covering the terms and conditions for attachment for a set period.¹⁶ After the Master Agreement is agreed upon (or potentially while negotiations are in progress), the attacher files an application for attachment to specific poles.¹⁷ To complete the application, the potential attacher must have determined the route for its network build, which is typically driven by an internal assessment of its lowest-cost path based on multiple factors, including its estimated costs for make-ready, pole rental fees, and time for the work to be completed by others.

The Commission's four-stage timeline begins when a utility determines that an application is complete.¹⁸ A utility may not act unreasonably in making this determination.¹⁹ The utility then has 45 days to accept or deny the application.²⁰ During this time, the utility will survey the route and potentially conduct other engineering analyses to determine the feasibility of attachment and necessary make-ready, such as moving communications equipment, replacing a pole, or adding additional supports to meet safety or engineering requirements.²¹ Often, attachers – who typically do their own assessments prior to submitting their applications – and pole owners will not immediately agree on how much make-ready work is required.

Once the utility accepts the application, it must provide a cost estimate within 14 days and the attacher has 14 days to accept or reject it.²² Here again, attachers and utilities often will

¹⁶ *2011 Pole Attachment Order*, 26 FCC Rcd at 5261, para. 40 (stating a Master Agreement is not a prerequisite for starting the timeline for reviewing pole attachment applications).

¹⁷ *Id.* at 5250, para. 19.

¹⁸ *Id.* at 5255, para. 25; 47 C.F.R. § 1.1420(c).

¹⁹ *2011 Pole Attachment Order*, 26 FCC Rcd at 5255, para. 25 (requiring that any engineering specifications for pole attachment applications must be reasonable).

²⁰ *Id.*; 47 C.F.R. § 1.1420(c).

²¹ *2011 Pole Attachment Order*, 26 FCC Rcd at 5254-55, paras. 24-25.

²² *Id.* at 5255-56, paras. 26-28; 47 C.F.R. § 1.1420(d).

not immediately agree on the appropriate cost estimate. After the cost estimate is accepted, the utility must promptly notify existing attachers if they need to move their equipment and has 60 days to conduct necessary make-ready involving its own equipment and the poles.²³ In practice, the attacher, rather than the utility, often ends up communicating and coordinating make-ready with other attachers.²⁴ After the 60 days run, the utility has the option to extend the timeline by 15 days.²⁵ When those 15 days end, if the utility or the existing attachers have not completed the make-ready involving the existing attachers, the attacher can hire an approved contractor to move the other attachers' equipment, although as explained herein, that process is not often invoked for a variety of reasons or is not seamless.²⁶

Based on the attached declarations, conversations with ACA members, and other sources, ACA details in the following section problems attachers experience today in the pole attachment process. Some of these problems are long-standing and the Commission has yet to address them. Others were addressed by the Commission, but the solution has proven inadequate. This proceeding gives the Commission the opportunity to improve the attachment process for all concerned, based on a plethora of attacher experiences, to ensure it serves the public interest. To that end, after discussing the problems with the pole attachment process, ACA proposes solutions to these current concerns.

1. Utilities impose unwarranted and unreasonable Master Agreement terms and conditions

Utilities often seek to impose unwarranted and unreasonable Master Agreement terms and conditions on attachers. Master Agreements govern the rights and responsibilities of

²³ *2011 Pole Attachment Order*, 26 FCC Rcd at 5256-59, paras. 29-35, 47 C.F.R. § 1.1420(e).

²⁴ *2011 Pole Attachment Order*, 26 FCC Rcd at 5258, para. 32.

²⁵ *Id.* at 5265-67, paras. 49-53; 47 C.F.R. § 1.1422.

²⁶ *2011 Pole Attachment Order*, 26 FCC Rcd at 5267-70, paras. 54-61.

utilities and attachers through the entire attachment lifecycle and through multiple attachments. Section 224 requires that pole access rates, terms, and conditions be “just and reasonable.”²⁷ To date, the Commission has refrained from mandating terms and conditions, let alone a specific Master Agreement template, cognizant that utilities may have individual standards and may be governed by differing restrictions under State and local laws. Rather, the Commission determines the reasonableness of pole access rates, terms, and conditions on a case-by-case basis,²⁸ guided by a limited set of generally applicable rules and policies.²⁹ Because of the Commission’s prior reluctance to adopt regulations governing the contents of Master Agreements, and because pole attachment regulations may be unclear or insufficiently enforced, utilities often exercise their leverage in Master Agreement negotiations to impose unwarranted or unreasonable terms and conditions. Recent problems faced by attachers include:³⁰

Full Application Review for Overlapping

Cable and telecommunications providers typically overlap to add capacity to their networks or to run fiber from a splice point to a location that is multiple poles away. The Commission ruled over 15 years ago that applications for such overlaps are unnecessary,

²⁷ 47 U.S.C. § 224(b).

²⁸ *2011 Pole Attachment Order*, 26 FCC Rcd at 5246, para. 11.

²⁹ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd 15499, 16071-74, paras. 1151-58 (1996).

³⁰ Attachers also report that utilities seek to include provisions in pole agreements that violate Commission rules and orders. For example, the MBO and Cross family of companies, a group of telecommunications service providers in Oklahoma, report that one of the utilities in its footprint includes pole agreement language allowing the utility to set attachment fees exceeding the Commission’s rate formula. See Declaration of Jake Baldwin, General Counsel for the MBO and Cross family of companies, at para. 4 (June 5, 2017) (“MBO and Cross Declaration”). The offending utility refuses to accept pole applications until the new agreement is signed, effectively holding applications hostage until the attacher accedes to the utility’s demands. *Id.* Another ACA member reports that a utility in a State subject to the Commission’s framework seeks pole application and make-ready timeframes longer than the maximum timeframe allowed under Commission rules. In addition to being illegal, such provisions increase the costs and timeframes for network deployment.

finding that “neither the host attaching entity nor the third party overlasher must obtain additional approval from or consent of the utility for overlashing other than the approval obtained for the host attachment,”³¹ provided, however, that a utility can deny access for reasons of safety or reliability and charge for make-ready if the overlashing requires strengthening the pole.³² Nonetheless, some utilities require, or seek to require, additional prior approvals for overlashing projects. ImOn, an overbuilder in Iowa, notes that Alliant, a utility in its territory, requires that all overlashing projects go through the full application process.³³ Another ACA member reports that a utility requires it to go through the full application process for overlashing and then charges fees as high as \$1,000 per pole. Requiring prior approval for overlashing violates Commission policy, increases costs, and delays deployments. But applicants may be reluctant to file a complaint with the Commission to avoid damaging their relationships with utilities necessary for future deployments.

Full Application Review for Drops

While utilities generally permit an attacher to “Attach and Notify” to connect drops directly to a customer location from an attacher’s facilities on a previously-approved pole,³⁴ some utilities have used their leverage to add a provision to Master Agreements requiring attachers to file an application for any drop to a customer that involves an attachment to an

³¹ *Amendment of Commission’s Rules and Policies Governing Pole Attachments*, CS Docket Nos. 97-98, 97-151, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12141, para. 75 (2001).

³² *S. Co. Servs., Inc. v. FCC*, 313 F.3d 574, 578 (D.C. Cir. 2002).

³³ See Declaration of Patrice M. Carroll, Chief Executive Office of ImOn, at para. 8 (June 12, 2017) (“ImOn Declaration”).

³⁴ “Attach and Notify” permits attachers to connect customers upon request and then inform the utility of the new attachment so the utility can charge rent for the pole and review the attachment for compliance with safety codes. See N.Y. Pub. Serv. Comm’n, *Proceeding on Motion of the Commission Concerning Certain Pole Attachment Issues*, Order Adopting Policy Statement on Pole Attachments, Case 03-M-0432, Appendix A (Aug. 6, 2004), available at <http://www.utilityregulation.com/content/orders/04NY0432E.pdf> (last visited June 13, 2017) (“*N.Y. Pole Attachment Order*”).

additional pole, regardless of whether an attacher's equipment is already attached to the pole. These provisions can delay providing requested service to customers for weeks. This issue arises because existing attachers may not be able to reach a new customer from their existing attachments. In these instances, the attacher often needs incidental access to one or more nearby poles to make the customer drop. This occurs, for instance, when a customer is on the other side of the street from a run of attached poles or is a block away from a run. Some utilities that MetroNet, a service provider in the Midwest, attaches to impose this requirement.³⁵ Alliant also seeks to impose this provision on ImOn, undermining ImOn's goal of connecting homes passed in its footprint within 24 hours of a customer signing up for service.³⁶

Requiring full application review of drops is a significant departure from the standard industry practice of "Attach and Notify," based in part on government requirements that cable operators provide service within a limited time.³⁷ "Attach and Notify" has proven satisfactory for both utilities and attachers, as customer connections use light cables attached with non-invasive clips that add minimal additional load to poles. Utilities agreeing to "Attach and Notify" do not give up their rights to attacher compensation or compliance with safety standards. The turn from "Attach and Notify" to "Apply and Attach" (or even "Notify and Attach") in effect shrinks service providers' markets and limits the potential returns from their broadband buildouts, which disincentivizes investment in such deployments, counter to the Commission's objectives.³⁸

Compensatory Damages and Legal Fees

As discussed below, ACA members find the Commission's complaint process to be of little value for many reasons, two of which the Commission can address through requirements in

³⁵ See Declaration of John Greenbank, Executive Vice President of MetroNet, at para. 4 (June 6, 2017) ("MetroNet Declaration").

³⁶ See ImOn Declaration at para. 8.

³⁷ 47 C.F.R. § 1.1420.

³⁸ *Wireline NPRM*, 32 FCC Rcd at 3267, para. 1.

Master Agreements. Today, attachers are neither entitled to receive compensatory damages or legal fees when they prevail in a complaint. As a result, ACA members report that utilities have little to lose from demanding unjust and unreasonable terms and conditions, and thus are not sufficiently deterred from continuing to require them. These members further explain that this “skewed environment” overhangs the entire negotiating process and so, by addressing these and other matters set forth herein, the Commission would create a climate that would lead to more productive results for all parties.

Asymmetrical and Non-Reciprocal Indemnification Provisions

In 2014, Mediacom Communications (“Mediacom”) filed a petition for declaratory ruling with the Commission to clarify that indemnification clauses in Master Agreements imposing asymmetric and non-reciprocal indemnification liability for negligence on attachers are unjust and unreasonable provisions under Section 224.³⁹ Mediacom supported its petition by relying on the Enforcement Bureau’s 2003 *Georgia Power Order*, which found that the utility’s non-reciprocal indemnification provision was not a just and reasonable condition of the pole agreement.⁴⁰ ACA supported Mediacom’s petition, arguing that an asymmetric indemnification clause violated both the reciprocity principle and the principle that pole attachment agreements must provide that each party be liable for losses that are caused by its own misconduct.⁴¹ The Commission, however, did not issue a decision in response to the petition because Mediacom withdrew the petition as a result of settlement.⁴² Consequently, the Commission has not ruled

³⁹ See Petition for Declaratory Ruling of Mediacom Communications Corporation, WC Docket No. 14-52 (filed Feb. 19, 2014).

⁴⁰ See *Cable Television Ass’n of Ga. v. Ga. Power Co.*, Order, 18 FCC Rcd 16333 (EB 2003), *recon. denied* 18 FCC Rcd 222871 (EB 2003) (“*Georgia Power Order*”).

⁴¹ See Comments of the American Cable Association Supporting the Petition by Mediacom Communications for Declaratory Ruling Concerning Indemnification Clauses in Pole Attachment Agreements, WC Docket No. 14-52, at 4 (May 8, 2014).

⁴² See Letter from Craig A. Gilley, Counsel for Mediacom Communications Corporation, to Marlene H. Dortch, Esq., Secretary, Federal Communications Commission, WC Docket No. 14-52 (May 14, 2015).

on this issue and, while ACA believes the issue was addressed and settled by the Enforcement Bureau in the *Georgia Power Order*, ACA members report that one-sided indemnification clauses continue to be proposed by utilities in negotiations for Master Agreements. Thus, this issue of asymmetric indemnification burdens on attachers remains and, given that potential liabilities may be substantial, needs to be addressed.

2. Utilities do not facilitate attachers' access to information about the location and availability of their poles

Attachers would greatly benefit from having access to an online database of information about poles that is created and managed by the pole owner; yet, despite database creation and maintenance being a common practice in firms across industries, many utilities do not provide attachers with readily or easily accessible information regarding the location and availability of poles. As a result, when attachers plan the route for network builds, they typically need to “walk the route” to identify pole location and availability, and determine where they can attach to poles and where they need to change the route. This is time-consuming, inefficient, and may lead to disputes with the utility.

In 2010, the Commission considered requiring utilities to collect and make available information about the location and availability of poles.⁴³ But it declined to adopt such a requirement in the *2011 Pole Attachment Order*, finding the burdens of creating the database outweighed the potential benefits.⁴⁴ In particular, the Commission found that the “data collection would necessarily take significant time,” it would be difficult to keep such data up-to-date, and the data may not have much value to attachers.⁴⁵ Now, some six years later, ACA

⁴³ *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Order and Further Notice of Proposed Rulemaking, 25 FCC Rcd 11864, 11897, paras. 75-76 (2010).

⁴⁴ *2011 Pole Attachment Order*, 26 FCC Rcd at 5280, para. 89.

⁴⁵ *Id.*

can confirm that the Commission's failure to adopt such a data collection requirement has proved costly for attachers.

Utility use of electronic pole databases has increased greatly since 2011 and many utilities share their pole databases with attachers. A recent workshop sponsored by the California Public Utilities Commission demonstrated that utilities in the State have been digitizing their infrastructure records to improve operations.⁴⁶ Southern California Edison, for example, uses databases to manage and share pole-related data with joint pole owners and renters.⁴⁷ One ACA member points to Alabama Power as an example of a utility that permits attachers to access its pole database.⁴⁸ This database, which is kept up-to-date via periodic audits, allows attachers in Alabama Power's territory to quickly identify the location, height, and material type of poles, which helps attachers map routes more quickly and forecast potential make-ready requirements.⁴⁹ This reduces the likelihood of disagreements with Alabama Power during the make-ready cost estimate and acceptance stages that can delay deployments.

Nonetheless, many utilities still do not have adequate pole databases or, if they have such databases, they are for internal purposes only and not shared with attachers. This was a major complaint in ACA's discussions with its members. LISCO, a provider of broadband and telephone services in Iowa, reports that no utilities in its footprint provide such pole databases.⁵⁰ USA Communications, a cable operator in Nebraska, Montana, Colorado, Alabama and

⁴⁶ Cal. Pub. Utils. Comm'n, *Pole and Conduit Databases & Application, Workshop*, available at <http://www.cpuc.ca.gov/general.aspx?id=6442453019> (last visited June 13, 2017).

⁴⁷ So. Cal. Edison, *Pole Database Workshop* (Mar. 17, 2017), available at <http://www.cpuc.ca.gov/WorkArea/DownloadAsset.aspx?id=6442453014> (last visited June 13, 2017) ("*Edison Pole Database Workshop*").

⁴⁸ See Declaration of Chris Hilliard, Chief Executive Officer of USA Communications, at para. 6 (June 13, 2017) ("*USA Communications Declaration*").

⁴⁹ *Id.*

⁵⁰ Declaration of David Magill, Vice President of Administration and Legal of LISCO, at para. 7 (June 5, 2017) ("*LISCO Declaration*").

California, reports that only one utility in its footprint has digital databases with pole plant information.⁵¹ Other ACA members report that many utilities have electronic records of their poles, but do not make them readily accessible to attachers. As a result, when attachers are working on pre-application documentation, they must spend time “walking the route” to determine the identity of existing attachers and scheduling appointments with utilities to review maps or databases maintained at their offices. This results in attachers having to incur significant time and costs to collect information that the pole owner already has, or the pole owner could have easily collected and retained from its previous work on the pole, which in turn limits attachers’ builds.

3. Utilities unreasonably delay review and approval of applications

In the *2011 Pole Attachment Order*, the Commission adopted a detailed timeline for processing attachment requests to “give necessary guidance to both pole owners and attachers” and end “excessive delays.”⁵² Yet, ACA members continue to experience delays in the review and approval of attachment applications. In some instances, utilities ignore the timeline. In other instances, utilities take the maximum period allowed even though the requests are for simple attachments. Below ACA elaborates on these problems.

a. Utilities often take longer to process applications than the maximum timeframes permitted under the Commission’s rules

Despite the requirement that utilities perform pole surveys and provide a response to a complete application within 45 days,⁵³ ACA members report that utilities often exceed this timeframe for a variety of reasons. A leading reason is that, contrary to the Commission’s

⁵¹ USA Communications Declaration at para. 6.

⁵² *2011 Pole Attachment Order*, 26 FCC Rcd at 5250-51, para. 21.

⁵³ 47 C.F.R. § 1.1420(c). An additional 15 days is permitted for larger orders. 47 C.F.R. § 1.1420(g).

admonition that they act diligently,⁵⁴ utilities do not assign sufficient engineering staff to process pole applications.⁵⁵ This is especially troubling when attachers request a small number of attachments, often to allow them to reach prospective new end user locations, which the utilities should be able to handle in two to three weeks. In Montana, USA Communications experienced a delay of over a year on an application for eight pole attachments to connect five commercial customers because the utility only assigned one engineer to review survey reports and respond to applications.⁵⁶ MetroNet similarly has been waiting more than a year for approval of applications for 160 pole attachments because the one employee responsible for reviewing applications was out on extended medical leave.⁵⁷

ACA has found from discussions with its members that some utilities refuse to conduct joint surveys with attachers. As a result, when an attacher's application is rejected or the utility provides high-cost estimates for make-ready, the attacher often lacks the information necessary to challenge these findings. For example, LISCO reports that one of the two utilities in its footprint refuses to do joint surveys, which is one of the reasons it consistently has to engage in time-consuming negotiations with the utility to agree on necessary make-ready.⁵⁸ By contrast,

⁵⁴ See *2011 Pole Attachment Order*, 26 FCC Rcd at 5254, para. 24.

⁵⁵ The utilities acknowledge this problem. A survey from the Utilities Telecom Council indicated that the "size" and "volume" of applications were the reasons behind 58 percent of the applications that took longer than 45 days to process. In all, 19 percent of applications took longer than 45 days to process. See Comments of Utilities Telecom Council, WC Docket No. 07-245, App'x, *The Problem with Pole Attachments: A White Paper*, at 13 (Mar. 7, 2008).

⁵⁶ See USA Communications Declaration at para. 4.

⁵⁷ See MetroNet Declaration at para. 5. Problems also arise when utilities outsource pole application review and attachment engineering design to third parties. These third parties may be located far from the relevant poles or lack personnel in all areas within the utility's footprint, requiring additional logistics and travel time to perform pole surveys and collect data to evaluate attachments. LISCO, for example, has experienced these problems in dealing with the third party that executes pole surveys and engineering work for an investor-owned utility in southeast Iowa. See LISCO Declaration at para. 3. Because the third-party engineers surveying poles in its footprint are not in the same State and need to travel, they are frequently delayed in undertaking their work. *Id.* Other ACA members have reported that their local utility has taken longer to process applications since it outsourced pole management to a firm not located in the area.

⁵⁸ See *id.* at para. 4.

attachers who have the option of conducting joint surveys report that the surveys allow them to discuss and resolve issues with the utility's local engineers in real-time. They additionally report that joint surveys provide them with an opportunity to discuss alternatives to the utility's initial solution or dispute certain assessments, which may result in the utility's engineers taking the suggestions of the attachers. While attachers' representatives do not always agree with the assessments of the utility's engineers, disputes over make-ready estimates are rare following joint surveys because the attacher has clarity into the reasoning for the make-ready estimate. The net result is fewer delays and disputes during the estimate acceptance process.

b. Utilities fail to automate tracking of applications

Automatic tracking of pole attachment applications by utilities speeds the attachment process. Today, the majority of utilities in 30 States use the web-based National Joint Use Notification System ("NJUNS") that allows them to track work on jointly owned poles.⁵⁹ Additionally, at least 22 utilities in 38 States use NOTIFY, a software product that provides database and workflow management for infrastructure projects.⁶⁰ These systems allow attachers to track the status of work on their applications. But for providers that need to attach to utilities that have lagged in adopting these systems, delays can take longer to identify and resolve. For example, when an attacher sends required documentation to a utility via email or through an online portal, the attacher often must contact the utility directly by phone or email to learn its status and further prosecute its applications. Such *ad hoc* communications may lead to delays in learning about application problems, or the exchange of imprecise or insufficient information regarding problems, requiring further communications and potentially managerial

⁵⁹ See NJUNS, *Who We Are*, available at <https://web.njuns.com/about/> (last visited June 13, 2017); NJUNS, *Members*, available at <https://web.njuns.com/members/> (last visited June 13, 2017).

⁶⁰ See Alden Systems, Inc., *Our Clients*, available at <https://www.aldensys.com/about-us> (last visited June 13, 2017); see also Alden Systems, Inc., Presentation to Ca. Pu. Utils. Comm'n, available at <http://www.cpuc.ca.gov/WorkArea/DownloadAsset.aspx?id=6442453012> (last visited June 13, 2017) (providing number of States using NOTIFY system).

escalation to get specific information regarding an application's status that should be easily attainable.

c. The Commission's timeframes encourage utilities to take the maximum amount of time to process simple pole attachment applications for a small number of attachments

ACA members report that utilities often take the maximum amount time for simple applications for a small number of attachments. Although the Commission's timeframe helps determine rollout plans and the assignment of resources, it does not provide sufficient incentive for utilities to accelerate the review process, notwithstanding the Commission's direction that utilities act diligently and respond to applications well before the maximum timeframe.⁶¹ There is no justification not to move more quickly on applications to attach to a relatively small number of poles (e.g., fewer than 20)⁶² or on applications that do not present unusual issues. As one example, Alliant Energy uniformly responds to ImOn's pole applications at the end of the prescribed timeline, despite ImOn providing all requested information and volunteering to do anything else needed to accelerate access.⁶³

In the *2011 Pole Attachment Order*, the Commission stated that "[i]t would not be reasonable behavior for a utility to take longer to fulfill any [pole attachment] requests simply because a timeline with maximum timeframes is being adopted."⁶⁴ Taking the maximum amount of time to approve even simple pole attachment applications not only deters network investment but undermines the Commission's objective of enhancing competition, particularly in the market for business data services.⁶⁵ In a dynamic market, it is untenable for a provider to

⁶¹ See *2011 Pole Attachment Order*, 26 FCC Rcd at 5252-55, paras. 23-24.

⁶² Utah's rules identify small pole applications as covering 20 or fewer proposed pole attachments. See Utah Admin. Code r. 746-345-3.

⁶³ See ImOn Declaration at para. 4.

⁶⁴ *2011 Pole Attachment Order*, 26 FCC Rcd at 5252, para. 23.

⁶⁵ See *Bus. Data Servs. in an Internet Protocol Env't, et al.*, WC Docket No. 16-143, *et al.*, Report and Order, 32 FCC Rcd 3459, 3461, para. 1 (2017).

sign up a customer and then wait five months for pole access to service new locations or extend lines. Customers want their requested service quickly and know incumbent providers can deliver it. In addition, incumbents already attached to poles can take advantage of a request that it move attachments to alter market conditions prior to the arrival of competition. Incumbent competitors may offer shorter response times to connect new locations, lower subscription fees, or include additional features to retain existing customers, detrimentally affecting the business case for a new entrant's projects. The experience of a competitive provider in Oklahoma affiliated with the MBO and Cross family of companies provides an example. It has been forced to give new commercial customers six-month lead times to connect because the investor-owned utility refuses to grant its applications and enable attachments expeditiously, even for small-size attachments.⁶⁶ This service provider believes it has lost business opportunities to incumbents because customers are unwilling to wait that long to get service.⁶⁷

The reluctance of some utilities to respond to applications promptly is particularly troubling because ACA members also work with "good actor" utilities that address their pole attachment applications in a timely manner. As one example, LISCO has received application turnarounds from some utilities within 21 days.⁶⁸ In addition, ImOn has had positive experiences with MidAmerican, which completed review of an 89-pole application in two weeks.⁶⁹ These examples demonstrate that an expedited pole access process is possible and that certain utilities unreasonably delay pole access in violation of the Commission's rules.

⁶⁶ See MBO and Cross Declaration at para. 3.

⁶⁷ *Id.*

⁶⁸ See LISCO Declaration at para. 6.

⁶⁹ See ImOn Declaration at para. 10.

4. Make-Ready is a chief source of unjustified delays, as attachers face opaque and unreasonable actions by utilities and existing attachers

To proceed with new pole attachments in compliance with safety code standards, utilities engage in make-ready works – the rearrangement of both electrical equipment and communications cables installed on poles to maintain proper safety clearances. Many delays in the pole attachment process occur during this stage, largely because of pole owners and existing attachers' unwillingness to comply with existing timelines and unreasonable demands imposed on attachers by utilities. For example, utilities often delay make-ready work due to unresponsive existing attachers and try to push the responsibility for coordinating make-ready work to the attacher. Moreover, pole owners typically require that the attacher fix code violations the attacher did not cause and impose fees for pole maintenance unrelated to the new attachment. ACA discusses these and other concerns below.

a. Make-ready work often is delayed because utilities and existing attachers are unresponsive or fail to coordinate

ACA members have experienced make-ready delays for multiple reasons. In some instances, existing attachers may not respond to requests to undertake work or move their cables and equipment promptly within the make-ready timeline.⁷⁰ This issue was one of the top problems identified by most ACA members. MetroNet reports that existing attachers frequently do not conduct their make-ready within the normal 60-day timeframe.⁷¹ Another ACA member in Missouri reports that a single pole attachment owned by an unresponsive incumbent held up work on a 200-mile middle mile project.

Another reason for delay is that utilities either do not contact existing attachers or do not provide applicants with a cost estimate covering both utility and existing communications

⁷⁰ 47 C.F.R. § 1.1420(e)(1).

⁷¹ See MetroNet Declaration at para. 7.

attacher make-ready.⁷² One ACA member reports that it must directly contact existing attachers and request they move their equipment because the utility refuses to provide such information. In Indiana, utilities required MetroNet to directly contact existing attachers and request cost estimates of make-ready works in the communications section of poles.⁷³

Make-ready delays also occur because utilities fail to undertake work where an existing attacher is unresponsive, despite the *2011 Pole Attachment Order* allowing them to exercise authority to finalize make-ready works within 15 days after the standard make-ready period if existing attachers fail to do so.⁷⁴ An ACA member experienced this issue, which in some instances caused it to simply give up and find an alternative route. ACA members recognize that utilities do not want to move existing attacher's wires and cables because of the potential lack of clarity on liability in the event of property damage, accidents, or service interruptions. But such coordination is critical to the pole attachment process and should not be the sole responsibility of the attacher.

b. Utilities require an attacher to fix code violations the attacher did not cause

As part of the make-ready process, utilities may require attachers to fix code violations the attachers did not cause. Some ACA members report that utilities frequently include activities in the make-ready works to resolve safety violations caused by existing communications attachers. For example, ImOn found that Alliant charged it to fix violations

⁷² The *2011 Pole Attachment Order* does not say explicitly that utilities are responsible for make-ready cost estimates covering existing attachers, but it does imply this is the case. The Order states that, "[u]pon receipt of payment from the attacher, we require a utility to notify immediately and in writing all known entities with existing attachments that may be affected by the planned make-ready," implying that "planned make-ready" is inclusive of moving existing attachers' equipment. *2011 Pole Attachment Order*, 26 FCC Rcd at 5256, para. 29. See 47 C.F.R. § 1.1420(d) (stating a utility "must present to a requesting entity an estimate of charges to perform *all necessary make-ready work*") (emphasis added).

⁷³ See MetroNet Declaration at para. 6.

⁷⁴ 47 C.F.R. § 1.1420(e)(1)(iv).

created by existing attachers.⁷⁵ In other instances, an existing communications attachment is deemed in violation because of action taken by the utility. For instance, an investor-owned utility in Minnesota charged Mediacom to fix violations on poles to which Mediacom had been attached for 20 years caused by the utility moving its equipment during pre-make-ready inspections for a new attacher.⁷⁶ The Commission has found that requiring attachers to pay for the correction of violations caused by other attachers is unreasonable, and that attachers need only pay for the additional costs of accommodating their attachments.⁷⁷ In sum, attachers should not be responsible for correcting violations caused by others.

c. Utilities require new attachers to undertake general pole maintenance unrelated to the new attachment

ACA members report that utilities require as part of their make-ready that new attachers replace or undertake substantial work on “failing” poles that cannot sustain the load of existing equipment and cables. This results in disputes and additional on-site inspections and technical evaluations by attachers and utilities, pushing back make-ready completion dates. ImOn has been regularly subject to utility claims that it needs to undertake corrective maintenance in make-ready work.⁷⁸ Mediacom also received cost estimates that include the replacement of failing poles, even when the poles would have failed without Mediacom’s attachments.⁷⁹ ACA members understand that failing or inadequately maintained pole infrastructure represents a major risk for accidents and service interruptions in surrounding communities and that utilities

⁷⁵ See ImOn Declaration at para. 6

⁷⁶ See Declaration of William Wegener, GVP of Engineering and Network Development at Mediacom Communications, para. 5 (June 5, 2017) (“Mediacom Declaration”).

⁷⁷ See *Kansas City Cable Partners d/b/a Time Warner Cable of Kansas City v. Kansas City Power & Light Co.*, File Nos. PA 99-001, PA 99-002, Consolidated Order, 14 FCC Rcd 11599, 11606-07, para. 19 (1999) (“Correction of the pre-existing code violation is reasonably the responsibility of KCPL [the pole owner] and only additional expenses incurred to accommodate Time Warner’s attachment to keep the pole within NESC standards should be borne by Time Warner.”) (“*Kansas City Cable Partners*”).

⁷⁸ See ImOn Declaration at para. 6.

⁷⁹ See Mediacom Declaration at para. 5.

need to ensure the safety and reliability of poles. However, new attachers should not bear the full burden of pole replacement, especially when incumbent attachers pay rental fees to help defray maintenance costs.⁸⁰

5. Utilities impose unreasonable fees for standard pole attachment applications

Utilities often charge ACA members unreasonable fees for even standard pole attachment applications. ACA members believe that application fees are generally reasonable when they are levied on a per-application, not a per-pole, basis because not all poles need to be surveyed or require engineering design. Many utilities, however, assess engineering fees per pole, regardless of whether such work is needed for a pole. It is generally accepted that where there is only a single or limited number of communications attachers, sufficient clearance exists to proceed with an attachment without rearrangement of electrical equipment or pole replacement and the associated engineering that goes along with this work. But even in situations where visual inspection indicates sufficient capacity (e.g., only one other communications attacher on the pole), ACA members encounter utilities that demand engineering review of, and charge fees for, every pole. Mi-Tech, Alliant Energy's third-party pole management firm, charges engineering fees that can increase the cost of deployment by \$1,400 per mile, or roughly \$20 per pole.⁸¹

Utilities also impose unnecessary indirect fees on applicants when they require applicants to conduct pole load analyses for each attachment, even when a simple visual inspection could eliminate this requirement for most poles. To fulfill this requirement, attachers need to hire licensed engineers. Mediacom, which provides broadband service to 1.2 million subscribers in 22 States, reports that pole load analyses can increase its broadband

⁸⁰ *Kansas City Cable Partners*, 14 FCC Rcd at 11606-07, para. 19.

⁸¹ See ImOn Declaration at para. 4.

deployment project costs by over \$5,000 per mile.⁸² As a result, attachers bear significant upfront costs to proceed with attachments that do not represent any safety risks.

6. Utilities charge unreasonable fees for make-ready

ACA members continue to find that utilities provide inadequate documentation of make-ready costs and charge unreasonable fees for make-ready work. These excessive fees may stem from many sources, including unreasonable labor fees or work unrelated to the new attachment.⁸³ Exacerbating this issue, utilities and existing attachers often provide attachers with final invoices far in excess of their original cost estimates and years after the work is complete.

a. Utilities and existing attachers do not provide itemized cost estimates for make-ready work

While utilities must provide cost estimates of expected make-ready works within 14 days after acceptance of an application,⁸⁴ the Commission has refrained from adopting requirements for the content or format of these estimates, and some utilities are abusing this ambiguity to provide cost estimates that lack sufficient clarity or detail.

For example, one of the utilities in LISCO's footprint in Iowa provides estimates that are not itemized by pole or task, and the only useful information included is whether the poles need to be replaced.⁸⁵ LISCO's investment decision has become binary based upon this limited information: if a pole replacement is allegedly required, LISCO drops the project; if a pole

⁸² See Mediacom Declaration at para. 4.

⁸³ ACA members report that utilities and existing attachers charge above-market rates for make-ready works, often due to the use of labor that is paid by the hour and not by the job, even for routine jobs like moving attachments in the communications space. For a recent project in Montana, USA Communications states it could have done the same work for 25 percent of the utility's cost estimate. See USA Communications Declaration at para. 5. Mediacom received a \$100,000 invoice for post-attachment maintenance that included above-market labor charges. See Mediacom Declaration at para. 6.

⁸⁴ *2011 Pole Attachment Order*, 26 FCC Rcd at 5255-56, paras. 26-28.

⁸⁵ See LISCO Declaration at para. 4.

replacement is not required, the project continues. MetroNet encounters a similar lack of itemization from a major utility in Indiana.⁸⁶ MetroNet only gets additional information if it requests it.⁸⁷ In contrast, by having detailed estimates of make-ready costs, LISCO and ImOn found they are able to evaluate the reasonableness of the works more quickly, enter into negotiations with utilities where there are issues in dispute, and make economic decisions about whether to attach their wires or bury them.⁸⁸

The lack of itemization also occurs with invoices that utilities send to attachers after make-ready is completed to bill for any costs above the original estimates (so-called “true-ups”). In Indiana, MetroNet received a final invoice for true-up make-ready in excess of \$1 million of the original estimate without any description of the works.⁸⁹ Both ImOn and LISCO have experienced the same lack of transparency in final invoices from utilities in Iowa.⁹⁰ In sum, so they can evaluate whether charges are reasonable, attachers should be provided with sufficient detail of work and costs both before make-ready is undertaken and after the attachment is completed.

b. Utilities provide final invoices that are far in excess of the original cost estimate

As described above, attachers pay utilities estimated charges prior to make-ready and receive invoices after make-ready is completed that include “true-up” costs. ACA members recognize that it is difficult to estimate all expected costs, but being “off” by 50 percent or more from the original estimate, upon which the attacher relied as a good faith assessment, is unreasonable. Such post-make-ready financial surprises can damage the viability of projects,

⁸⁶ See MetroNet Declaration at para. 6.

⁸⁷ *Id.*

⁸⁸ ImOn Declaration at para. 11; LISCO Declaration at para. 6.

⁸⁹ See MetroNet Declaration at para. 8.

⁹⁰ See ImOn Declaration at para. 7; LISCO Declaration at para. 5.

relationships with financing entities, and the provider itself. Moreover, utilities may issue these true-up invoices several years after the work is performed. MetroNet recently received an invoice from a utility in its territory for a project done in 2014 that is \$1 million more than the original estimate.⁹¹ In 2016, ImOn was back-billed \$126,000 for a 591-pole project for make-ready works performed in 2014.⁹² LISCO similarly was back-billed \$96,000 in 2016 for make-ready works performed on 36 poles between 2012 and 2014 without any detailed description of works performed.⁹³ ACA members also have found that disputes over true-up invoices may harm relationships with utilities and result in delays in processing new attachment requests.

B. The Commission's Enforcement Process Continues to Have Serious Flaws

In the *2011 Pole Attachment Order*, the Commission recognized that its enforcement process was flawed.⁹⁴ In response, the Commission sought to facilitate the resolution of disputes between attachers and utilities by requiring “executive-level discussions” prior to filing a complaint and by allowing parties to include dispute resolution procedures in their pole attachment Master Agreements.⁹⁵ The Commission also modified its penalty standard for unauthorized attachments.⁹⁶ However, the Commission declined to adopt, as ACA and others urged, a requirement that compensatory damages be awarded to attachers when utilities unlawfully deny or delay pole access or require unjust and unreasonable pole attachment rates, terms, or conditions.⁹⁷ As discussed below, despite the actions taken by the Commission in 2011, ACA members continue to find the Commission's enforcement process inadequate.

⁹¹ MetroNet Declaration at para. 8.

⁹² ImOn Declaration at para. 7.

⁹³ LISCO Declaration at para. 5.

⁹⁴ *2011 Pole Attachment Order*, 26 FCC Rcd at 5285-90, paras. 97-112.

⁹⁵ *Id.* at 5286, 5287, paras. 100, 105.

⁹⁶ *Id.* at 5290-92, paras. 113-18. See 47 C.F.R. § 1.1413.

⁹⁷ *2011 Pole Attachment Order*, 26 FCC Rcd at 5288, paras. 107-09.

1. Attachers find the Commission's complaint process is too expensive and will not produce a result in a commercially reasonable timeframe

The experiences of ACA members demonstrate that the complaint process set forth in the *2011 Pole Attachment Order* is too expensive and fails to produce results in a commercially reasonable timeframe. In conversations with its members, ACA has yet to hear of a single instance where a member used the Commission's complaint process, despite one attacher estimating that it could have pursued a complaint in 20-30 percent of its projects.⁹⁸ There are many reasons why attachers are so reluctant to file a complaint. The Commission requires that the party filing a complaint needs to present a detailed case upfront and will dismiss complaints for lack of sufficient information.⁹⁹ As a result, an attacher filing a complaint incurs from the outset substantial costs, from use of in-house personnel to retaining outside legal counsel and consultants, to prepare the complaint. Incurring these substantial costs is a particular problem for smaller attachers. In addition, the lack of a shot clock for the Commission to resolve pole attachment complaints gives plaintiffs little confidence that their complaint will be addressed in a reasonable timeframe. Complaints also may undermine relationships with utilities, which are critical to facilitate future attachments.¹⁰⁰ The amounts awarded to attachers for prevailing in a complaint are uncertain – or for a small run of poles, may not be that great despite the damages caused to the attacher – and may be insufficient due to the lack of compensatory damage awards. In sum, for small providers, there is too much to lose and too little to gain in using the complaint process – a fact utilities understand and use to their advantage in pole attachment negotiations.

⁹⁸ See USA Communications Declaration at para. 7.

⁹⁹ 47 C.F.R. §§ 1.1404 *et. seq.*

¹⁰⁰ See MetroNet Declaration at para. 9 (“Another reason for our reluctance is the likelihood of the utility retaliating and ceasing/delaying to process applications”); USA Communications Declaration at para. 7 (“Furthermore, USA Communications recognizes that bringing a formal complaint against any utility company could have the unintended consequence of damaging relationships, resulting in further delays down the road”).

2. Attachers find the Commission’s rule concerning penalties for “illegal attachments” only encourages utilities to assess penalties more stringent than those authorized under the Oregon Public Utility Commission’s approach

The Commission’s framework for calculating penalties for “illegal attachments” only encourages utilities to assess high fines against attachers. In the *2011 Pole Attachment Order*, the Commission determined “there appears to be a well-founded concern that an unauthorized attachment payment amounting to no more than back rent provides little incentive for attachers to follow the authorization process.”¹⁰¹ On this basis, the Commission abandoned its previous limitation on unauthorized attachment penalties and created a safe-harbor – a rebuttable presumption that contractual penalties based on the Oregon Public Utility Commission’s approach would be reasonable.¹⁰² Many attachers argued that this approach would only encourage utilities to seek to impose greater penalties than allowed under the safe harbor.¹⁰³ ACA members can now confirm this has come to pass. ACA members have expressed concerns that some investor-owned utilities want to impose unreasonable penalties in their new pole agreements. The Commission must reexamine its methodology for “illegal attachment” fines to ensure utilities do not exercise their significant leverage over attachers to force the acceptance of unreasonable penalty provisions.

C. Solutions to Address Pole Attachment Problems

As explained above, cable, telecommunications, and broadband providers continue to face significant problems in attaching to poles owned by utilities subject to Section 224. Despite the Commission’s pole attachment rules, utilities continue to delay access to poles and impose unjust or unreasonable rates, terms, and conditions on attachers. This proceeding provides the Commission with the opportunity to address the many problems ACA has discussed and make

¹⁰¹ *2011 Pole Attachment Order*, 26 FCC Rcd at 5290, para. 114.

¹⁰² *Id.* at 5291-92, para. 115.

¹⁰³ *Id.* at paras. 121-122.

the pole attachment process work better for attachers and utilities. ACA therefore offers the following solutions to the problems it identified, which will lower the financial and temporal barriers to network deployment and allow providers to enhance service to users, including those located in rural and underserved areas.

1. The Commission should impose requirements on pole attachment Master Agreement terms and conditions

Master Agreements for pole attachments, which typically have terms of three to ten years and may have automatic renewal provisions, prescribe the process, timelines, and costs that an attacher and a utility agree to follow when the attacher submits a new pole application. To date, the Commission has been reluctant to provide extensive, explicit guidance about the terms and conditions of Master Agreements that attachers should be entitled to receive if they choose, reasoning that circumstances differ and parties need flexibility to craft provisions that fit specific needs.¹⁰⁴ But, as discussed herein, utilities are demanding terms and conditions that hinder network deployment that they are able to impose because of the Commission's limited engagement. Allowing utilities to make unreasonable demands also fosters disputes, which are costly to attachers (and ultimately consumers) and do not get resolved in a commercially reasonable timeframe. In some cases, the additional time and effort required for an attacher to deal with these onerous terms and conditions and reach a just and reasonable agreement with a utility can delay the start of a project or even cause it to be abandoned. In other cases, utilities may refuse to process applications for new attachments while an existing agreement is being renegotiated, which increases the utilities' leverage in these negotiations and forces attachers to accept unjust and unreasonable terms and conditions.

It does not have to be and should not be this way. Over the past decades, attachers and "good actor" utilities have gotten together and drafted provisions in Master Agreements that are

¹⁰⁴ See 2011 Pole Attachment Order, 26 FCC Rcd at 5264-65, paras. 46-47.

more equitable and achieve the Commission's goal of expediting the deployment of high-performance networks. The Commission also can find solutions to Master Agreement issues by looking to terms, conditions, and processes developed by many States. In Utah, for instance, utilities file standard contract attachment rates, terms, and conditions, which are reviewed for "reasonableness" by the State regulatory commission prior to taking effect.¹⁰⁵ Additionally, Vermont requires that all pole attachment contracts be submitted to the Vermont Public Service Board to review attachment rates and rental terms,¹⁰⁶ while New York requires pole owners to develop standard terms and conditions that apply to all attachers.¹⁰⁷

Ideally, given all this spade-work by utilities, attachers, and States, the Commission should be able to adopt targeted rules that dictate key default terms and conditions of Master Agreements that promote network investment and deployment, and prevent utilities from imposing unreasonable terms and conditions or making demands that slow down infrastructure attachments. In particular, ACA recommends that the Commission provide that an attacher may request and receive from utilities the following provisions in pole attachment Master Agreements:

a. Allow attachers to overlash through a "Notify and Attach" process

Attachers, by rule, should have the choice, memorialized in their Master Agreements, to use the "Notify and Attach" process to overlash on poles. Because overlapping generally does not overload poles and is not a new attachment, it is well-established that overlapping can be done through a "Notify and Attach" process. The rule ACA proposes would allow attachers to

¹⁰⁵ Utah Admin. Code r. 746-345-1.

¹⁰⁶ See Tit. 30, Ch. 7 Vt. Code R. § 3.704.

¹⁰⁷ See *N.Y. Pole Attachment Order*, *supra* note 34.

demand provisions that allow them to overlash after giving the utility 14-days' notice.¹⁰⁸ This timeframe would permit the utility to determine whether the work would harm the safety or reliability of existing attachments. Should the utility determine that the work would be harmful to the pole or create a safety issue, it would be required to inform the attacher in writing of the specific issues and, during resolution of the issues, it could stop the clock on its response. Should the parties not resolve the problems, the utility could halt work entirely, although the attacher could file a complaint if a resolution is not reached within 15 days and it believes the utility's action was unreasonable. Post-overlapping, a utility would be permitted to audit the work within 90 days of being notified by the attacher that work is complete to determine whether there are any attachment violations.

b. Allow attachers to install drops through an "Attach and Notify" process

Attachers, by rule, should be entitled to provisions that permit them to use the "Attach and Notify" process to install drops. Under such a provision, the attacher would be required to notify the utility within 30 days after the drop attachment and the utility could audit the attachment within 90 days of notification to determine whether there are any violations.

As discussed previously, several ACA members explained that utilities include or insist upon provisions in their pole agreements requiring attachers to submit new pole applications before making any individual end-customer connection (*i.e.*, service drop). This requirement unnecessarily delays the provision of service to customers and undermines attachers' ability to reach new markets. ACA members have highlighted the benefits of "Attach and Notify," and many utilities have codified the practice.¹⁰⁹ At the same time, ACA's proposal provides utilities

¹⁰⁸ Vermont allows overlapping in accordance with accepted engineering standards with only 10-days' notice to the pole-owning utility, Tit. 30, Ch. 7 Vt. Code R. 3.708, and Washington allows overlapping with 15-days' notice to the pole-owning utility. Wash. Admin. Code § 480-54-030.

¹⁰⁹ See, e.g., ImOn Declaration at paras. 8-9; Joint Use Pole Agreement between IPL and AT&T, available at

with the ability to audit the installation of drops so they are able to protect their interest in ensuring the safety and reliability of the attachments.

c. Authorize compensatory damages and legal fees when utilities unreasonably delay or deny access or charge unjust, unreasonable, or discriminatory fees

A utility should be liable for compensatory damages for unreasonably delaying access to poles or charging unjust, unreasonable, or discriminatory fees. As discussed herein, attachers find the cost of the Commission complaint process to be so great and the benefits so little that they rarely file complaints to protect their rights. Utilities know this imbalance and are encouraged to seek to impose unreasonable terms and conditions that delay applicants' ability to make attachments or provide for unjust, unreasonable, or discriminatory fees.

The Commission holds the power to terminate unjust or unreasonable pole access rates, terms, and conditions, and order utilities to provide access under new rates, terms, and conditions.¹¹⁰ But the remedies available to the Commission do not end there. The Commission also may order a refund or payment to the attacher, commonly representing “the difference between the amount paid under the unjust and/or unreasonable rate, term, or condition and the amount that would have been paid under the rate, term, or condition established by the Commission.”¹¹¹ As a result, in response to unjust, unreasonable, or discriminatory charges and fees, the Commission can order “monetary recovery in a pole

<http://webcache.googleusercontent.com/search?q=cache:jH0soDbTPLEJ:agendas.indepmo.org/AttachmentViewer.ashx%3FAttachmentID%3D19079%26ItemID%3D9839+&cd=1&hl=en&ct=clnk&gl=us> (last visited June 13, 2017); CenterPoint Energy, “Pole Attachment Guidelines and Procedures” (July 2016), available at <http://www.centerpointenergy.com/en-us/Documents/Pole-Attachment-Guidelines-and-Procedures.pdf> (last visited June 13, 2017).

¹¹⁰ 47 C.F.R. § 1.1410(b).

¹¹¹ 47 C.F.R. § 1.1410(c). See Wash. Admin. Code § 480-54-070(b) (allowing the Washington Utilities and Transportation Commission to “order a refund or payment of the difference between any rate the commission prescribes and the rate that was previously charged”).

attachment action to extend as far back in time as the applicable statute of limitations allows.”¹¹²

The Commission should exercise this authority and authorize the award of compensatory damages when a utility unreasonably delays or denies access or charges unjust, unreasonable, or discriminatory fees. Although the Commission declined to authorize compensatory damages in the *2011 Pole Attachment Order*, it explicitly stated it would “revisit the propriety of . . . compensatory damages” if it failed to see improvement in the speed of access and fees charged by utilities.¹¹³ As described above, utilities continue to unreasonably delay and effectively, if not actually, deny access to attachers and charge unjust, unreasonable, or discriminatory fees. Only compensatory damages can make attachers whole and ensure that utilities understand the consequences of withholding the timely pole access necessary for new deployments.

In addition to compensatory damages, attachers should be entitled to an award of legal fees if they prevail in a pole attachment complaint. As currently structured, the complaint process does not deter utilities from seeking to impose unreasonable pole attachment provisions. Allowing the award of legal fees would, in effect, lower the cost to attachers of filing complaints to address violations. Adopting this type of provision would not be novel for the Commission, as it permitted the recovery of legal fees for parties successful in program access arbitration under the *Comcast-NBCU Order*.¹¹⁴

d. Ensure symmetrical indemnification provisions between attachers and utilities

Attachers, by rule, should be entitled to provisions in their Master Agreements that provide for symmetrical indemnification obligations among the parties and do not result in attachers being required to pay for damages caused by utilities. As described above, utilities

¹¹² *2011 Pole Attachment Order*, 26 FCC Rcd at 5290, para. 112.

¹¹³ *Id.* at 5288-89, para. 109.

¹¹⁴ *Applications of Comcast Corp., Gen. Electric Co. and NBC Universal, Inc., et al.*, MB Docket No. 10-56, Memorandum Opinion and Order, 26 FCC Rcd 4238, 4262, para. 58 (2011) (“*Comcast-NBCU Order*”).

may delay make-ready work due to a potential lack of clarity on liability in the event of property damage, accidents, or service interruptions. In response, some utilities attempt to impose the responsibility for any damages arising out of the pole attachment process on the new attacher. As a result, the new attacher is left liable not only for its own negligence and misconduct, but also for the negligence and misconduct of the utility or incumbent attachers. By contrast, symmetrical indemnification provisions “simply would result in each party assuming responsibility for losses occasioned by its own misconduct.”¹¹⁵ The Commission therefore should allow attachers to demand symmetrical indemnification obligations in Master Agreements. Otherwise, utilities and incumbent attachers will continue to unjustly shift the cost for damages caused by their action (or inaction) onto new attachers and not take actions to maximize the safety of their poles.

e. Limit penalties for “illegal attachments” to an amount no greater than that provided for under the Oregon Public Utility Commission’s ruling

As discussed above, the Commission reformed its framework for illegal attachment penalties in the *2011 Pole Attachment Order* and created a safe-harbor – a rebuttable presumption that contractual penalties based on the Oregon Public Utility Commission’s approach would be reasonable.¹¹⁶ Specifically, the Oregon Public Utility Commission’s approach imposed an unauthorized attachment fee of \$500 per pole for pole occupants without a contract.¹¹⁷ Oregon also imposed an unauthorized attachment fee of five times the current annual rental fee per pole if the pole occupant does not have a permit and the violation is self-reported or discovered through a joint inspection, with an additional sanction of \$100 per pole if

¹¹⁵ *Georgia Power Order*, 18 FCC Rcd at 16346, para. 31.

¹¹⁶ *2011 Pole Attachment Order*, 26 FCC Rcd at 5291-92, para. 115.

¹¹⁷ *Id.*

the violation is found by the utility in an inspection in which the pole occupant declined to participate.¹¹⁸

However, rather than imposing any discipline against unreasonable illegal attachment penalties, the Commission's safe harbor rule has operated as a dare for utilities to see how far they can go in assessing even greater penalties. In short, utilities have treated the Oregon safe harbor framework as a floor, given the absence of a clear upper limit on the penalties they can rightfully impose on attachers. This is clearly not what the Commission intended and again highlights the unreasonable leverage utilities have over attachers. The Commission thus should fix the problem by adopting a rule allowing attachers to insist that the penalties in the Oregon ruling (or some equivalent) are the maximum penalty that a utility can impose on an attacher for an illegal attachment.

2. The Commission should facilitate attachers' access to information about the location and availability of poles

The Commission should adopt a rule requiring utilities with poles subject to Section 224 to develop and maintain a searchable electronic database of the location and availability of poles, ducts, and conduit that are installed, replaced, or upgraded after the order adopted in the *Wireline NPRM* proceeding takes effect. The Commission also should require that this database, and any other relevant paper or electronic information that the utility possesses regarding its poles, be made available to existing and potential attachers, subject to appropriate confidentiality and security protections.¹¹⁹ For poles, these databases should include, at minimum, the pole location, pole height, pole grade and available capacity, and if available,

¹¹⁸ *Id.*

¹¹⁹ See CPS Energy, Standard Pole Attachment License Agreement, available at [https://www.cpsenergy.com/content/dam/corporate/en/Documents/PoleAttachments/CPS%20Energy%20Standard%20Pole%20Attachment%20Agreement%20\(Pro-Forma\)%20-%20RevisedVersion%20072216.pdf](https://www.cpsenergy.com/content/dam/corporate/en/Documents/PoleAttachments/CPS%20Energy%20Standard%20Pole%20Attachment%20Agreement%20(Pro-Forma)%20-%20RevisedVersion%20072216.pdf) (last visited June 13, 2017) (holding users liable for any unauthorized use of pole information). Utilities can also sequester sensitive information so that it is inaccessible through the portal that attachers and applicants use.

heights of attachments and age of pole.¹²⁰ For ducts and conduit, it should include paths, manholes, and space availability.¹²¹

In the *2011 Pole Attachment Order*, the Commission declined to require utilities to develop a database of poles and other potential shared infrastructure, determining that “the burdens of such a data collection are outweighed by the potential benefits,” pointing to such issues as excessive cost, data security, and the timeliness of data.¹²² Since then, internal pole databases used by utilities have become more common, demonstrating that cost, security, and timeliness concerns are surmountable and that many utilities have found sufficient value in creating databases to support their operations.¹²³ These databases often include some combination of GIS files mapping pole locations, geospatial coordinates (latitude and longitude) of pole locations, and information about pole heights, pole material, available space, and grade.

Searchable electronic databases have numerous benefits to both attachers and utilities: they reduce the time and cost of route planning;¹²⁴ they reduce the potential for disputes during the cost estimate process; they help utilities better identify “problem” poles in their footprint and schedule them for maintenance, replacement, or retirement; they ensure that attachers are making payments to the correct parties and that utilities are collecting the full attachment fees they are due; and they ensure that applicants are making requests for pole attachments to the right parties and receiving make-ready estimates from the right parties. In short, databases that

¹²⁰ See, e.g., AT&T, “Pole and Conduit Databases & Applications in California” (Mar. 17, 2017), available at <http://www.cpuc.ca.gov/WorkArea/DownloadAsset.aspx?id=6442453013> (last visited June 15, 2017).

¹²¹ *Id.*

¹²² See *2011 Pole Attachment Order*, 26 FCC Rcd at 5280, para. 89.

¹²³ See, e.g., *Edison Pole Database Workshop*, *supra* note 47; SDGE, *Workshop: Pole and Conduit Databases & Applications in California* (Mar. 17, 2017), available at <http://www.cpuc.ca.gov/WorkArea/DownloadAsset.aspx?id=6442453017> (last visited June 13, 2017).

¹²⁴ See Alden Systems, Inc., “Q&A from CPUC Pole and Conduit Workshop” (Mar. 17, 2017) (stating databases allow attachers to see all routes for deployments, while providing pole details), available at <http://www.cpuc.ca.gov/WorkArea/DownloadAsset.aspx?id=6442453105> (last visited June 13, 2017).

attachers can access as well as utilities make the pole attachment process run more smoothly than when the databases do not exist or are not made available to applicants.

The Commission also should require that utilities make available to attachers at their expense a web-based ticket management system that allows for tracking applications and make-ready works. Utilities would be required to offer the system within two years of the effective date of an order in the *Wireline NPRM* proceeding.¹²⁵ As discussed above, the benefits of these systems for tracking works on poles are well-documented.¹²⁶ Not only do the great majority of utilities use NJUNS or NOTIFY,¹²⁷ both Utah and Connecticut require the usage of NOTIFY,¹²⁸ while Maryland directed its electrical utilities to join NJUNS.¹²⁹ To deal with those utilities not using such a system, the Commission should mandate that utilities use a web-based ticket management system to track pole attachment applications and make-ready works.

¹²⁵ The Commission should require utilities to certify to the Commission that they provided the required web-based ticket management system by the applicable deadline and notified all parties with which they have pole attachment agreements about the system.

¹²⁶ See Conn. Pub. Util. Reg. Auth., *Report of Pole Attachment Working Group on Recommended Pole Administration Structure* (Feb 28, 2013), available at http://www.ct.gov/occ/lib/occ/6.14.13billworking_group_final_report_022813.pdf (last visited June 13, 2017); Pub. Serv. Comm'n of Md., *A Report on Utility Pole Attachments in Maryland* (Jan. 15, 2016), available at http://dlslibrary.state.md.us/publications/Exec/PSC/HB541Ch431_2015.pdf (last visited June 13, 2017) ("*Maryland Pole Attachment Report*").

¹²⁷ See *supra* notes 59-60.

¹²⁸ Pub. Serv. Comm'n of Utah, *Order Vacating Scheduling Order and Approving Electronic Notification System for Pole Attachments* (Apr. 27, 2012), available at <https://pscdocs.utah.gov/electric/elecindx/2011/documents/22349011035199ovsoaaensfpa.pdf> (last visited June 13, 2017); Conn. Pub. Util. Reg. Auth., *DPUC Investigation into the Appointment of a Third Party Statewide Utility Pole Administrator for the State of Connecticut* (Oct. 8, 2014), available at <http://www.dpuc.state.ct.us/dockcurr.nsf/8e6fc37a54110e3e852576190052b64d/325ffcefc29a07685257d6d0051ae3b?OpenDocument> (last visited June 13, 2017).

¹²⁹ *Maryland Pole Attachment Report*, *supra* note 126.

3. The Commission should enhance transparency in the pole attachment application and evaluation process

As documented above, delays during the pole attachment Application stage are common. Targeted reforms focused on transparency and barring excessive requirements can accelerate the process and speed up deployments. ACA thus proposes that the Commission require utilities to publish their application requirements and provide attachers with the option of requesting a joint pole survey with the utility, which will offer greater visibility for attachers into what utilities are looking for and concerned about where make-ready is being required. In addition, barring utilities from charging for unnecessary pole loading analyses will reduce the upfront costs of pole attachment without compromising safety standards.

a. The Commission should require a utility to make available on its website and upon request its process for accepting and evaluating applications for pole attachments, including the information required and format

Ambiguity in application requirements can lead to delays, as prospective attachers may unknowingly fail to collect and submit materials sought by the utility and then be forced to correct and resubmit the application. The Commission should address this problem by requiring utilities to post application requirements online, including those related to required fees, engineering plans, drawings, pole load calculations analyses, and route maps, and to follow their posted requirements at the time the application is filed.¹³⁰ Such a requirement would provide attachers and utilities with certainty about when an application is “complete.” CPS Energy of San Antonio, Texas (“CPS”), and Nashville Electric Service (“NES”) of Tennessee each provide a model of transparency by publishing comprehensive materials on their

¹³⁰ As part of this requirement, the Commission should ensure the applications are sufficiently detailed so that the attacher clearly knows and understands the information needed for the application. ACA members report that the specific information required to be submitted in an application and the process that the utility will use when reviewing and approving applications are not generally included in Master Agreements.

application processes.¹³¹ Failure by the utility to follow the Commission's requirements would be a violation of the Commission's rules, and ACA recommends that the Commission establish an expedited complaint process to address such violations.

b. The Commission should require a utility to conduct joint surveys of poles at the applicant's request

The Commission should require utilities to participate in joint surveys of poles if an application requests such a joint survey. As discussed above, joint surveys during the application process allow representatives from the attacher and the utility to discuss in real-time any issues and often facilitate solutions. Many, but not all, utilities offer joint surveys as a matter of course.¹³² Central Hudson Gas & Electric Corp. provides a good model, whereby its Master Pole Agreement requires the company to give at least five days advance notice of the survey to the attacher and states that the attacher has the right to be present for the survey.¹³³ The Commission should impose a similar requirement on all utilities.

¹³¹ CPS Energy, "Pole Attachment Standards" (May 6, 2016), available at <https://www.cpsenergy.com/content/dam/corporate/en/Documents/PoleAttachments/Pole%20Attachment%20Standards.pdf> (last visited June 13, 2017) ("CPE Pole Attachment Standards"); CPS Energy, "Pole Attachment Standards Workshop" (May 19, 2016), available at https://www.cpsenergy.com/content/dam/corporate/en/Documents/PoleAttachments/Pole%20Attachment%20Workshop_Presentation_19May2016.pdf (last visited June 13, 2017); NES, "Pole Attachment and Conduit Usage Guidelines" (Sept. 15, 2016), available at <https://nespower.com/documents/PoleAttachmentGuidelines.pdf> (last visited June 13, 2017) ("NES Guidelines").

¹³² While many Master Agreements include the option of a joint survey, they are typically vague on the timeline and process. See, e.g., Verizon New York, Pole Attachment Agreement, available at https://www22.verizon.com/wholesale/attachments/pcl/PCL_CT_Pole_Agmt.pdf (last visited June 13, 2017); S. New England Telephone Co., Pole Attachment Agreement, available at http://www.ct.gov/broadband/lib/broadband/ctgig_project/attachment_d_snet_muni_pole_attachment_agreement_3_31_15.pdf (last visited June 13, 2017) ("S. New England Pole Attachment Agreement").

¹³³ See Cent. Hudson Gas & Electric Corp., Standard Pole Attachment Agreement, available at <https://www.cenhud.com/pdf/standardpoleattachmentagreement.pdf> (last visited June 13, 2017).

c. The Commission should prohibit utilities from requiring an applicant to pay for engineering design where a visual inspection (or inspection using an electronic database) indicates no work is required

Ideally, utilities should charge for applications based on a per-application and per-pole basis since poles often have few attachments, which can be known through a visual determination or use of a utility's electronic database. Yet, that often is not the case, and the attacher is forced to pay for unnecessary work. Accordingly, the Commission should not permit utilities to charge for engineering design work on any pole where a simple visual inspection or examination of a utility's electronic database shows that no work is required.

d. The Commission should prohibit utilities from requiring an applicant to pay for a pole loading analysis where there are two or fewer existing communications attachers on the pole

Because utilities are increasingly requiring pole loading analyses on every pole in an application, irrespective of the condition of the pole or what is attached to it,¹³⁴ the Commission should rule that a pole load analysis is not needed where there are two or fewer existing communications attachers on the pole.

ACA understands that requiring these analyses is appropriate because poles continue to age and the number of attachers has increased in most areas. However, an analysis is not required on all poles. In fact, in areas with fewer attachers or otherwise less-stressed poles, ACA members report parties can frequently rely on visual inspection, rather than a loading analysis, to determine whether a pole requires make-ready to support another attacher. CPS provides a good model for pole loading analyses, offering specific constraints around what poles it requires analyses for, including all poles with five or more attachments and all poles with angles of greater than 10 degrees.¹³⁵ NES offers a web-based software tool to calculate pole

¹³⁴ See Mediacom Declaration at para. 4; LISCO Declaration at para. 4.

¹³⁵ CPE Pole Attachment Standards, *supra* note 131.

load analyses.¹³⁶ Proscribing automatic pole load analyses when there are fewer than three attachers would speed up the pole attachment application process while providing utilities with a sufficient margin of safety.¹³⁷

4. The Commission should impose a 90-day timeframe on applications involving 20 or fewer attachments

The Commission application timelines do not meet service providers' needs, especially when they are connecting new business customers or providing line extensions. In 2011, the Commission accepted that having a specific timeline offers certainty to attachers and allows them to make concrete business plans.¹³⁸ There are numerous data points from declarers, utilities, and States indicating that the process can be conducted in significantly less time than the Commission's rules permit. Moreover, a shorter process is essential for providers to serve consumers in a commercially reasonable time or to meet franchise requirements. In many of these cases, to provide service to a new business customer requires just a few new attachments. In other cases, a line extension to serve a few new homes in an unserved area may require approximately a dozen attachments. To ensure that providers can meet the demands of consumers and perform other small projects, ACA recommends that the Commission adopt a 90-day deadline for completion of pole attachments covering 20 or fewer attachments.

Indeed, there is ample evidence that even much larger applications can be processed and make-ready completed in 90 days or less.¹³⁹ For example, the Connecticut Department of

¹³⁶ NES Guidelines, *supra* note 131.

¹³⁷ The Commission should also consider issuing a Public Notice asking utilities to provide information on how often they require pole load analyses and the percentage of analyses done on poles with three or more attachers where they discovered issues.

¹³⁸ 2011 Pole Attachment Order, 26 FCC Rcd at 5250-51, para. 21.

¹³⁹ In 2011, the Commission considered but ultimately declined to adopt a 45-day timeframe for the make-ready phase. *Id.* at 5261, para. 40. However, it noted that such a timeframe should be sufficient for

Public Utility Control (“DPUC”) determined that a maximum 90-day process for applications of any size through to completion of make-ready should be sufficient “given the experience and the efficiency that the utility companies have demonstrated to manage such projects in the past.”¹⁴⁰ Similarly, LISCO reports that a cooperative utility in its footprint consistently completes the entire process in 90 days.¹⁴¹

In the following paragraphs, ACA submits evidence from various sources demonstrating how different stages of the timeline can be completed in periods shorter than the maximum allowable timeframes under the Commission’s existing rules. Specifically, ACA proposes a 90-day timeframe for completion of pole attachment applications involving 20 or fewer attachments. ACA’s proposal allots 45 days for completion of the application, survey, cost estimate, and acceptance phases, with another 45 days for completion of the make-ready phase.

In the *2011 Pole Attachment Order*, the Commission provided utilities with 14 days to develop make-ready cost estimates after the utility informed the prospective attacher whether it would accept or deny a pole attachment application.¹⁴² The Commission gave utilities additional time to develop make-ready cost estimates to account for situations where the prospective attacher provides the survey data and the utility therefore needs time to review the data and respond to it.¹⁴³ However, ACA members indicate that utilities are unwilling to rely solely on applicants’ submissions for determining the cost of make-ready. Typically, the process of

uncomplicated pole attachments. *Id.* at 5258, para. 32. The Commission also stated a 45-day timeframe for the make-ready phase should be a “best practice” for medium-size pole attachment requests. *Id.*

¹⁴⁰ Conn. Dep’t of Pub. Util. Control, *DPUC Review of the State’s Public Service Company Utility Pole Make-Ready Procedures – Phase I*, at 18-20 (Apr. 30, 2008), available at <http://www.dpuc.state.ct.us/FINALDEC.NSF/0d1e102026cb64d98525644800691cfe/aaea565b8447236e8525743b00643e81?OpenDocument&Highlight=0,Docket,No,07-02-13> (last visited June 13, 2017) (“*DPUC Make-Ready Procedures*”).

¹⁴¹ LISCO declaration, para. 7.

¹⁴² *2011 Pole Attachment Order*, 26 FCC Rcd at 5255, para. 26; 47 C.F.R. § 1.1420.

¹⁴³ *2011 Pole Attachment Order*, 26 FCC Rcd at 5255-56, paras. 27-28.

developing a make-ready cost estimate runs simultaneous — and is indeed inextricable — from the application process. ACA therefore does not believe that utilities require additional time beyond the generous 45-day application processing timeline to develop cost estimates.

Multiple States, utilities, and declarers provide additional evidence that the application and estimate process takes less than the Commission's combined 59 days (45 days for application, 14 for estimate):¹⁴⁴ Utah requires 45 days for both application and estimate phases for pole applications with 20 or fewer attachments;¹⁴⁵ Connecticut's DPUC recommends 45 days for both application and estimate phases for pole applications of any size;¹⁴⁶ CPS Energy requires only 21 days for the application and estimate;¹⁴⁷ and MidAmerican processes applications within about 15 days.¹⁴⁸

There is also evidence of make-ready taking less than the Commission's 60-day timeframe. New York allows a maximum of 45 days for make-ready of any size,¹⁴⁹ Connecticut's DPUC recommends 45 days for make-ready of any size,¹⁵⁰ and New Hampshire requires make-ready for pole applications of 10 poles or fewer to be conducted within 45 days.¹⁵¹ In addition, Oregon dictates that parties must negotiate a satisfactory make-ready timeframe when make-ready will take longer than 45 days to complete.¹⁵²

¹⁴⁴ Unlike the Commission, not all States or utilities make a distinction between the application and estimate stages.

¹⁴⁵ Utah Admin. Code r. 746-345-3.

¹⁴⁶ *DPUC Make-Ready Procedures*, *supra* note 140.

¹⁴⁷ See CPE Pole Attachment Standards, *supra* note 131.

¹⁴⁸ See ImOn Declaration at para. 10.

¹⁴⁹ See *N.Y. Pole Attachment Order*, *supra* note 34.

¹⁵⁰ See *DPUC Make-Ready Procedures*, *supra* note 140; see also S. New England Pole Attachment Agreement, *supra* note 132.

¹⁵¹ N.H. Code Admin R. 1303.12.

¹⁵² Or. Admin R. 860-028-0100.

In line with the procedures adopted in these “reverse preemption” States, ACA recommends that the Commission adopt a 90-day timeframe for small pole attachment applications covering 20 or fewer poles. Specifically, the Commission should require utilities to provide a make-ready estimate to an attacher within 45 days after receipt of an application and provide utilities with a 45-day period to complete make-ready. If make-ready is not completed within 45 days of an applicant’s payment of the make-ready estimate, ACA proposes that attachers reserve “self-help” one-touch make-ready rights, as described below.

5. The Commission should allow applicants to undertake all necessary make-ready when a utility or existing attacher fails to timely complete make-ready

To reduce the likelihood that utilities or existing attachers could delay make-ready for an indeterminate time, the *2011 Pole Attachment Order* provides attachers with a “self-help” remedy to ensure make-ready is completed within a predetermined time period.¹⁵³ Following the 60-day period for make-ready, the utility can choose to extend the make-ready timeframe by 15 days.¹⁵⁴ If this additional 15-day period comes and goes without the utility or the existing attachers moving the existing attachers’ equipment, the attacher then is given a further 15 days to use a utility-approved contractor to move existing attachers’ equipment.¹⁵⁵

While these “self-help” rules were well-intentioned, the experience of ACA members suggests that, in practice, few utilities are allowing attachers to exercise their self-help rights. The “self-help” remedy provides no protection for a attacher if the utility needs to move its own equipment and does not do so within the 60-day make-ready period, as the Commission’s rules only apply to the communications space on the pole, not the electric space. Moreover, the Commission declined to set a minimum number of utility-approved contractors in the *2011 Pole*

¹⁵³ *2011 Pole Attachment Order*, 26 FCC Rcd at 5265, para. 49.

¹⁵⁴ 47 C.F.R. § 1.1420(g).

¹⁵⁵ 47 C.F.R. § 1.1420(i).

Attachment Order.¹⁵⁶ ACA believes this lack of specificity has led to utility-approved contractors offering inflated prices for make-ready work. When some utilities provide a list of utility-approved contractors for attachers to use, the list is so small — one or two names — that the contractors have little incentive to offer a competitive price.

a. Attachers should be permitted to undertake all necessary make-ready if a utility or existing attacher fails to complete make-ready within the Commission’s timeframe

ACA proposes a variation of one-touch make-ready that would be triggered if a utility or existing attacher fails to timely complete make-ready. Specifically, the Commission should allow an applicant to undertake all necessary make-ready by using a utility-approved contractor, including work in the electric space, if a utility or existing attachers has not completed make-ready within the timeframe specified by the Commission. The process would work as follows:

1. An attacher who wishes to reserve an option to conduct “self-help” make-ready will post a performance bond of an adequate size to provide security for all involved parties in the case of accidental damages;
2. Immediately following the end of the make-ready period, the attacher is allowed to contract with a utility-approved contractor to perform all necessary make-ready work in both the electric space and communications space.¹⁵⁷ A utility must provide applicants with a list of at least five approved contractors among which to use to complete make-ready and must certify the list on an annual basis; and
3. The attacher gives seven days’ prior notice to the utility and existing attachers before initiating make-ready work on their equipment, and enables them to be present when

¹⁵⁶ *2011 Pole Attachment Order*, 26 FCC Rcd at 5268, para. 57.

¹⁵⁷ The communications utility on the pole would provide the contractors approved to work in the pole’s communications space and, if necessary, the electric utility would provide the contractors approved to work in the pole’s electric space.

the work occurs. As part of the notice, the attacher shall present evidence of their performance bond.

Providing an option for “self-help” make-ready in both the electric and communications space has precedent in State and local one-touch make-ready regulations. As examples, New York,¹⁵⁸ Oregon,¹⁵⁹ Nashville,¹⁶⁰ and Louisville¹⁶¹ all allow for some form of “self-help” by applicants for pole attachments. Both Nashville and Louisville provide attachers with an upfront option of performing one-touch make-ready, while New York reserves the “self-help” right only if the utility did not complete make-ready within a prescribed timeframe. Nashville requires new attachers provide 15-days advance notice to existing attachers and Louisville requires 30-days advance notice. ACA proposes a shorter advance notice period of seven days because the utility already had at least 60 days under the Commission’s timeframe to complete make-ready before the applicant exercises its “self-help” remedy.

“Self-help” one-touch make-ready better aligns incentives to ensure timely but safe deployment of new plant, while respecting the rights of existing attachers and utilities. ACA’s proposed process would provide attachers with greater certainty that their projects will be completed within its proposed 90-day period for attachments of 20 or fewer poles. The process also would provide an incentive for utilities and existing attachers to conduct necessary make-ready works in a timely fashion to prevent other companies from moving their equipment.

¹⁵⁸ See *N. Y. Pole Attachment Order*, *supra* note 34.

¹⁵⁹ See Or. Admin. R. 860-028-0100.

¹⁶⁰ See Nashville Metropolitan Code § 13.18.020.

¹⁶¹ See Louisville Metro Code § 116.72.

b. Utilities should provide applicants with a list of at least five approved contractors, except where justified, to use to complete make-ready

Commission rules require utilities to give attachers the option to select a utility-approved contractor to conduct make-ready, however, ACA members report that few utilities comply with this obligation. In the rare case that they do, utilities often provide attachers with only one or two contractors from which the attacher can choose,¹⁶² limiting the contractors' incentive to provide competitive bids, either in terms of cost or timing. Whether the Commission adopts ACA's proposed "self-help" make-ready proposal described above or maintains its existing rules, the Commission should expand the minimum number of utility-approved contractors to at least five, except in unusual circumstances. By doing so, the attacher would receive more competitive pricing and it would not unreasonably burden utilities, as evidenced by CPS Energy, who without any regulatory mandate, provides a list of 11 contractors approved to conduct make-ready in Texas.¹⁶³ The Commission also should require utilities to post the list of contractors on its website, so that the Commission could easily verify utilities' compliance without having to rely upon complaints from attachers.

6. The Commission should enhance transparency in the make-ready fees charged by utilities

The *2011 Pole Attachment Order* acknowledged, but did not sufficiently address, the problem of excessive make-ready fees.¹⁶⁴ The Commission did not follow the recommendation of the National Broadband Plan that it "[e]stablish a schedule of charges for the most common categories of work (such as engineering assessments and pole construction)" as an additional way to lower the cost and increase the speed of the pole attachment process.¹⁶⁵ The

¹⁶² USA Communications Declaration at para. 5.

¹⁶³ See CPE Pole Attachment Standards, *supra* note 131.

¹⁶⁴ *2011 Pole Attachment Order*, 26 FCC Rcd at 5243, para. 6.

¹⁶⁵ National Broadband Plan at 111.

Commission also declined to require that utilities make available a common schedule of make-ready charges, although it recognized that such schedules could provide more transparency to providers.¹⁶⁶ Utilities, however, have exploited these gaps by providing attachers with vague and un-itemized pre-job estimates and post-job bills for make-ready work and attempting to charge attachers for fixing existing safety code violations and subsidizing the utilities' own deferred maintenance.

a. The Commission should prohibit utilities and existing attachers from charging for make-ready that is not directly related to the new attachment

ACA members report that utilities seek to have attachers, in addition to paying for any make-ready specifically tied to the additional costs of the new attachment, pay for the utilities' deferred maintenance on poles and often seek to have new attachers pay to clear existing attachers' violations before they can attach their own equipment.¹⁶⁷ These extra make-ready charges add significantly to attacher construction costs and may even cause attachers to build expensive underground routes instead. While the Commission did not include specific prohibitions against these types of charges unrelated to the costs to accommodate a new attachment in the *2011 Pole Attachment Order*, it has found that requiring an attacher to pay for others' violations is unreasonable and that an applicant need only pay for the additional costs of accommodating the new attachment.¹⁶⁸ A number of States and utilities have gone further and codified a prohibition against charges unrelated to accommodating the attachment. As examples, New Hampshire and Vermont prohibit utilities from charging new attachers for fixing existing safety code violations.¹⁶⁹ A number of utilities also include restrictions in their Master

¹⁶⁶ *2011 Pole Attachment Order*, 26 FCC Rcd at 5279, para. 86.

¹⁶⁷ See ImOn Declaration at para. 6; Mediacom Declaration at para. 6.

¹⁶⁸ See *Kansas City Cable Partners*, 14 FCC Rcd at 11606-07, para. 19.

¹⁶⁹ See N.H. Code Admin. R. 1303.07; Tit. 30, Ch. 7 Vt. Code R. § 3.708.

Agreements on acceptable make-ready costs. CPS Energy prohibits charges for the replacement of failing poles and repair of existing safety code violations,¹⁷⁰ while Rocky Mountain Power in its agreement with First Digital Telecom specifically precludes payment by attachers of the entire cost for poles being replaced for Rocky Mountain Power's benefit.¹⁷¹ By expressly prohibiting these categories of charges from inclusion in make-ready, the Commission would help reduce the cost of construction and promote additional network deployment.

b. The Commission should require utilities and existing attachers to provide make-ready cost estimates with itemized detail on a per-pole basis

The Commission should require utilities to disclose the individual costs that make up the total charges they intend to assess attachers at the individual pole level. Itemized cost estimates allow attachers to quickly evaluate the reasonableness of the estimates provided by utilities and decide whether individual "problem" poles should be bypassed and removed from an application. In many cases, the costs of pole replacement are greater than the costs of short runs of conduit. In these situations, pole-level cost estimates allow the attacher to make the most cost-effective decision for deploying plant. New York regulations provide that make-ready estimates must be "detailed."¹⁷² Oregon regulations require pole owners to provide detailed make-ready estimates for the time and cost of the work.¹⁷³ ACA members noted that MidAmerican consistently provides itemized cost estimates prior to make-ready.¹⁷⁴ Other ACA members have also found great benefits to this practice. Requiring utilities to provide more detailed information on a per-pole basis will not impose new burdens. It is only requiring the

¹⁷⁰ CPE Pole Attachment Standards, *supra* note 131.

¹⁷¹ Pole Attachment Agreement between Rocky Mountain Power and First Digital Telecom LLC (2011), available at <https://pscdocs.utah.gov/electric/11docs/11035198/212051Exhibit%20A%20-%20Pole%20Attachment%20Agreement%2012-6-2011.pdf> (last visited June 13, 2017).

¹⁷² *N.Y. Pole Attachment Order*, *supra* note 34.

¹⁷³ See Or. Admin. R. 860-028-0100.

¹⁷⁴ See ImOn Declaration at para. 11.

utilities to disclose the individual costs that make up the total charges that they intend to assess the applicant and preventing utilities from hiding unreasonable or simply unnecessary make-ready charges in aggregate cost estimates.

c. The Commission should require utilities and existing attachers to provide post-make-ready invoices with itemized detail on a per-pole basis

ACA urges the Commission to require utilities and existing attachers to provide post-make-ready invoices with sufficient detail on a per-pole basis. The Commission also should place the burden on utilities and existing attachers in a complaint proceeding to justify post-make-ready invoices that differ materially (more than 20 percent) from the estimate. Multiple ACA members reported receiving “true-up” invoices for make-ready that differed substantially from estimates and that included, at best, minimal detail on the work conducted.¹⁷⁵ There is no reason for there to be such a wide discrepancy between the estimate and final invoice, and permitting it to occur only encourages utilities to provide misleading estimates. Moreover, disputes over these invoices impose legal costs on both the attacher and the utility, and may introduce delays into other unrelated pole attachment applications. At the point make-ready has been completed, a utility should be able to identify the make-ready activities it had to conduct on a per-pole basis and the associated itemized costs. New York provides a good model for itemized invoicing by requiring that post-make-ready true-up invoices include, among other items, a description of the work, unit cost of work, cost of itemized materials, and any miscellaneous charges.¹⁷⁶ As mentioned with regard to itemizing pre-make-ready costs, there is no new burden imposed on the utility because the utility is only required to be transparent with the numbers that it used to provide the total charges to the applicant.

¹⁷⁵ See MetroNet Declaration at para. 8; LISCO Declaration at para. 5; ImOn Declaration at para. 7.

¹⁷⁶ See *N.Y. Pole Attachment Order*, *supra* note 34.

7. The Commission should strengthen its pole attachment enforcement process

The Commission should make its pole attachment enforcement process more effective and efficient. As explained above, attachers rarely file complaints against utilities for a number of reasons, especially because they are most concerned with time-to-revenue for new deployments. Hitting the pause button on an application to enter a complaint process that is expensive and has no prescribed end point is not an appealing option.

a. The Commission should adopt its proposed 180-day shot clock for complaints

In the *2011 Pole Attachment Order*, the Commission recognized the concerns raised by attachers regarding the length of time taken by the Enforcement Bureau to resolve pole attachment complaints.¹⁷⁷ However, the Commission opted not to modify its complaint rules at the time. Over six years later, the concerns regarding protracted complaint proceedings and the detrimental impacts such delays have on time-to-revenue for new deployments remain. The Commission therefore should adopt its proposed 180-day shot clock for Enforcement Bureau resolution of pole attachment complaints.¹⁷⁸ A 180-day shot clock would harmonize the Commission's resolution of pole attachment complaints with most State complaint resolution timeframes.¹⁷⁹ Moreover, the 180-day shot clock is consistent with the Commission rules requiring "reverse preemption" States to take "final action" on a complaint "within 180 days after

¹⁷⁷ *2011 Pole Attachment Order*, 26 FCC Rcd at 5286, para. 102.

¹⁷⁸ *Wireline NPRM*, 32 FCC Rcd at 3280, para. 3280-81, para. 47.

¹⁷⁹ See, e.g., Tit. 30, Ch. 7 Vt. Code R. § 3.710 (stating Vermont Public Service Board "shall take final action within 180 days after the filing of the complaint"); 220 Mass. Code Regs. 45.08 (stating Massachusetts Department of Telecommunications and Energy "shall issue a final Order on the complaint . . . within 180 days after the complaint is filed").

the complaint is filed.”¹⁸⁰ If the State fails to meet the 180-day deadline, jurisdiction for resolving the complaint reverts to the Commission.¹⁸¹

ACA also believes that the 180-day shot clock should start upon the filing of the complaint. Both federal law and the regulations adopted in some “reverse preemption” States start the shot clock upon the filing of the complaint.¹⁸² Starting the shot clock upon the filing of a reply by a utility or after discovery is complete would unnecessary delay already lengthy complaint proceedings.¹⁸³ The Commission should require the Enforcement Bureau to resolve pole attachment complaints within 180 days of their receipt and impose prompt reply deadlines on utilities to avoid unnecessary gamesmanship.¹⁸⁴

As proposed by the Commission, the Bureau’s ability to “pause” the 180-day shot clock should remain limited.¹⁸⁵ Specifically, the Bureau should be able to pause the shot clock when the parties mutually decide to pursue informal dispute resolution or enter into settlement negotiations, and each expresses the understanding that the shot clock will be stopped as a result.¹⁸⁶ As in the transactions context, the Bureau also should be able to pause the shot clock if the parties need additional time to produce information requested by the Bureau.¹⁸⁷ Such delays should only occur in response to supplemental information requests from the Bureau and

¹⁸⁰ States may specify a longer timeframe for resolving complaints. 47 U.S.C. § 224(c)(3)(B) (providing that the timeframe cannot “extend beyond 360 days after the filing of such complaint.”).

¹⁸¹ 47 U.S.C. § 224(c).

¹⁸² See, e.g., 47 U.S.C. § 224(c)(3)(B); Tit. 30, Ch. 7 Vt. Code R. § 3.710; 220 Mass. Code Regs. 45.05; see also Or. Admin. R. 860-028-0195 (stating shot clock runs after “complaint is filed”).

¹⁸³ *Wireline NPRM*, 32 FCC Rcd at 3281, para. 48.

¹⁸⁴ See 220 Mass. Code Regs. 45.05 (requiring response to pole attachment complaint within 14 days after service of the complaint); Or. Admin. R. 860-028-0070 (requiring response to pole attachment complaint within 30 days after service of the complaint).

¹⁸⁵ *Wireline NPRM*, 32 FCC Rcd at 3281, para. 49.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

not because a utility allegedly lacks the resources to timely respond to a complaint.¹⁸⁸ The Bureau should restart the shot clock immediately once it receives the requested information.¹⁸⁹

Instituting a shot clock as the Commission recommends would provide plaintiffs with greater certainty about when their complaint will be resolved and, more importantly, when their deployment will resume. The shot clock introduces a more prominent “stick” to disincent offending utilities from imposing unreasonable delays or costs into the pole application and make-ready process. ACA notes that nothing prevents the Bureau from conducting its own investigations regarding pole attachment violations in the absence of a complaint.¹⁹⁰ As explained above, attachers may be unwilling to file complaints to avoid damaging the relationships with utilities necessary for new deployments. The Bureau should not wait for a complaint to take remedial action against pole attachment violations. Consequently, the Bureau should launch an investigation to the extent it receives information from broadband service providers, other Commission offices, or any source indicating that a utility is unreasonably delaying access or forcing attachers to accept unreasonable rates, terms, or conditions. Moreover, the Bureau should periodically review utilities’ actions to ensure they are complying with any new rules that might require public disclosure.

b. The Commission should impose significant penalties on utilities for pole attachment violations

Commission enforcement, whether through the complaint process or independent investigations, means little unless it results in significant penalties against utilities that violate the rules. In addition to the compensatory damages and legal fees discussed above for attachers that prevail in their pole attachment complaints, the Commission should exercise its authority to

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 3281-82, para. 49.

¹⁹⁰ See 47 C.F.R. § 0.111(a)(17) (empowering the Bureau to conduct investigations “in connection with complaints, *on its own initiative or upon request of another Bureau or Office*”) (emphasis added).

impose forfeiture penalties against utilities that violate its rules, whether in the course of resolving a complaint or as the result of a separate investigation. The Commission may impose penalties against entities that fail to comply with “any rule, regulation, or order issued by the Commission,” including those related to pole attachments.¹⁹¹ Indeed, the Commission’s rules establish a \$7,500 base penalty per violation for violations of the pole attachment rules.¹⁹² These base penalties represent a floor and the Commission may increase its forfeitures for intentional and repeated violations, violations causing substantial harm, or for other egregious misconduct.¹⁹³ Attachers regularly face unjust or unreasonable rates, terms, and conditions when attempting to access poles, as well as a potential loss of customers when trying to address unreasonable delays, denials of access, or unreasonable or discriminatory charges. Utilities should face significant fines as a result of these violations. The Commission therefore should strengthen its pole attachment enforcement process by modifying its rules to require the Enforcement Bureau to address pole attachment complaints within 180-days of receipt and imposing significant fines when it determines that a utility unreasonably delayed access to attachers or charged attachers unjust or unreasonable fees.

¹⁹¹ 47 U.S.C. § 503(b). See 47 C.F.R. § 1.80(a).

¹⁹² 47 C.F.R. § 1.80(b), Section I, Base Amounts for Section 503 Forfeitures.

¹⁹³ 47 C.F.R. § 1.80(b), Section II, Adjustment Criteria for Section 503 Forfeitures.

III. CONCLUSION

For the foregoing reasons, ACA recommends that the Commission establish a more transparent, rules-based regulatory regime for pole attachments by adopting the proposals described herein. By removing barriers to infrastructure investment and reforming Commission regulations that increase costs and slow broadband deployment, the Commission will make the pole attachment process work better for attachers and utilities alike and foster the expansion of service to rural and other underserved areas.

Respectfully submitted,

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June 15, 2017

EXHIBITS

EXHIBIT A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Accelerating Wireline Broadband	)	WC Docket No. 17-84
Deployment by Removing Barriers to)	
Infrastructure Investment)	
)	
Accelerating Wireless Broadband	)	WT Docket No. 17-79
Deployment by Removing Barriers to)	
Infrastructure Investment)	

DECLARATION OF JAKE BALDWIN

1. My name is Jake Baldwin. I am the General Counsel for the MBO and Cross family of companies, a group that provides broadband, video and communication services to approximately 15,000 residential and commercial customers in Oklahoma. Our new builds have focused on extending our network into new residential areas and building extensions to reach business customers.

2. I submit this Declaration in support of the Comments of the American Cable Association in the above-referenced proceedings.

3. The FCC’s current timeframe for attachments is much too long and places us at a competitive disadvantage. Let me explain. Under this timeframe, we have little choice but to establish six-month lead times in our contracts with business customers since in our experience investor-owned utilities in Oklahoma tend to take the full allowed time to respond in every step of the pole access process. Many businesses are unwilling to wait that long, especially when incumbents can provide service within weeks, if not days. In addition, by the nature of the

process, we effectively are giving significant advance notice to our competition, existing communications attachers, that we are building in their market, which gives them an opportunity to respond to our initiatives. We have tried to circumvent the problem where the costs to construct underground are not so great compared to aerial deployments, but this often is not the case. As a result of these problems, it is likely that we have lost opportunities to win new customers to incumbents. The FCC can alleviate some our issues by expediting pole applications and make-ready, especially where we are requesting less than 200 poles.

4. We have also been experiencing difficulties in negotiating a pole attachment agreement with an investor-owned utility in Oklahoma. The utility insists we include a provision that allows the utility to charge higher pole attachment rental fees than the FCC's regulated rate, which it contends reflects a court decision from the Eleventh Circuit, which applies in states not in our footprint. We refuse to accept the provision, but the utility will not budge. As a result, we cannot attach to new poles.

5. We also face difficulties with one rural cooperative that wants to charge pole rental fees that are almost double what we pay for pole attachments to other rural cooperatives and nearly four times what we pay for pole attachments to investor-owned poles. If the cooperative refuses to negotiate the rate down, we would face nearly \$30,000 more in pole attachment expense per year for the poles that we currently attach to—money that we would otherwise likely allocate to upgrading or expanding our network in other areas. Burying our facilities is not a cost-effective option in this area given the rocky terrain.

I declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief.

Executed on June 5, 2017

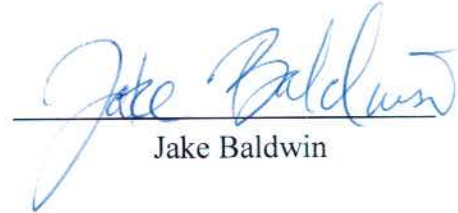

Jake Baldwin

EXHIBIT B

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

In the Matter of)	
)	
Accelerating Wireline Broadband	)	WC Docket No. 17-84
Deployment by Removing Barriers to)	
Infrastructure Investment)	
)	
Accelerating Wireless Broadband	)	WT Docket No. 17-79
Deployment by Removing Barriers to)	
Infrastructure Investment)	

DECLARATION OF PATRICE M. CARROLL

1. My name is Patrice M. Carroll. I am the Chief Executive Officer of ImOn, a telecommunications operator providing broadband to approximately 16,000 subscribers, video service to approximately 10,000 subscribers and voice services to 2,800 subscribers in markets in Iowa. Since our founding in 2007, we have built new fiber networks in three communities in Iowa, providing customers with more choices for their broadband, video and telephone service. In our markets, we compete with an incumbent cable operator and local telecommunications provider.

2. I submit this Declaration in support of the Comments of the American Cable Association in the above-referenced proceedings.

3. ImOn has been recently deploying fiber to the home (FTTH) networks to provide ultra-high-speed broadband to residential and business customers, expanding our network by 107 miles from 2014-2016, approximately 4,000 homes passed. Our expansion projects include aerial construction on poles as well as underground construction of conduit and a limited amount of

conduit leasing. These projects require significant cooperation from investor-owned utilities in Iowa. With Alliant¹, ImOn is attached to more than 13,000 pole attachments. With MidAmerican², we have nearly 579 pole attachments. In a small part of our footprint, we attach to poles owned by rural electric cooperatives. ImOn has experienced both good and bad behavior from investor-owned utilities, which we discuss below.

4. Recently, ImOn has encountered obstacles in dealing with Alliant as we extend our network and connect new residential and business customers. Approximately three years ago, the utility turned over its pole management to a third-party engineering and survey firm, Mi-Tech, and since then, the pole application process has slowed and become less transparent. First, ImOn is required to provide pole location, total cable diameter, proposed attachment height at each pole and existing attachers to each pole. To obtain this information, ImOn has to visit each pole. Alliant's process then requires their third party engineering firm to also visit each pole to take exact measurements. This duplication of efforts costs ImOn an estimated \$20/pole. In a large scale project, this extra cost can get into the thousands of dollars. Alliant's third party firm takes the entire allotted time prescribed by the FCC, regardless of the number of poles in the application. We also found Alliant to take the entire allotted time prescribed by the FCC to respond to pole applications, submit cost estimates and execute make-ready.

5. Second, Alliant has changed its approach on surveys and engineering designs. Prior to outsourcing pole management to Mi-Tech, Alliant trusted our surveys and engineering

¹ In Iowa, Alliant's subsidiary Interstate Power and Light provides electricity to 488,000 customers and has annual revenues of \$1,380,000,000. Both numbers are YE2015. *See* U.S. Energy Information Administration, Retail sales of electricity to ultimate customers – Total, all sectors, available at <https://www.eia.gov/electricity/data.php#sales>.

² In Iowa, MidAmerican Energy Co. provides electricity to 663,000 customers and has annual revenues of \$1,425,000,000. Both numbers are YE2015. *See* U.S. Energy Information Administration, Retail sales of electricity to ultimate customers – Total, all sectors, available at <https://www.eia.gov/electricity/data.php#sales>.

designs, and limited themselves to reviewing the applications, saving a lot of time and money in engineering fees. Now, with Mi-Tech involved, Alliant requires that ImOn pay for expensive, duplicative engineering analysis, despite the fact that we submit similar information as part of the requirements of the application. Mi-Tech conducts engineering analysis on every pole, even those that clearly do not require make-ready. These additional, unnecessary charges increase the cost of deployment by approximately \$1,400 per mile.

6. In addition, we have had a series of problems dealing with Alliant in the make-ready process. Alliant does not provide itemized estimated make-ready costs for ImOn to review, which is critical to our determination about whether to attach or build our own conduit. As a result, once we receive estimates, we have had to engage in extensive additional investigation, which has revealed that Alliant has charged us for items that should not be included in make-ready, such as resolution of other attachers' safety violations, pole replacements due to poor pole maintenance or other routine pole maintenance.

7. In past years, Alliant did not provide estimates and invoiced for make-ready work years after the make-ready was completed. In 2016, we were back-billed \$126,000 for make-ready work for a 591-pole project from 2014, without including any itemization of the works and costs. The FCC should require pole owners to provide detailed cost estimates and true-up invoices to bring more transparency to the pole access process.

8. Alliant is also looking to renew our master pole agreement under unreasonable provisions that require us to go through the complete pole attachment application process for every service drop line (which may span several poles, especially if crossing a street) to connect new customers and for any overlashing of wires over our existing attachments. In contrast, the existing practice is governed by "attach and notify," whereby we notify Alliant of service drops

or overlashing soon after we do the work, and Alliant then charges us recurring pole rental fees where applicable. The newly requested requirement on service drops would make it impossible for us to provide one-day installation to residential customers, which is our current promise to new customers. This requirement would put ImOn at a significant competitive advantage to other attachers who are not operating under such restrictions.

9. In contrast to our experiences with Alliant, ImOn has had few problems attaching to poles owned by MidAmerican. Although we have to notify MidAmerican of service drops as well, we do not need to go through the pole application process. Instead, we just inform the utility via email of the new attachments, so that the utility can perform the pole inspection and check the compliance of safety standards.

10. MidAmerican's process timeline has typically been prompt unless there are hold-ups from existing attachers. In a recent 89-pole (submitted) which eventually dropped to 62-pole (attached) application, MidAmerican responded within 15 days to execute a survey and respond to a pole attachment application. In situations where another utility or telecommunications provider is attached, the response takes up to 45 days, through no fault of MidAmerican. If make-ready is required, MidAmerican usually takes two weeks to perform the electrical equipment arrangement on the poles and grant access. Otherwise, ImOn can install fiber immediately.

11. Moreover, MidAmerican provides an itemized cost estimate with the expense required for make-ready. This transparency helps us evaluate make-ready works and decide the most cost effective option to deploy our network. In the same 89-pole project mentioned in the previous paragraph, we found the requested make-ready costs for 20 of the poles would be in excess of the cost of building underground conduit, so we went underground instead.

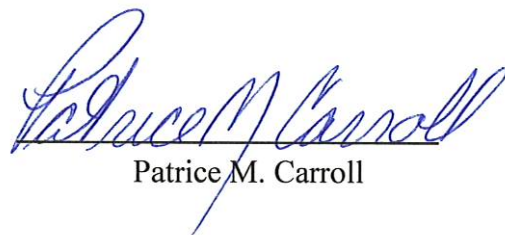
Accessing rights of way ruled by state and local laws

12. ImOn has noticed that municipalities are not diligent in documenting their easements. Outdated, paper-based maps do not accurately depict the location of sewer or gas pipes, leading to accidents while excavating and boring. Communities could ensure better safety conditions and reduce potential risks if consistent GIS information were maintained and shared in advance.

13. Regarding the execution of projects and relocation of existing infrastructure, ImOn has engaged with utilities in joint build agreements to share the costs of excavation. However, ImOn would welcome more participation from competing telecommunications companies to join such initiatives when both ImOn and the other company are building a common route. That practice would reduce costs for everyone and mitigate both traffic and public right-of-way disruption.

I declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief.

Executed on June 12, 2017



Patrice M. Carroll

EXHIBIT C

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Accelerating Wireline Broadband	)	WC Docket No. 17-84
Deployment by Removing Barriers to)	
Infrastructure Investment)	
)	
Accelerating Wireless Broadband	)	WTC Docket No. 17-79
Deployment by Removing Barriers to)	
Infrastructure Investment)	

DECLARATION OF JOHN GREENBANK

1. My name is John Greenbank. I am Executive Vice President of MetroNet¹, a provider of broadband, video and gigabit data/Internet services to subscribers in more than 30 communities in the Midwest. Since it first launched in 2005, MetroNet has expanded its network throughout many rural and underserved areas, using fiber-to-the-premise (FTTP) architecture to serve residential and business customers (including schools, rural hospitals, and other community anchor institutions) with high-speed connections. Our network is 100% fiber all the way to the home and business. We offer broadband services that help communities grow and compete on the national and international stage. MetroNet epitomizes the goals to make high speed broadband ubiquitous and eliminate the digital divide in urban and rural areas. To enable our network growth, MetroNet has negotiated (and continues to negotiate) agreements with pole-owners, including investor owned, municipal and cooperative utilities. Unfortunately, our

¹ MetroNet is CMN-RUS, Inc., Metro Fibernet, LLC and their affiliated companies

growth is being stymied by our inability to access these utilities' poles in a cost efficient and timely manner.

2. I submit this Declaration in support of the Comments of the American Cable Association in the above-referenced proceedings.

3. MetroNet has faced major challenges accessing poles. While the FCC's *2011 Pole Attachment Order* improved many pole access processes, MetroNet still faces significant barriers that prevent it from rapidly deploying its broadband facilities, such as the following:

- a. Despite the make ready time frames set forth in the *2011 Pole Attachment Order*, pole attachment processes, particularly survey and make ready processes, remain slow. In several instances, pole attachment processes imposed by utilities have delayed MetroNet deployments by many months.
- b. Although pole rental rates are regulated by the FCC in many jurisdictions, the unregulated, utility imposed charges for make ready work can make deployment of fiber cost prohibitive. In fact, MetroNet has not entered certain otherwise viable markets in need of high speed broadband services because make ready costs of one major utility are so high, a community fiber buildout is not economically viable. High make ready costs can also have a disparate impact in socio-economically challenged areas which are usually located in older sections of communities and rural areas where utility poles are primarily used for the delivery of utility services. In short, high make ready costs broaden the digital divide, deter economic development and deter the deployment of high speed broadband networks.

- c. Because there are no monetary penalties, utilities sometimes ignore the law, particularly in instances where the FCC guidance is embodied in orders issued in connection with complaints and not in a rule or regulation.
- d. Municipals and cooperatives are not subject to the FCC rules that promote access to poles and impose limits on fees.
- e. Some states that have opted to reverse-preempt federal jurisdiction have adopted laws that govern annual attachment rates for cable television providers, but do not have laws governing telecommunication providers' annual pole rates and other important pole attachment matters, such as survey and make ready time frames.

The following are a few examples of challenges MetroNet has experienced. We appreciate the FCC's interest in these matters and believe the FCC should encourage private investment in broadband network expansion, and adopt new provisions that make it easier to access poles, conduit and rights of way.

Accessing poles owned by utilities subject to Section 224

4. *Service Drops.* Prompt delivery of service to customers is critically important. To connect a customer to our network in an area served by utility poles, MetroNet is required to deploy a fiber strand ("service drop") from a fiber distribution terminal located on a utility pole to the customer premises. This route can sometimes span multiple utility poles. We are in over thirty markets, and in any given market, we may have more than 200 customer installations in a month. To meet this demand in a timely fashion, MetroNet must have the ability to connect the customer first and then notify the utility of the attachment of the service drop to the affected utility poles (i.e. "attach and notify"). Service drops add a virtually unmeasurable load to poles and are attached with j-hooks or strand clamps instead of an invasive through-bolt. Because of

this, and the need to deliver service to customers promptly, it is reasonable that service drops be affixed on an “attach and notify” basis. Still, investor-owned utilities often impose seemingly arbitrary and onerous service drop attachment requirements hindering our ability to connect customers quickly. Often, utilities’ standard pole attachment agreements do not have provisions that allow MetroNet to affix service drops on an “attach and notify” basis. Accordingly, MetroNet has to expend time and resources in attempting to negotiate inclusion of this critical process. Even when MetroNet has been successful in negotiating the “attach and notify” process for service drops, some utilities require that MetroNet submit a new application for any service drop that requires attaching to more than one pole, regardless of whether our equipment is already attached to the pole. This is burdensome. It would be cost prohibitive for a telecommunications provider to have a fiber distribution terminal on every pole. Rather, a telecommunications provider will have a fiber terminal on one pole from which several drops can be extended sometimes utilizing multiple utility poles between the fiber terminal and the customer premises. It is important to note that MetroNet believes it is appropriate to pay an attachment fee to a utility for all poles to which its facilities are attached including those that only contain a service drop attachment, but does not believe that a multi-month permit application process and pre-approval should be required for service drops. Imposing such a process unnecessarily delays customer installations making it challenging for MetroNet to win customers, and can give incumbent competitors an unfair advantage even if they have slower bandwidth speeds.

5. *Survey Time Frames.* Even though survey time frames are prescribed by the *2011 Pole Attachment Order*, major investor-owned utilities often exceed the established 45-day period to respond to pole applications, thereby frustrating MetroNet’s plans to deploy new

broadband in communities. Delays have resulted from a number of circumstances, including refusal by the utilities to dedicate sufficient personnel to review applications and utilities' vague or changing pole application instructions. For instance, in May 2016, MetroNet submitted three applications to one investor owned utility to install fiber cable on a total of approximately 160 poles needed to reach hundreds of customers. We submitted the application and all relevant documentation, including the application form, engineering proposals, drawings, pole load calculations, and route maps. All documentation met the appropriate application requirements as we understood them. Within a few weeks following our submission, we were informed that certain of the information must be submitted as a jpg picture instead of the industry standard digital image. After verbal follow-ups, in the succeeding eight months MetroNet did not receive any explanation or request for additional information. In February 2017, again MetroNet inquired about the status of the application. The utility indicated to us that the one person allocated to review pole surveys had been on medical leave for an extended period. This utility then asked that the information submitted in jpg format be resubmitted in pplx format. As of the date of this declaration, MetroNet has not received approval for these three applications.

6. *Inadequate Details of Make Ready Cost Estimates.* For pole attachments that require make-ready work, cost estimates from investor-owned utilities can be difficult to evaluate. Some major utilities do not provide any documentation or itemization of make ready work estimates—only the total amount for make-ready. With one such utility, we are able to seek additional detail, but the utility requires our response to the estimated make ready within three (3) business days. This hinders our ability to fairly assess the cost estimate, as it effectively reduces the time for accepting or disputing the estimate to a few days.

Another major utility refuses to provide estimates of all make-ready costs. The utility will provide the cost associated with rearranging its own attachments, but not the estimated cost associated with rearranging the attachments of telecommunications providers; the utility has simply left this responsibility to MetroNet, making it more difficult to estimate the total cost and time to execute make-ready work.

7. *Make Ready Delays and Barriers to Attachment.* Even after a make-ready estimate is agreed to, we face challenges in having regulated utilities execute work within the established 60 day timeframe. One large investor owned utility often does not complete make ready work within the 60 day timeframe.

8. *Inadequate Details of Actual Make Ready Costs.* In the post-make-ready stage, we often receive invoices that lack the detail necessary for us to determine the reasonableness of the utilities' make ready costs. There is often no itemization of costs or breakdown of work completed in final bills. In January of 2017, MetroNet received an invoice for over \$1 million from a major utility for make-ready work, virtually all of which was performed in 2013 and 2014. This invoice was to "true up" actual make ready costs with the estimated costs given to MetroNet in 2013 and 2014 prior to execution of the make ready work². No detail or cost breakdown or description of work per pole was provided in the "true up" invoices. The specific poles involved were not even identified. Accordingly, we were unable to assess the reasonableness of the make ready cost invoiced by this utility.

² The estimates provided in 2013 and 2014 were significantly lower than the actual costs. In many instances, MetroNet would not have proceeded with the make ready work if it had known the final costs. For example, one estimate was approximately \$34,000 and the "true up" amount was an additional \$138,000. One estimate was \$2,000 and the "true up" amount was an additional \$21,000. Another estimate was \$21,000 and the "true up" amount was an additional \$48,000. Although we have asked for it, we have not received an explanation of why the estimate was so wrong.

In negotiating pole attachment agreements, we routinely ask to include a provision that requires invoices for cost based charges to be based upon actual, reasonable costs, and requires the utility, at our request, to provide sufficient detail for us to determine the reasonableness of the cost. Our attempts to negotiate inclusion of such a provision virtually always have been unsuccessful. One utility refuses to “true up” make ready estimates if estimated costs are less than \$15,000. In essence, due to the terms of our agreement with this utility, make ready work estimated to cost less than \$15,000 may not be based upon actual costs. We feel that the FCC should adopt rules to codify that make-ready estimates and invoices must be based upon actual, reasonable costs and must be sufficiently detailed so broadband providers can verify the reasonableness of such costs.

9. *Complaint Process and Remedies.* We believe that attachers’ remedies under the FCC rules are insufficient and should be expanded. Although the self-help remedies set forth in 47 CFR §1.1420(i) may be useful in some situations, they do not help with make ready work outside of the communications space or in situations where pole replacements are required. We believe the remedies set for in 47 CFR §1.1420(i) should be expanded to allow attachers to use utility approved contractors outside of the telecommunications space, including in the electrical space.

Even when a utility is not acting in accordance with the FCC rules, MetroNet is reluctant to file a complaint with the FCC. One reason for our reluctance is the time and expense of filing a complaint. We prefer to try to resolve our issues with utilities through relationships with utility personnel, but this process is also time consuming resulting in costly delays. Another reason for our reluctance is the likelihood of the utility retaliating and ceasing/delaying to process applications. MetroNet would like the rules to be more clear that utilities may not deny or delay

attachment requests based upon the attacher disputing the utility's action or formally or informally filing a complaint.

We believe that 47 CFR §1.1410 should be amended to allow the FCC to impose monetary penalties and assess attorneys' fees and costs.

Accessing poles owned by utilities not subject to FCC oversight pursuant to Section 224

10. *Municipal utilities, cooperatives and reverse-preemption.* MetroNet has experienced delays and obstacles in accessing poles owned by municipal utilities, cooperatives and utilities in states that have exercised "reverse preemption." These utilities are not subject to FCC jurisdiction.

11. For example, Illinois, a state that has opted for reverse-preemption, has rules that dictate pole rate formulas for cable television services, but has few rules that offer meaningful guidance on the pole attachment process. In Illinois, we have experienced a wide disparity between the cable television annual pole rate and the rate that applies to telecommunication providers. For example, one large investor owned utility charges "non-CATV" attachers an annual fee of approximately \$24.00 per pole, while it charges cable providers approximately \$9.00 per year per pole.

One Illinois investor owned utility will not commit or adhere to the survey and make ready time frames set forth in the FCC rules. Illinois pole attachment laws do not address survey or make ready time frames.

Investor owned utilities in Illinois are not required to allow overlashing and the attachment of service drops on a notice basis and are not prohibited from assessing annual pole rentals on overlashed attachments.

There are no clear criteria in Illinois as to what constitutes reasonable make ready. As a result, we have been subject to unreasonable make ready requirements such as being required to replace poles that do not need to be replaced. In essence, one Illinois utility requires new attachers to finance the utility's pole replacement plan. For example, MetroNet submitted an application to attach its facilities to seventy-nine poles owned by an Illinois investor owned utility. The utility had a survey conducted at a cost to MetroNet of \$120 per pole, totaling survey costs of close to \$10,000. The survey prepared by the utility recommended that twenty-seven of the seventy-nine poles be replaced. After months and hundreds of hours expended by MetroNet's professionals in disputing the estimate, the utility reduced the number of poles needing replaced from twenty-seven to only two poles. During the dispute process, the utility realized that five poles were not even part of its pole inventory. MetroNet feels that it should not be charged for inaccurate and misleading surveys. Furthermore, if we had been unsuccessful in convincing the utility that two rather than twenty-seven poles needed replaced, we would have had to either abandon our plans to provide service in the community due to the extreme cost of delivery or pay for unnecessary and unreasonable make ready with an estimated approximate cost of \$300,000. Because our efforts were successful in disputing the need for so many pole replacements, we estimate that make ready charges for this area will be less than \$65,000.


One Illinois utility requires MetroNet to fix safety violations of the utility and third party attachers, which we believe to be contrary to federal law, but is not specifically addressed in the laws of Illinois.

Illinois law does not specifically require that utilities notify existing attachers of necessary make ready affecting their attachments and the time frames in which such make ready must be completed. One Illinois utility has informed MetroNet that this is the responsibility of

MetroNet despite (i) the utility does not indicate the identity of the other attachers in its reports, (ii) MetroNet has no official relationship with the other attachers (certainly no privity of contract), and (iii) in some instances the other attachers are direct competitors of MetroNet with every incentive not to cooperate.

I declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief.

Executed on June 6, 2017



John Greenbank

EXHIBIT D

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
	)	WC Docket No. 17-84
Accelerating Wireline Broadband)	
Deployment by Removing Barriers to)	
Infrastructure Investment	)	WTB Docket No. 17-79
)	
Accelerating Wireless Broadband)	
Deployment by Removing Barriers to)	
Infrastructure Investment)	

DECLARATION OF CHRIS HILLIARD

1. My name is Chris Hilliard. I am the Chief Executive Officer of USA Communications. We offer broadband services to approximately 11,000 subscribers, video services to approximately 6,700 subscribers, and basic voice services to nearly 2900 subscribers in communities in Nebraska, Montana, Colorado, Alabama and California. In addition, we serve 1400 business and wholesale customers.

2. I submit this Declaration in support of the Comments of the American Cable Association in the above-referenced proceedings.

3. After the launch of our first network more than 20 years ago in Borrego Springs, California, USA Communications has expanded to communities in Montana, Alabama, Colorado, and more recently, in Nebraska. Over the past three years, we have expanded

our network over 200 miles. We are deploying fiber networks to reach additional residential and commercial areas in small towns and rural communities specifically. Unfortunately, some network builds have been subject to needless delays – the result of private pole owners applying inconsistent standards, including onerous provisions, and imposing unreasonable costs. In small communities and rural areas in particular, these pole owners have made it difficult to access poles. This has limited our ability to build networks in new areas and ultimately interfered with our goal of providing the best quality of services to our customers.

4. USA Communications has experienced delays when accessing poles owned by utilities in the the cities of Laurel and Billings Montana. In a Laurel MT network extension connecting 5 commercial customers, Northwestern Energy took longer than the designated 45-day period to respond to a small 8-pole application. From our experience, these delays occur because pole-owners do not assign sufficient personnel to review applications. In this case, the utility appointed only one engineer to review both survey reports and pole applications, creating bottlenecks in the process. USA Communications has been waiting for over a year, original submission date to receive approval of this pole attachment project.

5. In addition, Northwestern Energy employs only one unionized contractors for make-ready work in both electrical and communication sections of poles. In 2015, we applied to Northwestern Energy for 15 pole attachments in Laurel, Montana. We received a cost estimate of nearly \$3,825 for engineering and \$6378 make-ready work on 20 poles. In the cost breakdown of the estimate, we noticed that both materials and labor

accounted for nearly 66% of the total estimate and the other third was for the crew's transportation expenses. We could have done the rearrangement of communication wires with our own crews for 20%~25% of the cost charged by the utility-approved contractor. Under the current regime, the electrical make-ready can only be executed by the utility's crews, or one of their approved contractors. When these costs are entirely unreasonable, USA Communications often chooses the less cost-effective, but more viable, option of skipping attaching to poles and building underground conduit.

6. A good practice that we have observed in other investor-owned utilities is the execution of periodic audits and repairs to the pole plant. Such preemptive measures benefit all parties – pole owners, existing attachers, and new attachers alike – as pole plant is maintained for less, compliance of safety codes is kept, and there are up-to-date records of the infrastructure. Alabama Power is an example of how well this works. Because it performs pole audits approximately every 3 years, Alabama Power maintains electronic databases of poles that expedite future attachments and support infrastructure management more generally. Unfortunately, no other utility is doing anything similar in our other markets.

7. The FCC's process to dispute make-ready charges or pole attachment complaints is very expensive and extremely time consuming. USA Communications has good reason to pursue a complaint with the FCC in 20% to 30% of our projects. However, we have never filed a complaint because fees for lawyers and consultants could cost \$10,000 to \$20,000, if not more. Instead, we could use those resources to pursue other solutions (e.g. build our own underground conduit), and continue with our projects. Furthermore,

USA Communications recognizes that bringing a formal complaint against any utility company could have the unintended consequence of damaging relationships, resulting in further delays down the road.

I declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief.

Executed on June 13, 2017

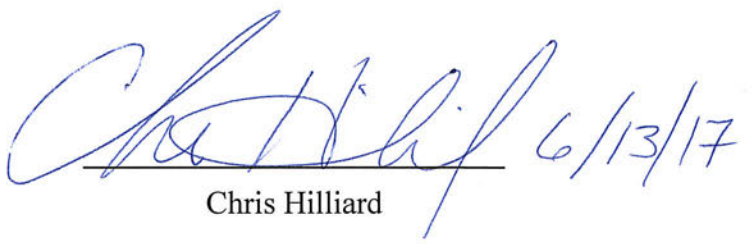
 6/13/17
Chris Hilliard

EXHIBIT E

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Accelerating Wireline Broadband	)	WC Docket No. 17-84
Deployment by Removing Barriers to)	
Infrastructure Investment)	
)	
Accelerating Wireless Broadband	)	WT Docket No. 17-79
Deployment by Removing Barriers to)	
Infrastructure Investment)	

DECLARATION OF DAVID MAGILL

1. My name is David Magill. I am the VP of Administration and Legal at LISCO, an Iowa telecommunications provider that provides broadband, telephone and pay-TV service in Fairfield, Iowa, and broadband and telephone services to 11 other communities in southeast Iowa. In total, we serve about 2,500 broadband subscribers and 580 pay-TV subscribers. Our recent builds have focused on network extensions to provide communication services for business customers in our communities.

2. I submit this Declaration in support of the Comments of the American Cable Association in the above-referenced proceedings.

3. We obtain access to poles from two investor-owned utilities in our operating footprint. These utilities differ in their business practices, and we have had more success with one utility than the other so we can contrast their practices. The key difference between the two utilities is that one has outsourced their pole management to a third-party survey and engineering firm located out-of-state, and the other has maintained in-house control with locally based staff.

We find that the utility that has maintained in-house control responds to applications more quickly, provides greater clarity on costs, and is generally easier to work with, allowing us to meet customer needs more rapidly and at a lower cost.

4. The utility that has outsourced its pole application process provides little to no transparency into pole application process or costs or make-ready costs. For the initial application, the utility conducts and requires us to pay for engineering assessments of every pole, but these costs are not known until we receive a bill. The utility refuses to conduct joint surveys with us, and we are not told about its surveys until after they are completed. Even more egregiously, until recently, the utility did not provide cost estimates for make-ready, in contravention of FCC rules. Instead, the utility only provided the engineering documentation and recommendations, and left us to figure out whether the utility was planning on requiring pole replacements. Within the past two years the utility has started to provide cost estimates when we request them. However, these are not itemized, so we have no way of assessing their reasonableness. The utility only explicitly says in the application documents if the pole needs to be replaced. In those cases, we forgo the attachment altogether, as pole replacements are generally cost-prohibitive. The proper estimate information should be available beforehand so that we can make a more informed project decision.

5. Should we proceed with pole attachments with the “out-sourced” utility, it sends us a final invoice that only includes a lump sum for application, make-ready, and engineering without a detailed breakdown of the costs. In most of the pole attachment projects, we receive the final invoice years after the works were executed because this utility does not perform timely post-attachment inspections. In one case, we had 36 pole attachments that were done between 2012 and 2014 for which this utility had not yet billed us, and then, in 2016 we received an “un-

itemized” bill for about \$96,000. Even after asking, the utility refused to provide a breakdown of these charges, leaving us in the dark with regards to make-ready and engineering costs. The lack of transparency and cooperation creates business challenges that make a working relationship with the utility impractical going forward.

6. In contrast, the “in-house” utility charges a flat \$10 fee per pole for engineering for every pole in our applications (assuming a 25-pole minimum). This engineering is conducted more quickly because it is conducted by local staff, so applications are approved in less than the 45-day limit, usually within 21 days. When make-ready is deemed necessary, they provide an itemized cost estimate. This other utility is able to complete the entire make-ready process typically in under three months, allowing us to serve our customers more quickly.

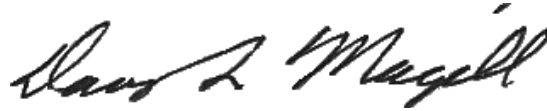
7. Neither of the aforementioned utilities has digital pole databases that we can access. Electronic pole location maps that included information on the possibility of additional attachments in the communications space would be useful. Currently we rely first on Google Earth, then on-site observation to determine whether to submit pole attachment requests.

8. LISCO would find the following changes greatly beneficial to our pole attachment requests:

- a. A fixed price for the pole application
- b. For drops off existing mainline involving no new poles, attacher should be able to notify pole provider without awaiting approval and without additional charge.
- c. Invoices should be categorized by which of the four parts of the FCC-specified timeline are involved and by time and materials provided.

I declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief.

Executed on June 5, 2017

A handwritten signature in black ink, appearing to read "David L. Magill". The signature is written in a cursive style with a horizontal line underneath it.

David L. Magill

EXHIBIT F

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

In the Matter of)	
)	
Accelerating Wireline Broadband	)	WC Docket No. 17-84
Deployment by Removing Barriers to)	
Infrastructure Investment)	
)	
Accelerating Wireless Broadband	)	WT Docket No. 17-79
Deployment by Removing Barriers to)	
Infrastructure Investment)	

DECLARATION OF WILLIAM WEGENER

1. My name is William Wegener. I am the GVP of Engineering and Network Development at Mediacom Communications, a cable operator that provides broadband services to approximately 1.2 million subscribers, video services to approximately 800,000 subscribers, and voice services to 500,000 subscribers in twenty-two states across the nation. In addition, our fastest-growing segment is business services, which grew 9.6% from 2015 to 2016, and now accounts for 14% of our total revenues.

2. I submit this Declaration in support of the Comments of the American Cable Association in the above-referenced proceedings.

3. Mediacom has been investing in fiber infrastructure to upgrade existing networks to provide broadband to new housing developments, business data services to commercial customers, and mobile backhaul connectivity for wireless operators. The planned initiatives under our capital plan include Project Gigabit, a wide-scale deployment of DOCSIS 3.1 to nearly all of our 3 million homes passed; Project Open Road, which will connect tens of thousands of

new commercial locations that contain multiple potential customers; residential line extensions covering at least 50,000 homes passed; and development of community Wi-Fi access points in high-traffic commercial and public areas. As part of our investment, Mediacom builds 300 to 400 new plant miles a year. Approximately 25% of this new plant is aerial. Getting rapid and cost-effective access to existing aerial infrastructure is especially important for us when building out to commercial and wholesale customers. These customers choose Mediacom because we offer lower prices and superior service to incumbent telephone companies—delays in deploying to these customers puts a brake on competition.

4. In recent years, Mediacom has found that investor-owned utilities are seeking to impose requirements that add unreasonable costs and delay attachments. For instance, at one time, utilities generally did not require a pole loading analysis in an application except in areas with extreme weather conditions (e.g. the Gulf Coast in Hurricane season). Utilities and Mediacom agreed that in most instances a visual inspection was sufficient. Now, some utilities are routinely demanding that Mediacom pay for pole loading analysis on every pole in every pole application, even to overlash our existing cables. Because this analysis must be carried out by a Professional Engineer, we must incur additional costs of up to \$150 per pole, which can increase project costs by over \$5,000 per mile of aerial plant.

5. After this pole loading analysis is submitted, utilities often ask Mediacom to pay for the replacement of “failing” poles. Mediacom often disputes these claims because in many instances where there is a “failing” pole, the pole failure is already occurring and would not be due to the proposed Mediacom attachment.

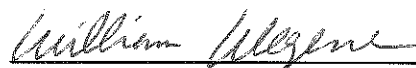
6. Another problem we encounter is that utilities request that Mediacom pay for pole replacements to remedy violations on poles to which we have been attached for years. From our

experience, these violations arise after utilities perform corrective or preventive maintenance on their equipment and do not replace the poles to maintain the clearance specified in the Pole Attachment Agreement. Utilities then audit their pole plant and find that our attachments are not in compliance with their standards, requiring us to pay for pole replacements. In one case, Empire Electric in Missouri conducted an audit in 1999 after Mediacom acquired systems from US Cable (a subsidiary of Cablevision Systems) and found hundreds of attachments with violations. There was no evidence of a change in the attachment location so we argued that following the construction of the cable plant Empire had the opportunity to conduct a post construction survey and these violations should have been addressed years prior to our acquiring the systems. In checking with the seller we learned that there was a post construction survey and they paid Empire to make the necessary corrections. It was apparent at this point that Empire opted not to make the corrections. Following the audit, the utility asked us to pay for violations that the previous operator had already paid to have corrected. In another instance, in 2014 Mediacom was asked to reimburse Minnesota Power in Aurora and Hoyts Lake, MN for violations on poles to which we have been attached for over 20 years. We performed our attachment in accordance with the engineering documentation and the utility had ample opportunity to conduct the post-make-ready inspection. Instead, the utility executed preventive or corrective maintenance and modified the clearance required for our cables. Mediacom then received a cost estimate in excess of \$100,000 for violations as part of the make-ready to allow a third party seeking to access those poles. We found unreasonable and above-market labor charges in this case for works that the utility had failed to address. We rejected those charges on the grounds that existing attachers already pay for pole attachment fees, which are intended to cover management and maintenance costs. In addition, we asserted that all capital costs required

to perform make-ready should be covered by the new attacher as described in existing regulations.

I declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief.

Executed on June 5, 2017


William Wegener

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Accelerating Wireline Broadband Deployment	)	WC Docket No. 17-84
by Removing Barriers to Infrastructure)	
Investment)	

COMMENTS OF CROWN CASTLE INTERNATIONAL CORP.

Kenneth J. Simon
Senior Vice President and General Counsel

Monica Gambino
Vice President, Legal

Robert Millar
Associate General Counsel

CROWN CASTLE
INTERNATIONAL CORP.
1220 August Drive, #600
Houston, Texas 77057
724-416-2000

June 15, 2017

SUMMARY

The deployment of broadband networks is critical to ensure that the United States maintains its position at the forefront of the technological revolution. Crown Castle is working vigorously to answer the Commission's call to deploy next-generation broadband networks that can meet the intensifying demand for bandwidth across the country. As one of the country's largest independent owners and operators of shared infrastructure, with more than 40,000 towers, nearly 25,000 small cell installations, and over 26,500 miles of fiber, Crown Castle is uniquely positioned to meet the challenge to deploy the networks necessary to power a 21st century economy. Crown Castle uses its fiber optic networks to provide telecommunications services to myriad customers, including wireless carriers, traditional enterprise customers, educational institutions, and government.

Crown Castle urges the Commission to adopt rules that clearly prohibit pole owners from attempting to evade the Commission's intended pole-attachment processes and timelines. As Crown Castle endeavors to both maintain its existing inventory of pole attachments and gain access to poles as a new attacher, the pole attachment process is often complicated by the actions of the companies that own the poles, such as investor-owned utilities and incumbent local exchange carriers (collectively "utilities"). Crown Castle has encountered a growing number of utilities that have exploited their ownership of the poles by requiring new entrants to adhere to a variety of pole attachment standards that effectively deny access to the poles. At the very least, the imposition of these pole attachment standards significantly increases both the cost and time necessary for deployment, thwarting the Commission's efforts to promote efficient broadband deployment.

To reduce inefficiencies currently plaguing the pole attachment timeline, Crown Castle

supports adjustments to the current pole attachment processes. Crown Castle is deeply concerned with a growing number of utilities who require a “pre-application” process before they will accept an application for attachment – thus preventing attaching entities from starting the clock on the Commission’s four-stage timeline. Crown Castle suggests the Commission amend its pole rule to follow its wireless Shot Clock and Section 6409 rules to have the timeline start immediately upon submission of an request for access to prevent utilities from evading the timeline imposed by the Commission. To promote efficiency in the pole attachment process, Crown Castle also supports the elimination of the additional 14-day cost estimate phase of the timeline, which is superfluous, unnecessary, and only acts to prolong the pole attachment process. Furthermore, Crown Castle agrees with the Commission that additional transparency is needed and will lead to more efficient pole attachments. To that end, Crown Castle recommends that the Commission require pole owners to provide a breakdown of the pole owners’ “actual costs” in of the cost estimate for make-ready work.

As both an existing attaching entity and new entrant, Crown Castle agrees with the Commission that that the make-ready process is a significant part of the attachment and deployment process; and Crown Castle generally supports proposals to expedite make-ready by putting more control into the hands of the party seeking to attach, but only if appropriate safeguards are included. For example, Crown Castle supports the Commission’s proposal to adopt as a rule its 2011 “best practice” make-ready period of 30 days or less, but not limited to orders under a certain size. Additionally, Crown Castle urges the Commission to not leave attaching parties without any meaningful remedy when electric utilities fail to perform electric space make-ready in a timely fashion. To that end, Crown Castle suggests the Commission modify its rules to allow attaching parties to use utility-approved contractors for all aspects of

make-ready work, not just communications space make-ready work.

In order to avoid unnecessary delays in the pole attachment process, Crown Castle additionally recommends the Commission support the adoption of automated databases and notifications systems, such as those provided by NJUNS,¹ as a “best practice” for all utilities and attaching parties. Furthermore, since broadband deployment is often thwarted by electric companies refusing to timely activate attachments, Crown Castle urges the Commission to recognize electric power activation of all attachments as part of the make-ready work that must be completed within the Commission’s defined timeframe.

Crown Castle supports the evaluation of alternative make-ready processes to help speed access to poles for new entrants, and generally supports in concept the processes that are loosely termed “one-touch” make-ready. However, Crown Castle believes the Commission should carefully evaluate the details of such plans to reach an alternative process that will facilitate deployment while protecting the legitimate interests of existing attachers.

In Crown Castles’ experience, despite the Commission’s existing requirements, utilities are slow to provide data on available conduit, and some utilities in particular refuse to make their conduit maps available at all. Because of the lack of data on the availability of conduits, Crown Castle is often left with no option other than trial and error when determining where to deploy its broadband infrastructure. Therefore, Crown Castle supports the Commission’s proposal to incentivize utilities to make information on available conduit publically available. Access to conduit would also benefit from use of central databases.

Crown Castle has encountered difficulty obtaining access to municipally owned poles, as a threshold matter and also on reasonable terms and conditions. In Crown Castle’s experience,

¹ *NJUNS Efficient Utility Communication*, NJUNS, available at <https://web.njuns.com/> (last visited on June 15, 2017).

some cities are using their control over the public rights of way to force providers to use only city-owned poles, and then enriching themselves with excessive rental demands. Therefore, the Commission should adopt a rule, or at least a declaratory ruling, holding that access to municipal poles is governed by Section 253 of the Act, and that local governments cannot deny access to their poles or impose unreasonable or discriminatory fees for their use.

Crown Castle also agrees with the Commission's view in the *Notice of Inquiry* that some state and local regulations imposing restrictions on broadband deployment may effectively prohibit the provision of telecommunications service. Crown Castle encourages the Commission to use its authority under Section 253 to enact rules that formalize its prior interpretations of Section 253 as well as the many court decisions that followed the Commission's lead.

As a threshold matter, the Commission has the authority to issue rules interpreting and implementing Section 253. As courts have recognized, the Commission's ability, through Section 253(d), to address specific circumstances on a case by case basis does not otherwise preclude the Commission from adopting rules to interpret and implement Section 253. In order to avoid increasing barriers from local government demands and requirements to the deployment of broadband infrastructure, the Commission should adopt rules that interpret and implement Section 253 and, in so doing, effectuate Congress' deregulatory vision. Cases decided by the Commission and the courts shortly after passage of the 1996 Act correctly reflected the intention of Congress to let competition, not parochial local interests and regulations, determine which providers and technologies would successfully compete in the marketplace. However, a few courts have unfortunately issued decisions that conflict with previous cases recognizing that Section 253(a) does not require an insurmountable barrier to entry, and those decisions have

diminished the impact of Section 253 to help promote deployment and competition, as Congress intended.

The deployment of new technologies and competitive services requires a significant capital investment—potentially millions of dollars for each community. Uncertainty resulting from wholly subjective, discretionary, and discriminatory local requirements creates so much risk that companies may not even undertake the investment involved in planning for new services in communities that assume they are authorized to deny consent or impose significant burdens on consent. Therefore, the Commission should clearly define what actions effectively prohibit the provision of telecommunications services to ensure the pro-deployment, pro-competitive, deregulatory intent of Section 253 is upheld going forward. For example, the Commission should recognize that any time (1) new entrants are subjected to a different process than other rights-of-way pole users; (2) *de facto* and explicit moratoria are imposed by municipalities; (3) excessive delays occur in negotiations and approvals for right of way agreements and permitting; (4) excessive fees or other costs are required in the permitting process; and/or (5) any other unreasonable conditions or prohibitive conditions are imposed by municipalities, such actions impede deployment of broadband infrastructure in violation of Section 253. Accordingly, the Commission should adopt a rule that reiterates that Section 253(a) bars state or local requirements that have the effect of imposing barriers to broadband infrastructure deployment.

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Accelerating Wireline Broadband Deployment	)	WC Docket No. 17-84
by Removing Barriers to Infrastructure)	
Investment)	

COMMENTS OF CROWN CASTLE INTERNATIONAL CORP.

Crown Castle International Corp. and its subsidiaries (“Crown Castle”) submit these comments in response to the Commission’s Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment on the Commission’s proposals to streamline deployment of wireline broadband infrastructure.² Crown Castle appreciates this opportunity to submit its views and encourages the Commission to act quickly to adopt the NPRM proposals suggested herein to create a regulatory environment that will allow the United States to maintain its position as a global leader in the deployment and utilization of broadband services and infrastructure.

I. INTRODUCTION

The deployment of robust broadband networks is critical to meet the increasing demand for bandwidth and services, and to ensure that the United States maintains its position at the forefront of the technological revolution. The proliferation of broadband-enabled devices has placed an unwavering demand on ubiquitous broadband availability throughout the country, and, as the Commission has recognized, “new uses of the network – including new content, applications, services, and devices – lead to increased end-user demand for broadband, which

² *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment*, 32 FCC Rcd 3266, WC Docket No. 17-84 (rel. Apr. 21, 2017) (“NPRM”).

drives network improvements, which in turn lead to further innovative network uses.”³ This cycle will only intensify as technology evolves over time. Therefore, it is critical that the Commission adopt rules that foster the deployment of next-generation broadband networks that can meet the intensifying demand for bandwidth and services.

However, the challenge of developing the facilities and infrastructure needed to power next-generation broadband networks is substantial. As Chairman Pai recently explained, “building, maintaining, and upgrading broadband networks is expensive. . . . [O]perators will have to deploy millions of small cells, and many more miles of fiber and other connections to carry all this traffic. Doing all this will command massive capital expenditures.”⁴

Crown Castle is uniquely positioned to meet the challenge to deploy the networks necessary to power a 21st century economy. Founded in 1994, Crown Castle is the country’s largest independent owner and operator of shared wireless infrastructure, with more than 40,000 towers, nearly 25,000 small cell installations, and over 26,500 miles of fiber. Crown Castle has more than 15 years of experience deploying small cell networks. Notably, Crown Castle does not hold wireless licenses, and does not itself provide personal wireless services; rather, its network offerings are exclusively wireline. Utilizing its extensive fiber networks, Crown Castle provides (among other service offerings) wholesale wireline transport services to its wireless carrier customers.⁵

³ *Preserving the Open Internet*, Report and Order, 25 FCC Rcd 17905, ¶ 14 (2010).

⁴ *Remarks of Federal Communications Commission Chairman Ajit Pai at the Mobile World Congress*, Ajit Pai, FCC at 2 (Feb. 28, 2017), available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-343646A1.pdf.

⁵ Crown Castle entities currently hold utility certifications in 45 states, the District of Columbia, and Puerto Rico. In all of these jurisdictions, utility commissions have issued Crown Castle entities certificates or the equivalent to provide its wholesale transport services. However, the status of these service offerings has recently come into question in Texas and Pennsylvania. See *Complaint of Extenet Network Sys., Inc. Against the City of Houston for Imposition of Fees for*

Indeed, although well-known for its tower business, Crown Castle is also now one of the nation's largest providers of fiber optic telecommunications services.⁶ Crown Castle uses its fiber optic networks to provide telecommunications services to myriad customers, including wireless carriers, traditional enterprise customers, educational institutions, and government.

As both an infrastructure provider and a telecommunications service provider, Crown Castle occupies a unique position in the deployment of broadband networks – Crown Castle is an existing attacher to poles, a new entrant, and a pole and conduit owner. Therefore, Crown Castle maintains an invaluable perspective on the Commission's proposals to speed access to poles, and more generally, on the Commission's proposals to deploy wireline broadband infrastructure.

In Section II of these comments, Crown Castle offers some examples of its experiences as an existing attacher to poles and as a new entrant, highlighting some of the issues it has faced attaching to poles, and Crown Castles suggests ways that the Commission can ensure access to poles occurs in an expedited and efficient manner. In Section III of these Comments, Crown Castle describes its support for Commission rules interpreting Section 253 of the Communications Act, and describes how localities have created barriers to the deployment of broadband networks.

Use of Public Right of Way, Proposal for Decision, SOAH Docket No. 473-16-1861, PUC Docket No. 45280 (Tex. State Office of Admin. Hearings Feb. 24, 2017) (finding that unswitched point-to-point transport service to retail CMRS providers is not a wireless service); *but see Review of Issues Relating to Commission Certification of Distributed Antennae System Providers in Pennsylvania*, Motion of Robert W. Powelson, 2517831-LAW, Docket No. M-2016-2517831 (Penn. PUC Mar. 2, 2017) (finding that DAS networks should no longer be deemed utilities under Pennsylvania law because they are deemed CMRS facilities).

⁶ *Crown Castle Announces Agreement to Acquire Wilcon*, Crown Castle, News Release (Apr. 17, 2017), available at <http://investor.crowncastle.com/phoenix.zhtml?c=107530&p=irol-newsArticle&ID=2262255> (stating that Crown Castle now owns over 26,500 route miles of fiber, and is one of the nation's largest providers of fiber infrastructure).

II. THE COMMISSION SHOULD ADOPT RULES THAT ENSURE JUST AND REASONABLE POLE ATTACHMENT CONDITIONS TO STREAMLINE BROADBAND INFRASTRUCTURE DEPLOYMENT

As Crown Castle endeavors to both maintain its existing inventory of pole attachments and gain access to poles as a new attacher, the pole attachment process is often complicated by the actions of the companies that own the poles, such as investor-owned utilities and incumbent local exchange carriers (“ILECs”) (collectively “utilities”). Although many utilities seek to work with Crown Castle cooperatively, too often Crown Castle encounters utilities that continue to obstruct pole attachments by imposing extremely burdensome rates, terms, and conditions on attachers that delay and complicate the pole attachment process. As discussed below, Crown Castle supports many of the Commission’s proposals to expedite the pole attachment process, and Crown Castle also identifies additional issues that the Commission should address.

A. Pole Owner Practices That Are Inhibiting The Deployment Of Broadband

In the NPRM, the Commission seeks comments on proposals to streamline and accelerate access to poles, focusing on the Commission’s timelines and make-ready processes. In addition, however, Crown Castle believes the Commission should address an issue that significantly inhibits the deployment of broadband. Although the Commission has in the past declined to limit pole owners to National Electric Safety Code (“NESC”) standards,⁷ Crown Castle is encountering a growing number of pole owners that use that loophole, allowing them to adopt “construction standards,” to adopt requirements that vastly exceed the NESC and in so doing exclude altogether or otherwise inhibit many attachments. Essentially, pole owners are adopting *de facto* blanket bans under the guise of adopting their own “construction standards.” These

⁷ See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket Nos. 96-98, 95-185, Report and Order, 11 FCC Rcd 15499, 16068-69, ¶¶ 1145-49 (1996) (*Local Competition Order*) (specifically declining to impose the National Electric Safety Code (NESC)).

individual standards are not legitimately grounded in safety, reliability, or engineering concerns. Rather, they reflect a desire by the utilities involved to severely limit if not outright prohibit pole attachment. In that respect, these steps are a continuation of the behaviors that have driven pole attachment law and regulation since the adoption of the 1978 Act.

For example, for decades, it has been common and standard utility industry practice to attach equipment to poles in the “unuseable” space (*i.e.*, below the lowest communications line).⁸ Yet, particularly over the past several years, Crown Castle has encountered a growing number of pole owners, whose territories cover many states, who have adopted blanket bans on attaching any equipment in the common space – despite the fact that this is a well-established and long-standing practice. The NESC has rules explicitly governing the safe attachment of ancillary equipment to the pole,⁹ and it is a practice that has been widely used by cable operators, incumbent and competitive LECs, and even electric utilities themselves. But after the Commission explicitly rejected blanket bans on wireless equipment in its 2011 Order, utilities are trying a different approach by adopting new construction standards that prohibit attachment of any type of equipment, other than antennas, to poles. Essentially, the utilities are using the

⁸ *In the Matter of Texas Cablevision Company v. Southwestern Electric Power Company*, 1985 FCC LEXIS 3818, ¶6 (1985) (“to the extent this ancillary equipment may occupy the 18-28 feet designated as ‘ground clearance,’ which by definition is excluded from usable space, it is to be omitted from any measurements”); *Capital Cities Cable, Inc. v. Mountain States Tel. and Tel. Co.*, 1984 FCC LEXIS 2443, ¶ 23 (1984) (“[T]he space deemed occupied by CATV includes not only the cable itself, but also any other equipment normally required by the presence of CATV.”).

⁹ *See, e.g.*, Institute of Electrical and Electronics Engineers, Inc., Nat’l Electric Safety Code, Rule 201 (“Part 2 of this Code covers supply and communication conductors **and equipment**” (emphasis added)); Rule 232B3 (setting clearance to equipment cases), Table 232-2; rule 236D (location of equipment relative to climbing space); Rule 252B2 (“The transverse load on structures and equipment shall be computed by applying, at right angles to the direction of the line, the appropriate horizontal wind pressure determined under Rule 250. This load shall be calculated using the projected surfaces of the structures and **equipment supported thereon**” (emphasis added)).

narrowest interpretation of what would otherwise appear to be clear guidance in the 2011 Order. At least in some cases, the new “construction standards” prohibiting equipment attachment on poles are despite the fact that the utility has allowed such equipment attachments on poles for many years.¹⁰ In the 2011 Order, the Commission clarified that to deny access, a utility “must explain in writing its precise concerns—and how they relate to lack of capacity, safety, reliability, or engineering purposes—in a way that is specific with regard to ***both the particular attachment(s) and the particular pole(s) at issue.***”¹¹ In the 2011 Order the Commission also rejected utility company attempts to adopt blanket bans on antenna attachments under the guise of individual construction standards.¹² A utility can no more exclude all equipment attachments based on alleged construction standards than it could exclude all pole top antenna attachments under the guise of an individual construction standard. Utilities may argue that the ban on equipment attachments is a “safety” issue. Yet, Crown has experienced several instances of utilities refusing to consider attachment methods and procedures for such equipment that are NESC compliant and in use safely by other utilities.

As the Commission stated in the 2011 Order, “[i]nterpreting section 224(f) as a Congressional delegation of authority to utilities to define the terms and conditions of attachment would trump the grant of rulemaking authority to the Commission in section 224(b)(1) and (2), and would render such determinations effectively unreviewable by the Commission.”¹³

¹⁰ See, e.g. *Fiber Technologies Networks, L.L.C. v. Duke Energy-Indiana, Inc., et al.*, FCC, Proceeding No. 14-227, File No. EB-14-MD-015.

¹¹ *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, WC Docket No. 07-245, GN Docket No. 09-51, 26 FCC Rcd 5240, ¶ 76 (2011) (*2011 Pole Attachment Order*) (emphasis added).

¹² *2011 Pole Attachment Order*, ¶ 77.

¹³ *2011 Pole Attachment Order*, ¶ 93 (citing 47 U.S.C. § 224(b)(1)–(2)).

Crown Castle has also encountered a growing number of pole owners that have imposed “construction standards” that vastly exceed the safety standards adopted by the NESC. For example, the 2017 version of the NESC adopted a change that now requires a vertical clearance between pole top antennas and power lines of only **6 inches** for lines at 8.7kV, **8 inches** at 13kV, and ultimately only **22 inches** even at 50kV.¹⁴ Yet, at least one major national investor owned utility now demands a **10 foot** clearance, and others require six feet or more. One major investor owned utility has imposed a requirement that antennas be separated from electric lines by a distance equal to three times the manufacturer’s “Minimum Approach Distance” for the antenna. In other words, they are imposing their own, arbitrary RF clearances. The effect is to require in every instance a new, significantly taller pole, which significantly increases the cost and increases the time for deployment.

These requirements are unjust and unreasonable terms and conditions of attachment, and in some instances they are *de facto* denials of access. Although the utilities allege safety concerns, there is no legitimate basis for such clearance requirements. For example, at least one utility has argued that the ban on equipment is based on the need for climbing clearances. However, Crown Castle has developed and proposed attachment techniques that are NESC compliant and address the utility’s assertions, but the utility will not accept Crown Castle’s resolution. Similarly, demands for clearance from antennas based on RF emissions ignore rules and practices that address RF safety concerns. For example, many utilities require and Crown Castle provides “cut off” switches that allow antennas to be deactivated during work in their vicinity and other mitigation measures. Electrical workers are highly trained, are accessing the pole in their professional capacity while cognizant of the danger, and can be expected to use a

¹⁴ Institute of Electrical and Electronics Engineers, Inc., Nat’l Electric Safety Code, Rule 235I, Table 235-6 Ln. 1.c. (2017 Edition).

disconnect switch. Crown Castle has deployed this safety measure in jurisdictions across the country. Similarly, demands for clearances of multiple times the manufacturers' recommendation ignore the fact that the Commission's rules regarding RF exposures already include a significant safety factor built in.¹⁵ For occupational exposures, such as would occur on the pole, the Commission's rules use a safety factor of 100 times below the level of potentially harmful biological effects.¹⁶ Thus, these construction standards that allegedly are based on safety concerns actually reflect attempts by utilities to achieve the pole top blanket bans that the Commission has already ruled unlawful.

Crown has also encountered other dimensional limitations in other parts of the country, such as limiting cabinet sizes to 2 feet by 3 feet. Again, there is no basis for such blanket limits. For any given pole, the utility must be able to identify specific safety and reliability grounds for denying equipment of a different size. In reality, there is no such basis, as many poles are structurally capable of accommodating larger equipment.

¹⁵ See, e.g., 47 CFR 1.1310; *Evaluating Compliance with FCC Guidelines for Human Exposure to Radiofrequency Electromagnetic Fields*, FCC Office of Engineering & Technology, OET Bulletin 65, Edition 97-01 (2001) available at <https://transition.fcc.gov/bureaus/oet/info/documents/bulletins/oet65/oet65c.pdf> (FCC OET Bulletin 65); *RF Safety FAQ*, Federal Communications Commission, available at <https://www.fcc.gov/engineering-technology/electromagnetic-compatibility-division/radio-frequency-safety/faq/rf-safety#Q9> (last visited June 15, 2017), (“The FCC guidelines for human exposure to RF electromagnetic fields were derived from the recommendations of two expert organizations, the National Council on Radiation Protection and Measurements (NCRP) and the Institute of Electrical and Electronics Engineers (IEEE). Both the NCRP exposure criteria and the IEEE standard were developed by expert scientists and engineers after extensive reviews of the scientific literature related to RF biological effects. The exposure guidelines are based on thresholds for known adverse effects, and **they incorporate prudent margins of safety**. In adopting the current RF exposure guidelines, the FCC consulted with the EPA, FDA, OSHA and NIOSH, and obtained their support for the guidelines that the FCC is using.” (emphasis added)).

¹⁶ FCC OET Bulletin 65 at n. 6 (“Both the ANSI/IEEE and NCRP exposure criteria are based on a determination that potentially harmful biological effects can occur at a SAR level of 4.0 W/kg as averaged over the whole-body. Appropriate safety factors were then added to arrive at limits for both whole-body exposure (0.4 W/kg for "controlled" or "occupational" exposure and 0.08 W/kg for "uncontrolled" or "general population" exposure, respectively”).

In addition to being unjust and unreasonable terms and conditions of attachment, these types of requirements – both excessive clearance requirements and prohibitions on equipment – impede deployment of broadband because they also create collateral issues with local governments and the public. For example, many local governments prohibit or strongly disfavor ground mounted equipment around poles. If the pole owner prohibits equipment on the pole, and the local government does not want equipment on the ground, Crown Castle’s deployment is stymied, as it is caught in the middle.

Excessive clearance requirements, in particular, create issues with local governments. By imposing clearance requirements that far exceed those required by the NESC, utilities have forced Crown Castle to attach antennas higher on the pole, thereby increasing the height of the pole. The resulting larger, taller poles often create unnecessary conflict with local regulations, and in some instances may render attachment impossible under local code. Many local governments are now adopting regulations limiting the height of antennas, either in total or above the pole or both. So, for example, an ordinance may allow antennas that are no more than three feet above the existing pole or no taller than 40 feet.¹⁷ But when the utility requires a 6 or 10 foot clearance, or requires the installation of a new Class 1 pole in all instances, Crown Castle cannot comply with the local code. The pole owner’s standards become effective prohibitions on deployment.

Some utilities are also imposing blanket requirements to replace the existing pole with a Class 1 pole for any wireless attachment. As a result, there is always a new, taller replacement pole installed. And a common problem is that when exiting attaching parties do not timely move their lines to the new pole, there are two poles next to each other. Local governments strongly

¹⁷ At the same time, such arbitrary limits imposed by local governments are problematic because they are divorced from the engineering requirements of deployment.

oppose such “double pole” situations. But again, they are not in Crown Castle’s control. They are precipitated by the utility company insisting on pole changes in every instance.

Therefore, Crown Castle requests that the Commission adopt a rule that any “construction standard” imposed by a utility that exceeds the NESC clearance standard by more than 20 percent is presumptively unfair and unreasonable in violation of Section 224 of the Communications Act.¹⁸

B. Improving Broadband Deployment With Amendments To The Commission’s Timeline Rules

In the NPRM, the Commission seeks comment on potential reforms to the various steps of the Commission’s current pole attachment timeline.¹⁹ While Crown Castle generally supports slight adjustments to the Commission’s pole attachment timeline,²⁰ in Crown Castle’s experience, manipulation of the timeline by utilities is a more significant cause of delay than the time frames, *per se*. For example, utilities have often required Crown Castle to undertake a “pre-application” process prior to triggering the Commission-mandated pole attachment shot clock, which substantially interrupts the Commission’s pole attachment timeline. Crown Castle urges the Commission to adopt rules that promote a clear and efficient pole attachment process that cannot be manipulated to the detriment of attaching parties.

1. Application Review

a. Timing

The Commission’s current four-stage timeline for wireline and wireless requests to access the “communications space” on utility poles generally promotes efficiency. However,

¹⁸ 47 U.S.C. § 224(b)(1) (requiring terms and conditions for pole attachment to be “just and reasonable”).

¹⁹ NPRM, ¶ 7.

²⁰ 2011 Pole Attachment Order, ¶¶ 22-23.

Crown Castle is deeply concerned with a growing number of utilities who require a “pre-application” process before they will accept an application – thus preventing attaching entities from starting the clock on the Commission’s four-stage timeline. For example, prior to accepting an application to attach to specific poles, utilities have required Crown Castle to submit a request to the utility to prepare an estimate of the costs to complete the make ready survey. In other words, the utility is imposing a new step where they effectively want to perform a survey to determine what the cost of the survey step will be. Such demands are duplicative and unnecessary.

Not only do the utilities require Crown Castle to take this extra step outside of the Commission’s defined pole attachment process, but the utilities also require Crown Castle to pay for developing the pre-application estimate. Only after each of these steps is completed will the utility accept an application that officially “starts the clock” on the required four-stage timeline. In many cases this “pre-application” process has taken several months, far outlasting the time allotted by the Commission for the pole attachment process through the four-stage timeline. Because it is deemed by the utility to be outside of the defined pole attachment process, they claim there are no timelines associated with completing this step. For example, utilities have required Crown Castle to submit an application, along with an application fee,²¹ to the utility to

²¹ These requirements also are unlawful because utilities cannot charge application fees. The administrative costs of processing pole attachment applications are already recovered as part of the pole rental under the Commission’s formula. *See, e.g., Texas Cable and Telecommunications Ass’n v. GTE Southwest, Inc.*, Order, 14 F.C.C.R. 2975 ¶ 32 (CSB 1999); *affirmed*, 17 F.C.C.R. 6261 ¶ 11 (FCC 2002)(disallowing double recovery of makeready costs by imposing such costs in the rent and requiring upfront payments); *Texas Cable & Telecommunications Ass’n v. Entergy Services*, Order, 14 F.C.C.R. 9138 ¶¶ 5, 14 (CSB 1999) (application fee not allowed); *Cable Association of Georgia*, at ¶ 20 (finding the utility’s practice of denying access to poles until up-front make-ready fee was paid unreasonable and stating that “Georgia Power first should incur the costs attendant to make-ready, and then seek reimbursement for its actual make-ready costs.”).

prepare an estimate of the costs to complete the initial survey. The application is then assigned to the appropriate operating region of the utility and an estimate of the costs of the make ready survey is developed. The utility requires that Crown Castle pay all of survey charges up front, before the application is scheduled for review and before the survey has occurred. Based on Crown Castle's experience with certain utilities, as much as 90 percent of the time this "pre-application" step results in delays of at least 45 days, and even as long as 11 months.

At least one ILEC has also engaged in a similar practice of imposing "pre-application" procedures. After application and fee are submitted, the carrier created estimates of the costs to complete the make ready work survey. Crown Castle was required to pay the costs of the survey before the pole owner would commence the start of the survey. Although Crown Castle believes that all of these activities clearly fall within the initial 45 day survey portion of the Commission's rules, the pole owner takes the position that all of those steps are "pre-application."

Additionally, as currently structured, the Rules do not allow the clock to start on pole attachment negotiations unless and until an attachment application is submitted for a particular pole. Typically, preliminary inquiry and negotiation on construction standards and the form of a master pole attachment agreement must take place before the attacher has enough information to create the application. While most utilities will accommodate such negotiations before receipt of a formal application, they are not subject to the Commission timelines and there is no enforced sense of urgency imposed on the pole owner. Consequently, these negotiations can take many months or even years.

While these "pre-application" steps may not seem overly burdensome, the delay they cause are significant. Further, when Crown Castle must undertake this "pre-application" process for thousands of poles, its ability to deploy broadband infrastructure is substantially hindered.

Since utilities are inappropriately imposing “pre-application” requirements on Crown Castle outside of the Commission’s four-stage pole attachment timeline, Crown Castle urges the Commission to adopt a rule that clearly prohibits pole owners from attempting to evade the timelines by imposing additional steps. The Commission should adopt a rule clearly prohibiting evasions of the timeframes and clarifying that pole owners must accept permit applications without “pre-application” processes that purport to be outside the timeframe.

Although the Commission has previously held that the timeframe starts upon submission of a “complete” application, the increasing use of allegedly “pre-application” mechanisms to delay starting the clock indicate that the Commission should revise its rules. Crown Castle suggests the Commission amend its pole rule to follow its wireless Shot Clock and Section 6409 rules. The timelines should start immediately upon submission of a request to attach – regardless of how characterized by the pole owner. If the pole owner contends the application is incomplete, it must notify the applicant in writing within 10 days in order to stop the clock, and such notification must identify the specific requirements in the pole attachment agreement or applicable attachment rules that are missing.

At a minimum, the Commission should clarify that all of these types of extra administrative steps imposed by the pole owner count against the 45 days.

2. Survey, Cost Estimate, and Acceptance

a. Eliminate The Fourteen Day Estimate Period

Crown Castle supports the elimination of the of the 14-day cost estimate phase of the pole attachment timeline. When the Commission adopted the four-stage pole attachment timeline in 2011, it allotted an initial 45-day period where “the pole owner conducts an engineering study to determine whether and where attachment is feasible, and what make-ready

is required.”²² An inherent part of conducting such an engineering study to determine what make-ready work is required is determining the potential costs of such work. Thus, the additional 14-day cost estimate phase is superfluous, unnecessary, and only acts to prolong the pole attachment process. Therefore, to streamline and promote an efficient pole attachment timeline, the Commission should eliminate the 14-day cost estimate phase and explicitly include the cost estimate as part of the initial engineering survey phase of the timeline. Subsequent to the completion of the engineering survey phase of the timeline, the attaching entity should then be permitted 15 days to either accept or reject the pole-owner’s proposed costs to complete the make-ready work. Under this proposal, the pole-attachment timeline will be shortened by two weeks, which over the course of time represents a significant step forward in promoting streamlined and efficient deployment of broadband infrastructure.

b. Need For Detailed Make-Ready Cost Estimates

In addition Crown Castle also agrees with the Commission that additional transparency is needed and will lead to more efficient pole attachments.²³ To assist attaching entities in determining whether the costs associated with attaching to a pole are “just and reasonable,” consistent with Section 224, Crown Castle recommends that the Commission require pole owners to provide a breakdown of the pole owners’ “actual costs” in the cost estimate for make-ready work. In this respect, Crown Castle also supports the Commission’s proposal to codify the existing law that limits make-ready fees to the actual costs incurred to accommodate a new attachment.²⁴

In Crown Castle’s experience, many utilities, including ILECs, will provide Crown

²² *2011 Pole Attachment Order*, ¶ 22.

²³ *NPRM*, ¶ 27.

²⁴ *NPRM*, ¶ 35.

Castle only an overall estimate of the costs of attaching, but refuse to give a pole-by-pole breakdown of the work and costs. By only providing a consolidated estimate of the costs of allegedly required make-ready, utilities may potentially include costs that are unnecessary, inappropriately inflated, or that attaching entities could easily avoid.²⁵

Crown Castle urges the Commission to adopt a rule that requires pole owners to provide attaching entities specific cost estimate broken down on a pole-by-pole basis. Doing so would level the playing field in negotiations between attaching entities and pole owners by giving attaching entities visibility on the front end of a pole attachment project to determine where the most expensive parts of the project lie and how they may be avoided. Therefore, attaching entities would no longer be subject to a “take it or leave it” policy from pole owners, and could either determine whether the pole owner is unlawfully inflating the make-ready cost or negotiate around expensive aspects of pole attachment projects. Such a rule would be consistent with Section 224 by ensuring adequate notice and that all aspects and costs of the pole attachment process are “just and reasonable.”

c. Large Applications

Crown Castle also believes that the Commission should amend its timeframe by eliminating the additional time allowed in the survey stage for “large” orders. Crown Castle has encountered utilities that attempt to manipulate Crown Castle’s ability to submit large orders for pole attachments, thereby undermining the Commission’s streamlined pole attachment processes. For example, many utilities put a limit on the total number of pole attachment applications they will accept in a 30-day period. Other utilities will manipulate the process by limiting the total number of poles, or total amount of linear feet, they will accept over defined periods of time.

²⁵ See *Cavalier Telephone, LLC v. Virginia Electric and Power Co.*, 15 FCC Rcd 9563 (2000) (finding that the attaching party was being required to pay for make ready that was not necessary for the accommodation of its attachments).

These limits are designed to spread processing pole attachments over multi-year periods so utilities can avoid having to hire extra personnel to process applications in peak periods. They are entirely arbitrary, and they undermine the Commission's goal to accelerate the deployment of next-generation infrastructure.²⁶

Although Crown Castle recognizes that utilities should not be expected to maintain staff for large pole attachment projects that may only happen occasionally and without predictability, there is an option for prompt processing. Crown Castle recommends that the Commission adopt a rule under which the attaching party would have the right to elect up front to pay for the use of utility-approved contractors to process the applications rather than having the timeframes extended. If the attaching party chooses not to hire contractors, then the current extensions can continue. But this approach would put the power of time in the hands of the attaching party.

3. Make-Ready

In the NPRM, the Commission recognizes that the make-ready process is a significant part of the attachment and deployment process. Yet, it is an activity that existing attaching entities are not necessarily focused on. They have their facilities attached and are concerned about potential harm that could cause service outages. At the same time, other than the electric company and ILEC, all other entities attached to a pole were, at some not too distant point, the company seeking to attach new facilities and having to deal with make-ready delays, costs, and obstructions.²⁷ As both a currently attached entity and a company actively seeking to deploy,

²⁶ NPRM, ¶ 5.

²⁷ See, e.g., *Texas Cable & Telecommunications Association, et al. v. Entergy Services, Inc.*, 14 FCC Rcd 9138 (1999) (finding unjust and unreasonable make-ready costs imposed by the utility on cable providers); *Cavalier Telephone, LLC v. Virginia Electric and Power Company*, 15 FCC Rcd 9563 (2000) (finding that the utility "cannot use its control of its own facilities to impede [the competitive provider's] deployment of telecommunications facilities"); *Knology, Inc. v. Georgia Power Company*, 18 FCC Rcd. 24615 (2003) (finding that "an attacher may not be

Crown Castle appreciates the concerns and interests of both sides of the issue.

As the following discusses, Crown Castle generally supports proposals to expedite make-ready by putting more control into the hands of the party seeking to attach, but only if appropriate safeguards are included. The concepts are easily supported, but the details are critical to actual implementation.

a. Shortening The Current Timeline

Crown Castle supports the Commission's proposal to adopt as a rule its 2011 "best practice" make-ready period of 30 days or less, but the 30 day period should not be limited to orders under a certain size.²⁸ Adopting the 30 day period as a rule will help fulfill the Commission's goal "to shorten the make-ready work timeframe."²⁹ Crown Castle often encounters pole owners and other attaching parties that do not prioritize make-ready work. We recognize utilities have many priorities and responsibilities, but the lack of prioritization results in countless delays in the pole attachment process. The adoption of a shorter make-ready period will promote the efficient completion of make-ready work.

Furthermore, as also discussed above, the longer timelines afforded in the case of large pole attachment requests and for wireless make-ready work above the communications space add even more delay in the pole attachment process and should be eliminated.³⁰ As proposed above, Crown Castle recommends that the Commission give the attaching party the option of agreeing

billed for unnecessary, duplicative or defective make-ready work"); *Cable Television Association of Georgia, et al. v. Georgia Power Company*, 18 FCC Rcd 16333 (2003) (finding that utilities should first incur make-ready costs, and then seek reimbursement from attachers for the actual make-ready costs); *Salsgiver Communications, Inc. v. North Pittsburgh Telephone Company*, 22 FCC Rcd 20536 (2007) (finding that utilities must give attachers an opportunity to review the estimated costs of make-ready work before agreeing to the work).

²⁸ *NPRM*, ¶ 11.

²⁹ *NPRM*, ¶ 11.

³⁰ *See* 47 CFR §§ 1.1420(e)(2)(ii), 1.1420(g).

to pay for approved contractors to perform the work on “large” projects, and if the party makes that election, there should be no additional time for “large” projects.

Allowing the attaching party to choose to use utility-approved contractors for wireless attachments in the electric space, likewise, eliminates any basis for giving utilities an additional 30 days to perform such make-ready. Indeed, the fundamental rationale for such extra time is extremely suspect at this point. In the 2011 Order, the Commission justified the additional time, in no small part, on the assertion that “at present, there is less experience with application of state timelines to attachments at the pole top, and in those circumstances, it is appropriate to err on the side of caution.”³¹ Although Crown Castle does not agree with this explanation in 2011, the justification certainly is no longer valid in 2017. Crown Castle and other companies have safely installed thousands of pole top wireless attachments. The NESC has even been modified to recognize that the installation of wireless antennas at the pole top will only be accomplished by qualified electrical workers, making excessive clearances unnecessary. Indeed, the 2017 Edition of the NESC provides for clearance between antennas and supply lines of only 6 inches for lines with voltages of 8.7kV and only 22 inches even at 50kV.³² Fundamentally, wireless installations on pole tops and in the communications space are no longer the unusual event that utilities were claiming before 2011.

When coupled with a Commission-defined make-ready period of 30 days, the use of utility-approved contractors to complete make-ready work would make for an efficient and predictable pole attachment process.

b. Use Of Approved Contractors In Electric Space

Another part of the Commission’s 2011 timeline rules that create a significant

³¹ *2011 Pole Attachment Order*, ¶ 33.

³² NESC Table 235-6 ln. 1.c.

impediment to timely make-ready is the rule preventing companies from using approved contractors to complete make-ready in the electric space. Under the current rules, if make-ready work in the communications space is not timely completed, Crown Castle has a remedy to use approved contractors to finish the work.³³ But if the make-ready work is in the electric space, Crown Castle does not have the same remedy. This is a significant gap in the Commission's rules that leaves Crown Castle without a meaningful remedy when the electric utility fails to perform make-ready work in a timely fashion. Unfortunately, such failures are increasingly common.

The Commission should not leave attaching parties without any meaningful remedy when utilities fail to perform electric space make-ready in a timely fashion. Crown Castle suggests the Commission modify its rules to allow attaching parties to use utility-approved contractors for all aspects of make-ready work, not just communications space make-ready work. Utility-approved contractors frequently are already performing make-ready work at the direction of utilities themselves, so a rule allowing attaching entities the ability to use the very same utility-approved contractors to complete pole replacements and transfer work would not drastically alter the pole-attachment ecosystem. In fact, such a rule should cause minimal concern for utilities and attaching entities alike, and would significantly shorten the make-ready work timeframe.

Additionally, by utilizing the same contractors used by the utility to perform make-ready work, any concern over compliance with safety standards should be minimized for the utility and the attaching entity alike.

³³ *2011 Pole Attachment Order*, ¶¶ 49-61 (stating that “if a utility does not meet the deadline to complete a survey or make-ready established in the timeline, an attacher may hire contractors to complete the work in the communications space”); *See also* 47 C.F.R. § 1.1420.

c. Improving Transparency, Data Availability, And Notifications

In the NPRM, the Commission also appears to recognize that the lack of availability of information and transparency into utility company information is an impediment to deployment.³⁴ Crown Castle agrees.

For example, a significant problem with completing make-ready within the Commission's timeframes is lack of information about existing attachments and also notification of existing attaching entities. Crown Castle has encountered pole owners that refuse to notify attaching parties of need for make-ready work and put the notification burden on Crown Castle. Disregarding the fact that pole owners are required by the Commission's rules to ensure notification of make-ready work to all other attachers,³⁵ the issue with utilities imposing this burden on Crown Castle is that Crown Castle lacks necessary information – or access to the information – to know what other entities may have attachments on the relevant poles. As a result, Crown Castle is unable to timely complete the notifications.

In order to avoid unnecessary delay in the make-ready process, Crown Castle proposes that the Commission recommend the adoption of automated databases and notifications systems, such as those provided by NJUNS,³⁶ as a “best practice” for all utilities. NJUNS, for example, is a “not-for-profit consortium of utility companies created for the purpose of providing ‘efficient utility communication.’ NJUNS provides software as a service that allows its members to communicate and track field workflow regarding joint utility ventures: joint pole administration,

³⁴ *NPRM*, ¶ 27

³⁵ *See* 47 C.F.R. § 1.1420(e).

³⁶ *NJUNS Efficient Utility Communication*, NJUNS, available at <https://web.njuns.com/> (last visited on June 15, 2017).

joint trench coordination, oversize load move coordination and large project notification.”³⁷

An automated make-ready notice system will help eliminate the current problems of timely notice to all attaching parties. It will also streamline the attachment process, in general, by providing attaching parties more information about the status of poles. It may significantly reduce the survey process. Some utilities are adopting systems like NJUNS to process all their pole attachment applications, and by tying this to make-ready notification to other attachers, information on next steps required will be made available to all who need it. It would also reduce the burdens imposed on utilities by the Commission’s rules thereby streamlining the make-ready process.

d. The Need To Complete All Make-Ready Needed To Activate Service

An additional impediment to achieving the Commission’s goal “to shorten the make-ready work timeframe”³⁸ is the failure by electric utilities to timely complete electric power activation of attachments. Like some other communications attachments, Crown Castle’s equipment requires electricity to function. Because of its location on the poles, power connections – sometimes including power line extensions and meters or other methods to monitor power consumption – must be installed.³⁹

If make-ready, and ultimately a guaranteed right to use poles under Section 224(f), are to be meaningful, at the end of the process, the attaching entity must have everything done at the

³⁷ *Id.*; *About NJUNS*, NJUNS, available at <https://web.njuns.com/about/> (last visited on June 15, 2017).

³⁸ *NPRM*, ¶ 11.

³⁹ Crown Castle has had to undertake extraordinary measures to bring power to its attachments in the past. Bringing power from a source of electricity to the poles is often extremely time consuming and resource intensive. For example, Crown Castle has spent approximately \$1 million bringing power to a single pole in the past. These measures could be remedied if utilities begin to monitor Crown Castles’ power consumption through a use of a small meter on or near the pole.

pole that is necessary for it to provide service. Yet, Crown Castle has encountered significant delays by electric utilities who take months to make the final electricity attachments to activate Crown Castle's equipment. Indeed, Commissioner O'Reilly specifically recognized the problem of broadband deployment being thwarted by electric companies refusing to timely activate attachments in his May 31, 2017 tweets.⁴⁰ The Commission's make-ready timelines are meaningless and easily thwarted if the electric utility is not required to perform all necessary actions to permit activation of all attachments. Therefore, Crown Castle urges the Commission to recognize electric power activation of attachments as part of the make-ready work that must be completed within the Commission's defined timeframe. Without such recognition, regardless of the timeframes to complete make-ready work adopted by the Commission, activation of attachments will be subject to the whims of electric utility thereby thwarting the efficient and predictable deployment of broadband infrastructure and rendering pole access ineffective.

C. Alternative Pole Attachment Processes

In the NPRM, the Commission seeks comment on possible alternatives to the Commission's current process, and the potential remedies, penalties, or other ways to incent utilities and existing attachers.⁴¹ In considering such alternatives, the Commission recognizes the need to balance the benefits of potential alternatives against safety and property concerns.⁴² In its consideration of alternative pole attachment processes, the Commission must reach a resolution that facilitates timely deployment of broadband facilities while also ensuring appropriate risk manage, liability, oversight and remedies for existing attachers consistent with

⁴⁰ Commissioner Mike O'Reilly, Twitter (8:08 AM – 31 May 2017) *available at* <https://twitter.com/mikeofcc/status/869933584143888384>.

⁴¹ *NPRM*, ¶ 13.

⁴² *Id.*

Section 224 of the Communications Act.

Crown Castle currently has approximately 1 million existing utility pole attachments nationwide. Accordingly, Crown Castle shares the same concerns as other existing attachers that are concerned about potential damage and service outages that can result from third-party make-ready work that moves and impacts existing attachments. Indeed, Crown Castle has experienced situations where utilities have moved Crown Castle's attachments without using Crown Castle-approved contractors, and there have been times where these unapproved third-party contractors damage Crown Castle's facilities, do not properly re-attach Crown Castle's equipment, and cause network outages. In addition to concerns about immediate damage, such improper work also could potentially move Crown Castle's facilities into violation of the NESC and/or other applicable regulations or standards.

At the same time, Crown Castle is aggressively pursuing the deployment of new wireless and wireline facilities.⁴³ As the Commission has noted, removal of barriers to infrastructure investment and deployment is crucial to fostering innovation and economic opportunity across all sectors of industry.⁴⁴ Unfortunately, as discussed above, Crown Castle has encountered significant delays in the make-ready process when utilities and existing attachers fail to complete make-ready work in a timely manner. Accordingly, Crown Castle supports the evaluation of

⁴³ See, e.g. *All Crown Castle Projects*, Crown Castle, <http://www.crowncastle.com/projects/all-projects.aspx> (last visited on June 15, 2017).

⁴⁴ *2011 Pole Attachment Order*, ¶¶ 2-3; See *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform – Mobility Fund*; WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17633, ¶¶ 2-5 (2011); See also Ajit Pai, *On the Road in the Industrial Midwest*, FCC Blog, March 20, 2017, available at <https://www.fcc.gov/news-events/blog/2017/03/20/road-industrial-midwest>.

alternative make-ready processes to help speed access to poles for new entrants.

Crown Castle generally supports the processes that are loosely termed “one-touch” make-ready. However, Crown Castle believes the Commission should carefully evaluate the details of such plans to reach an alternative process that will facilitate deployment while protecting the legitimate interests of existing attachers.

1. Use Of Approved Contractors

In general, as also mentioned above, Crown Castle supports proposals to change the Commission’s rules to give attaching entities more opportunities to use approved contractors. When a new competitor seeks to attach new facilities, understandably, engaging in make-ready to move existing attachments is low on the priority list for existing attachers, including the electric utility. Even if there is no anti-competitive motive, the reality is that engaging in make-ready may be viewed by the pole’s current occupants as a distraction that may be of no benefit to them while imposing inconvenience and cost.

Crown Castle believes that allowing new attachers greater opportunity to use approved contractors can promote more rapid completion of make-ready while also addressing some concerns of existing attachers. For example, in some cases, existing attachers may complain that there is an inherent cost to them of engaging in make-ready, even if they will be reimbursed for incurred costs in the end. But if they are not required to engage in any part of the make-ready process, then those existing attachers will avoid up-front cost or inconvenience.

One key issue in such a scheme is the ability of attaching entities to approve the contractors. For example, Crown Castle, in its role as an existing attacher, has encountered problems when new attachers use contractors who are not Crown Castle-approved. Accordingly, in order for attaching entities to have the opportunity to use approved contractors, Crown Castle generally supports proposals that would require the pole owner and all existing attachers to agree

to contractors that a new attacher would be allowed to use.⁴⁵ The ability of the pole owner and existing attachers to vet contractors will help provide greater comfort that work will be performed properly.

2. Penalties For Failure To Timely Perform Make-Ready

The Commission seeks comment on at least one proposal that would impose a \$500 per pole per month penalty for existing attachers who fail to timely complete make-ready.⁴⁶ Crown Castle does not support proposals where existing attachers would be “fined” \$500, or any other amount of money, for failing to meet required make-ready work deadlines. First, the administration, tracking, and enforcement of such fines would simply complicate matters. Do the fines get paid to the new attacher? Is the new attacher required to track the fines? And will the attacher be required to file a complaint in court or at the Commission to recover a fine that may only be a few thousand dollars? Second, a \$500 fine is not going to meaningfully motivate a company that is not engaging in make-ready.

Finally, from the perspective of the entity seeking to attach to the pole, fines are not an effective remedy to speed deployment of broadband infrastructure. To help achieve the Commission’s goal to accelerate the deployment of next-generation infrastructure,⁴⁷ it would be far more effective to allow new entrants more opportunities to utilize approved third-party contractors to perform the make-ready work. A proposal that requires the imposition of fines for failure to perform make-ready work only complicates the pole attachment processes and strays further from the Commission’s stated goals.

⁴⁵ *NPRM*, ¶ 17.

⁴⁶ *NPRM*, ¶ 25.

⁴⁷ *NPRM*, ¶ 5.

D. Access To Conduit

Crown Castle supports the Commission's proposal to incentivize utilities to make conduit information publically available.⁴⁸ In Crown Castles' experience, despite the Commission's existing requirements,⁴⁹ utilities are slow to provide data on available conduit, and some utilities in particular refuse to make their conduit maps available at all. Because of the lack of data on the availability of conduits, Crown Castle is often left with no option other than trial and error when determining where to deploy its broadband infrastructure. Particularly in congested areas, Crown Castle is unable to optimize the design of its broadband infrastructure deployment, which results in wasted resources and delayed deployment of facilities. Therefore, Crown Castle supports the Commission's proposal to require conduit owners to make information regarding conduits publically available.⁵⁰ If this information about location and availability of conduit were made available in an easy-to-use format it would significantly assist Crown Castle and other competitive providers in accessing conduit and would speed deployment of broadband infrastructure.

As discussed above in the pole context, this may be another situation where requiring – or at least strongly recommending – use of a central database or online portal would be tremendously helpful.

Crown Castle has also experienced particular difficulty accessing electric conduit. In its *2000 Pole Order*, the Commission rejected arguments by electric utilities claiming that communications lines cannot occupy electric conduit.⁵¹ Nonetheless, certain electric utilities

⁴⁸ *NPRM*, ¶ 27.

⁴⁹ 47 C.F.R. § 1.1404(j); *Local Competition Order*, ¶ 1223.

⁵⁰ *NPRM*, ¶ 27.

⁵¹ *Amendment of Rules and Policies Governing Pole Attachments*, 15 FCC Rcd 6453, ¶¶ 85, 94-

have completely refused to grant Crown Castle any access to their electric conduit. The Commission should clarify, again, that electric conduit must be made available to competitive providers in order to foster the efficient deployment of broadband infrastructure.

E. The Commission Should Emphasize That Section 253 Mandates Access to Municipally-Owned Poles

In the NPRM, the Commission recognizes that providers encounter difficulties accessing poles owned by entities not governed by Section 224, such as local governments and cooperatives.⁵² And the Commission asks what action it might take undertake to speed deployment even though such entities are not subject to Section 224.⁵³

Crown Castle has encountered difficulty obtaining access to municipally owned poles, as a threshold matter and also on reasonable terms and conditions. For example, Crown Castle has been working to secure access to poles in two municipalities for over 18 months, and still does not have any attachment agreement of any kind. Similarly, Crown Castle has recently encountered a significant increase in local governments seeking to leverage their ownership of poles and control over the public rights of way to impose unreasonable rates. At least one major city is on the verge of imposing a regulatory scheme under which ownership of any new pole installed in the public rights of way must be deeded to the city, and then the provider must pay the city annual rental in excess of \$1,000 per year. In other words, the city is using its control over the public rights of way to force providers to use only city-owned poles, and then enriching itself with excessive rental demands.

95 (2000) (finding electrical conduits are subject to the same access rules imposed on poles and other utility-owned conduits, and finding electrical conduits may safely be used by several occupants).

⁵² *NPRM*, ¶ 30.

⁵³ *Id.*

The Commission should adopt a rule, or at least a declaratory ruling, holding that access to municipal poles is governed by Section 253 of the Act, and that local governments cannot deny access to their poles or impose unreasonable or discriminatory fees for their use. Contrary to arguments by local governments that access to their poles is “proprietary” and therefore immune from Section 253, local governments are using access to their poles as a part of controlling access to the public rights of way, and it is done through their regulatory powers. Generally, if Crown Castle is seeking to use local government poles, it is because there are no utility-owned poles in the area and the local government will not allow Crown Castle to install its own pole. In such situations, access to the public rights of way is only possible through access to the local government’s poles. In effect, access to the municipal poles is access to the public rights of way. If Crown Castle is denied access to those poles, or denied access on reasonable rates, terms, and conditions, it is effectively prohibited from providing telecommunications service in violation of Section 253.

Moreover, the cities’ focus on the “proprietary” label is misplaced. The relevant legal issue is that they are exercising their governmental authority. Contrary to the local government’s arguments, courts have not held that Section 253 does not apply to “proprietary” interests. Section 253(a) preempts any local government “regulation, or any other . . . legal requirement. . . .”⁵⁴ Thus, whether the city’s actions are “proprietary” or not is irrelevant under Section 253.

In *State of Minnesota*,⁵⁵ the Commission addressed an attempt by the State of Minnesota to enter into an agreement granting to a single entity the exclusive right to construct fiber in the State’s rights-of-way. The State argued that the agreement was not a “legal requirement” under Section 253(a), and thus not within the limitations of the statute. The Commission rejected the

⁵⁴ 47 U.S.C. § 253(a).

⁵⁵ 14 FCC Rcd 21697, 21705, ¶¶ 12-18 (1999).

argument, interpreting the scope of Section 253(a)'s "legal requirement" language to be broad, and specifically holding that Section 253(a) does not limit its preemptive effect to "regulations":

We conclude that Congress intended that the phrase, "State or local statute or regulation, or other State or local legal requirement" in section 253(a) be interpreted broadly. The fact that Congress included the term "other legal requirements" within the scope of section 253(a) *recognizes that State and local barriers to entry could come from sources other than statutes and regulations*. The use of this language also indicates that section 253(a) was meant to capture a broad range of state and local actions that prohibit or have the effect of prohibiting entities from providing telecommunications services. We believe that interpreting the term "legal requirement" broadly, best fulfills Congress' desire to ensure that states and localities do not thwart the development of competition.⁵⁶

Thus, the plain language of Section 253(a) emphasizes that it does not apply only to "regulatory" actions by cities or exempt "proprietary" actions.

Even looking at the proprietary/regulatory distinction is not determinative. Applying the Supreme Court's precedent, the Fifth Circuit in *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, articulated the following test for evaluating whether "a class of government interactions with the market [is] so narrowly focused, and so in keeping with the ordinary behavior of private parties, that a regulatory impulse can be safely ruled out":

(1) whether "the challenged action essentially reflects the entity's own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances," and (2) whether "the narrow scope of the challenged action defeats an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem."⁵⁷

Applying that standard, local requirements governing access to the public rights-of-way are clearly regulatory in nature, not "proprietary." When cities impose requirements on telecommunications providers accessing the public rights of way, the demands do not reflect the

⁵⁶ *Id.* at 21707, ¶ 18 (emphasis added) (internal footnotes omitted).

⁵⁷ *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686, 693 (5th Cir. 1999); see also *Sprint Spectrum, L.P. v. Mills*, 283 F.3d 404, 420 (2d Cir. 2002).

local government's own interest in its efficient procurement of needed goods and services. The local government is imposing a general policy.

The analysis also extends to city-owned poles. For example, in *NextG Networks of NY, Inc. v. City of New York*,⁵⁸ the court rejected New York City's argument that its requirements for access to city-owned street light poles were exempt from Section 253. The court recognized that the city's scheme for allowing access to city-owned poles was not narrow and instead fundamentally reflected the city's management of access to the public rights-of-way. Accordingly, the court concluded that access to city-owned poles was subject to Section 253's limits.

Consequently, Section 253 regulates access to municipally-owned poles, and the Commission should adopt a rule stipulating as such.

III. THE COMMISSION SHOULD REITERATE ITS PRIOR INTERPRETATIONS OF SECTION 253 AND SHOULD FORMALIZE ITS INTERPRETATIONS IN RULES

Crown Castle agrees with the Commission's view in the *Notice of Inquiry* portion of the NPRM that some state and local regulations imposing restrictions on broadband deployment may effectively prohibit the provision of telecommunications service.⁵⁹ Crown Castle encourages the Commission to use its authority under Section 253 to enact rules that formalize interpretations of Section 253 set forth in the Commission's decisions as well as the many court decisions that followed the Commission's lead. Adopting rules to clarify the scope of local authority under Section 253 will fulfill the Commission's mandate to eliminate unnecessary regulation and

⁵⁸ *NextG Networks of N.Y., Inc. v. City of New York*, 2004 U.S. Dist. LEXIS 25063, at *16-18 (S.D.N.Y. 2004) (holding that City's requirements and fees for use of city-owned poles "are not of a purely proprietary nature, but rather, were taken pursuant to regulatory objectives or policy").

⁵⁹ *NPRM*, ¶ 101.

promote the deployment of advanced telecommunications services by eliminating local regulations that prohibit competition and deployment.

A. The Commission Has the Authority to Issue Rules Interpreting and Implementing Section 253

Congress passed the 1996 Act to establish “a pro-competitive, deregulatory national policy framework” for the telecommunications industry, and “to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans *by opening all telecommunications markets to competition.*”⁶⁰ The Conference Committee Report explained that the purpose of the statute is to provide for a “pro-competitive, de-regulatory national policy framework.”⁶¹ In Section 706 of the 1996 Act (codified at 47 U.S.C. § 157), Congress directed the Commission to “encourage the deployment . . . of advanced telecommunications capability to all Americans . . . by utilizing . . . measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.”⁶² Section 706(b) directs the Commission to undertake regular inquiries into the availability of advanced telecommunications capabilities, and if the Commission finds that advanced telecommunications capabilities are not being deployed to all Americans, Section 706(b) requires the Commission to “take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.”⁶³

Section 253 is a cornerstone to implementing the policy goals of the 1996 Act, providing

⁶⁰ S. Rep. No. 104-230, at 1 (1996) (Conf. Rep.) (emphasis added).

⁶¹ *Id.*

⁶² Pub. L. No. 104-104, § 706(a), 110 Stat. 153 (1996) (reproduced in the notes under 47 U.S.C. § 157).

⁶³ Pub. L. No. 104-104, § 706(b), 110 Stat. 153 (1996) (reproduced in the notes under 47 U.S.C. § 157).

that “[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”⁶⁴ By enacting Section 253, Congress gave due consideration to the potential conflict between state and local government regulation and the national need for deployment of advanced telecommunications and information technologies. In Section 253(a), Congress stated a broad general rule preempting local and state regulation. State and local governments generally were preempted from hindering market entry. To retain some state and local regulatory involvement, Congress reserved in Section 253(b) and Section 253(c) specific areas for state and local oversight. In Section 253(b), Congress reserved only to states the authority to adopt “requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.”⁶⁵ Section 253(c) reserves limited authority to local governments to “manage the public rights-of-way . . . on a competitively neutral and nondiscriminatory basis. . . .”⁶⁶ This statutory structure has been recognized to provide a broad preemption of local requirements and a narrow reservation of authority to municipalities.⁶⁷ As the Commission explained in the *Texas PUC Order*, “[t]hrough this provision, Congress sought to ensure that its national competition policy for the telecommunications industry would indeed be the law of the land and could not be frustrated by the isolated actions of individual municipal authorities or states.”⁶⁸

⁶⁴ 47 U.S.C. § 253(a) (emphasis added).

⁶⁵ 47 U.S.C. § 253(b).

⁶⁶ 47 U.S.C. § 253(c).

⁶⁷ See, e.g., *TCI Cablevision of Oakland County, Inc.*, 12 FCC Rcd 21396, 21441-43, ¶¶ 103-109 (*TCI Cablevision*).

⁶⁸ *In the Matter of the Public Utility Commission of Texas, the Competition Policy Institute*,

In the *Notice of Inquiry*, the Commission asks whether the adoption of rules to interpret or implement Section 253 would be consistent with Section 253(d), which grants the Commission preemptive authority over local regulations that violate Section 253(a) and (b). As courts have recognized, the Commission's ability, through Section 253(d), to address specific circumstances on a case by case basis does not otherwise preclude the Commission from adopting rules to interpret and implement Section 253.

The Supreme Court held in *AT&T Corp. v. Iowa Utilities Board* that the Commission has broad authority to interpret the 1996 Act, and this authority extends beyond those provisions giving the Commission an adjudicatory role.⁶⁹ Even where Congress explicitly provided for a judicial remedy in a federal or state court, the Commission has the authority to issue interpretive rulings of the provisions of the Communications Act and its amendments (including the 1996 Act).⁷⁰ The Sixth Circuit addressed this precise issue in *Alliance for Community Media v. FCC*. In that case, the Commission released an order adopting rules interpreting and implementing Section 621(a)(1) of the Communications Act, which prohibits local franchising authorities from “unreasonably refus[ing] to award” competitive cable franchises.⁷¹ The petitioners seeking to overturn the Commission's order in that case argued that because Congress specifically provided

Intelcom Group (USA), Inc. and ICG Telecom Group, Inc., AT&T Corp., MCI Telecommunications Corporation, and MFS Communications Company, Inc., Teleport Communications Group, Inc., City of Abilene, Texas, Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995, 13 FCC Rcd 3460, 3463, ¶ 3 (1997) (*Texas PUC Order*).

⁶⁹ *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 377-78 (1999) (*Iowa Utils. Bd.*).

⁷⁰ See, e.g., *Alliance for Cmty. Media v. FCC*, 529 F.3d 763, 775 (6th Cir. 2008) (*Alliance for Community Media*) (citing *Iowa Utils. Bd.*, 525 U.S. at 385 (“assignment[]” of the adjudicatory task to state commissions did not “logically preclude the [FCC]'s issuance of rules to guide the state-commission judgments”)); *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 133 S. Ct. 1863 (2013).

⁷¹ 47 U.S.C. § 541(a)(1).

for a judicial remedy under Section 621 and did not otherwise expressly reference the agency, the Commission lacked authority to issue the interpretive order.⁷² The Sixth Circuit disagreed and, relying on *Iowa Utilities Board*, held that “the FCC possesses clear jurisdictional authority to formulate rules and regulations interpreting the contours of Section 621(a)(1)” and “the statutory silence in Section 621(a)(1) regarding the agency’s rulemaking power does not divest the agency of its express authority to prescribe rules interpreting that provision.”⁷³ A similar conclusion was reached more recently by the Fifth Circuit in the challenge to the Commission’s *Shot Clock Order*, in which the Commission issued a declaratory ruling interpreting the language of Section 332(c)(7) regarding reasonable time frames for acting on wireless facility siting applications.⁷⁴ Relying on *Alliance for Community Media*, the Fifth Circuit concluded that “there is nothing inherently unreasonable about reading § 332(c)(7) as preserving the FCC’s ability to implement § 332(c)(7)(B)(ii) while providing for judicial review of disputes under § 332(c)(7)(B)(ii) in the courts.”⁷⁵

While adjudicatory proceedings pursuant to Section 253(d) will remain available for specific circumstances on a case by case basis, the Commission can and should adopt rules in this proceeding to settle the patchwork of local requirements that impede deployment.

B. The Commission’s and Courts’ Initial Interpretation Of Section 253 Correctly Reflected The Deregulatory Intent Of The 1996 Act

Although Section 253 was enacted as a cornerstone of Congress’ intention to limit the authority of states and local governments over telecommunications, and despite clear guidance from the Commission in early cases, judicial interpretation and application of Section 253 has

⁷² *Alliance for Community Media*, 529 F.3d at 773.

⁷³ *Id.* at 774.

⁷⁴ *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff’d*, 133 S. Ct. 1863 (2013).

⁷⁵ *Id.* at 251 (internal quotation marks and citations omitted).

not been uniform, particularly in recent cases. As a result, companies such as Crown Castle have encountered increasing barriers from local government demands and requirements. To prevent a parochial patchwork of requirements from thwarting the deployment of critical, advanced technologies and services, the Commission should adopt rules that interpret and implement Section 253 and, in so doing, effectuate Congress' deregulatory vision.

Cases decided by the Commission and the courts shortly after passage of the 1996 Act correctly reflected the intention of Congress to let competition, not parochial local interests and regulations, determine which providers and technologies would successfully compete in the marketplace. The standard adopted in those cases recognized that Section 253(a) does not require the provider to show a complete, "insurmountable" prohibition in order for a local regulation or requirement to run afoul of Section 253. Rather, the Commission and courts gave effect to the language of Section 253(a) that preempts not only local requirements that "prohibit" but also requirements that "have the effect" of prohibiting. For example, in *Classic Telephone, Inc.*, the Commission emphasized that with Section 253 Congress intended to eliminate impediments to deployment by *all* entities.⁷⁶ The market, not local regulations, was to determine success in the marketplace:

As explained in the *Local Competition First Report and Order*, under the 1996 Act, the opening of the local exchange and exchange access markets to competition "is intended to pave the way for enhanced competition in all telecommunications markets, by allowing *all* providers to enter *all* markets." Section 253's focus on State and local requirements that may prohibit or have the effect of prohibiting any entity from providing any telecommunications services complements the obligations and responsibilities imposed on telecommunications carriers by the 1996 Act that are intended to "remove not only statutory and regulatory impediments to competition, but *economic and operational impediments* as well." *Congress intended primarily*

⁷⁶ *Classic Telephone, Inc.*, 11 FCC Rcd. 1308, 13095-96, ¶ 25 (1996) (*Classic Telephone, Inc.*).

*for competitive markets to determine which entrants shall provide the telecommunications services demanded by consumers, and by preempting under section 253 sought to ensure that State and local governments implement the 1996 Act in a manner consistent with these goals.*⁷⁷

In *TCI Cablevision*, the Commission reiterated that Section 253 was intended to limit the authority of local governments, in particular, noting that a “third tier” of regulation that impedes deployment was contrary to Section 253.⁷⁸

In *California Payphone*, the Commission articulated a standard for evaluation of whether a requirement “has the effect” of prohibiting service under Section 253(a). The Commission stated that it considers “whether the Ordinance materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.”⁷⁹ Notably, the Commission’s *California Payphone* articulation required only that the requirement “inhibit” or “limit” the telecommunications provider—not that it completely bar service in all scenarios. Likewise, the Commission’s standard effectuated the intention of Congress by focusing on whether the local requirement limits the ability of any entity to compete in a “fair and balanced” regulatory environment. In other words, new entrants or certain types of providers are not allowed to be targeted with regulations not imposed on others (notably incumbents).

Following the same approach, in the 1999 *Minnesota Order*, the Commission⁸⁰ emphasized that Section 253(a) bars any state or local action that *impedes* competitors’ use of

⁷⁷ *Id.* (emphasis added).

⁷⁸ *TCI Cablevision*, 12 FCC Rcd at 21441, ¶ 105.

⁷⁹ *California Payphone Ass’n*, 12 FCC Rcd 14191, 14206, ¶ 31 (1997) (*California Payphone*).

⁸⁰ *Petition of State of Minnesota for Declaratory Ruling*, 14 FCC Rcd 21697 (1999) (*Minnesota Order*).

any possible market entry methods.⁸¹ Indeed, in the *Minnesota Order*, the Commission stated that “section 253(a) bars state or local requirements that *restrict* the means or facilities through which a party is able to provide service.”⁸² Again, the Commission did not require a complete barrier, but rather, focused on any requirements that restrict the means or facilities for providing services.⁸³

Court treatment shortly after 1996 similarly recognized that Section 253(a) did not require a complete prohibition of service.⁸⁴ Rather, many courts focused on preempting local regulatory schemes that, in combination or on the whole, had the effect of prohibiting entry, including burdensome regulatory schemes that gave local governments unfettered discretion to determine whether a provider could deploy. For example, in *Bell Atlantic-Maryland, Inc. v. Prince George’s County*, in the absence of any single provision that explicitly prohibits entry, the court held that “in combination,” the totality of the obligations imposed by Prince George’s County’s telecommunications ordinance violated Section 253(a) by “hav[ing] the effect of prohibiting” the provision of telecommunications services.⁸⁵

⁸¹ *Id.* at 21717, ¶ 38.

⁸² *Id.* at 21708, ¶ 21 (emphasis added) (citing *Texas PUC Order*, 13 FCC Rcd 3460).

⁸³ *Id.* at 21709, ¶ 23 (focusing on whether requirement has “*the potential to prevent* certain carriers from providing facilities-based services” (emphasis added)).

⁸⁴ *Iowa Utils. Bd.*, 525 U.S. at 370 (under the 1996 Act, states “may no longer enforce laws that *impede* competition”) (emphasis added).

⁸⁵ *Bell Atlantic – Maryland, Inc. v. Prince George’s County, Maryland*, 49 F. Supp. 2d 805, 815 (D. Md. 1999), *vacated on other grounds*, 212 F.3d 863 (4th Cir. 2000), *on remand*, 155 F. Supp. 2d 465 (D. Md. 2001). The Fourth Circuit Court of Appeals vacated and remanded the district court’s ruling on the grounds that the court should have addressed the state law claims in the case first, as their resolution may have mooted the federal law issues. The Fourth Circuit did not address the merits of the district court’s decision. While the district court’s decision has no precedential value, it will be discussed in these comments as indicative of at least one court’s considered interpretation of Section 253.

In *City of Auburn v. Qwest Corp.*,⁸⁶ the Ninth Circuit held that Section 253 is a “virtually absolute” preemption on municipal franchise requirements.⁸⁷ It stated that Section 253’s “purpose is clear—certain aspects of telecommunications regulation are uniquely the province of the federal government and Congress has narrowly circumscribed the role of state and local governments in this arena.”⁸⁸ Applying that standard, the court held that the city’s requirements, as a whole, had the effect of prohibiting the provision of telecommunications service. In particular, the court emphasized that the burdensome application process and the unfettered discretion left to the city had the effect of prohibiting telecommunications service in violation of Section 253.⁸⁹

In *RT Communications, Inc. v. FCC*,⁹⁰ the Tenth Circuit—in a decision affirming the Commission’s decision in *Silver Star Telephone Co.*⁹¹—explicitly rejected the argument that a regulation must be a complete barrier to entry to violate Section 253(a). The court held that “*the extent to which the statute is a ‘complete’ bar is irrelevant.* § 253(a) forbids any statute which

⁸⁶ *City of Auburn, et al. v. Qwest Corporation*, 260 F.3d 1160, 1175-76 (9th Cir. 2001) (*City of Auburn*), overruled by *Sprint Telephony PCS, L.P. v. Cty. of San Diego*, 543 F.3d 571 (9th Cir. 2008) (*Sprint Telephony*). As discussed herein, Crown Castle recognizes that *City of Auburn* was overturned by the Ninth Circuit sitting *en banc*. However, as Crown Castle demonstrates, the Commission should reject the Ninth Circuit’s *Sprint Telephony* decision as incorrectly interpreting Section 253.

⁸⁷ *City of Auburn*, 260 F.3d at 1175.

⁸⁸ *Id.*

⁸⁹ *Id.* at 1178-79.

⁹⁰ *RT Communications, Inc. v. FCC*, 201 F.3d 1264 (10th Cir. 2000) (*RT Commc’ns*).

⁹¹ *Silver Star Telephone Company, Inc. Petition for Preemption and Declaratory Ruling*, Memorandum Opinion and Order, 12 FCC Rcd. 15639 (1997), *recon. denied*, 13 FCC Rcd. 16356 (1998) (*Silver Star Telephone Co.*).

prohibits or has ‘the effect of prohibiting’ entry. *Nowhere does the statute require that a bar to entry be insurmountable before the FCC must preempt it.*”⁹²

The Second Circuit in *TCG New York, Inc. v. City of White Plains*, agreed with the Tenth Circuit’s holding that to violate Section 253(a) a prohibition does not need to be complete or “insurmountable.”⁹³ It also followed the Commission’s standard that an ordinance runs afoul of Section 253(a) if it “materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced regulatory environment.”⁹⁴

In *Qwest Corp. v. City of Santa Fe*, the Tenth Circuit reiterated that to establish a Section 253(a) violation, “[a] regulation need not erect an absolute barrier to entry . . . to be found prohibitive.”⁹⁵ Like other courts, it held that the “cumulative impact” of requirements could be prohibitive.⁹⁶ And most notably, it held that Section 253(a) was violated because the challenged requirements gave the city “unfettered discretion” over whether a company could provide telecommunications service.⁹⁷

In *Puerto Rico Telephone Co. v. Municipality of Guayanilla*, the First Circuit joined the Commission, Second Circuit, and the Ninth Circuit, holding that a requirement “does not need to be complete or ‘insurmountable’ to run afoul of § 253(a).”⁹⁸ It has also adopted the Commission’s formulation that a requirement has the effect of prohibiting telecommunications if

⁹² *RT Commc’ns*, 201 F.3d at 1268 (emphasis added).

⁹³ *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002).

⁹⁴ *Id.* (quoting *California Payphone*, 12 FCC Rcd. at 14206, ¶ 31).

⁹⁵ *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1269 (10th Cir. 2004).

⁹⁶ *Id.*

⁹⁷ *Id.* at 1270.

⁹⁸ *Puerto Rico Telephone Co. v. Municipality of Guayanilla*, 450 F.3d 9, 18 (1st Cir. 2006) (quoting *City of White Plains*, 305 F.3d at 76) (*Puerto Rico Tel.*).

it “materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.”⁹⁹

Therefore, as countless courts have agreed, Section 253(a) does not require the provider to show a complete, “insurmountable” prohibition, and the Commission should adopt rules stipulating as such to “promote the deployment of broadband infrastructure.”¹⁰⁰

1. Recent Decisions Take An Improperly Narrow View Of Section 253 And Undermine Competition

Unfortunately, a few courts have issued decisions that conflict with the cases recognizing that Section 253(a) does not require an insurmountable barrier to entry, and those decisions have diminished the impact of Section 253 to help promote deployment and competition, as Congress intended.

In *Level 3 Communications, L.L.C. v. City of St. Louis*,¹⁰¹ the Eighth Circuit asserted that a company must show “actual or effective prohibition, rather than the mere possibility of prohibition.”¹⁰² Although the Eighth Circuit gave lip service to the proposition that a plaintiff need not show a complete or insurmountable prohibition,¹⁰³ in its analysis, it rejected Level 3’s claims because Level 3 could not show sufficiently specific telecommunications services that it had not been able to provide as a result of the challenged requirements.

The Eighth Circuit’s stringent standard was then further tightened by the Ninth Circuit in *Sprint Telephony PCS, L.P. v. County of San Diego*.¹⁰⁴ In *Sprint Telephony*, the Ninth Circuit,

⁹⁹ *Id.*

¹⁰⁰ *NPRM*, ¶ 100.

¹⁰¹ *Level 3 Communications, L.L.C. v. City of St. Louis*, 477 F.3d 528 (8th Cir. 2007).

¹⁰² *Id.* at 533.

¹⁰³ *Id.* at 534.

¹⁰⁴ *Sprint Telephony*, 543 F.3d 571.

en banc, reversed its earlier *City of Auburn* decision and adopted the standard articulated in *Level 3*.¹⁰⁵ Indeed, the Ninth Circuit went farther, asserting that to succeed in a “facial” challenge under Section 253, a company must show that there is “no set of circumstances” under which the challenged requirement would be lawful.¹⁰⁶ In other words, to succeed, a provider would have to prove an absolute prohibition under all potential circumstances.

The Ninth Circuit was wrong in several respects. First, contrary to the Ninth Circuit’s citation, the U.S. Supreme Court has criticized and not followed the “no set of circumstances” test for facial “preemption” challenges.¹⁰⁷ Indeed, the Supreme Court has frequently not followed the *Salerno* standard used by the Ninth Circuit. In *Arizona v. United States*, the majority declined to apply *Salerno*.¹⁰⁸ Second, the criticism in *Sprint Telephony* that *City of Auburn* relied on a mis-quote of Section 253(a) through the use of ellipses also misstates the basis for the Ninth Circuit’s standard in *City of Auburn*.¹⁰⁹ *City of Auburn* made clear that its analysis was not based on the “mere possibility” that the challenged requirements “may” have the effect of prohibiting service. Rather, the court looked at the requirements as a whole, stating “our conclusion is based on the variety of methods and bases on which a city may deny a franchise, *not the mere franchise requirement, or the possibility of denial alone.*”¹¹⁰

¹⁰⁵ *Id.* at 577-78.

¹⁰⁶ *Id.* at 579.

¹⁰⁷ *United States v. Salerno*, 481 U.S. 739, 745 (1987); see Michael C. Dorf, *Facial Challenges to State & Fed. Statutes*, 46 Stan. L. Rev. 235, 239-40 (1994); *Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517 U.S. 1174, 1175 (1996) (op. of Stevens, J., respecting the denial of petition for certiorari) (noting that “*Salerno*’s rigid and unwise dictum has been properly ignored in subsequent cases”).

¹⁰⁸ *Arizona v. United States*, 132 S. Ct. 2492, 2500 (2012).

¹⁰⁹ *Sprint Telephony*, 543 F.3d at 576 (criticizing *City of Auburn* use of ellipses).

¹¹⁰ *City of Auburn*, 260 F.3d at 1176, n.11 (emphasis added) (citing *AT&T Commc’ns of Southwest, Inc. v. City of Austin*, 975 F. Supp. 928 (W.D. Tex. 1997)).

The standard for evaluating Section 253 claims articulated in *City of Auburn*, as well as in *City of Santa Fe* and *City of White Plains*, correctly reflects both the language and purpose of Section 253(a). The narrow reading in *Sprint Telephony* and *Level 3* effectively require a provider to demonstrate that a challenged requirement actually has prohibited the provision of service, or will actually prohibit the provision of all service in all circumstances. In so doing, the courts essentially eliminated the language of Section 253(a) that preempts both requirements that “prohibit” but also those that “have the effect” of prohibiting.

There is no doubt that the decisions by the Eighth and Ninth Circuits have had a significant chilling effect on broadband deployment. Local governments in those Circuits and others have been led to believe that they can impose extensive, burdensome, and discriminatory requirements that effectively prohibit deployment, without concern. Crown Castle has encountered local governments imposing discretionary, burdensome, and time-consuming regulation that effectively allow local governments to pick-and-choose which providers and which technologies enter the market and succeed—precisely the opposite of what Section 253 and the 1996 Act were meant to achieve.

Local governments may argue that anything short of an outright denial is not a “prohibition” under Section 253(a), but that ignores the regulatory scheme that Congress created with Section 253, as a whole, and it ignores the effect of unreasonable or discriminatory local regulations. The narrow focus of *Sprint* and *Level 3* also misses the effect of the inconsistent patchwork of local regulations. Telecommunications networks are designed and built as regional, statewide, and even national level networks. Yet, the current situation is that every neighboring jurisdiction imposes its own regulations. And they often conflict. What one municipality may prefer, its neighbor may prohibit. The “patchwork quilt” of regulation

prevents providers from deploying a network with scale and uniform technology. The Commission recognized this very point in one of its earliest Section 253 cases:

Each local government may believe it is simply protecting the interests of its constituents. The telecommunications interests of constituents, however, are not only local. ***They are statewide, national and international as well.*** . . . [A]n array of local telecommunications regulations that vary from community to community is likely to discourage or delay the development of telecommunications competition. . . . *Such a patchwork quilt of differing local regulations may well discourage regional or national strategies by telecommunications providers, and thus adversely affect the economics of their competitive strategies.*¹¹¹

For all those reasons, the Commission should exercise its role as the expert agency empowered to interpret and enforce the Communications Act to resolve the ambiguity created by the Eighth and Ninth Circuits and clarify the correct interpretation of Section 253(a) through new rules. Indeed, as the Commission recognized in the *Texas PUC Order*, it is obligated to act:

Section 253 expressly empowers -- indeed, ***obligates*** -- the Commission to remove any state or local legal mandate that “prohibits or has the effect of prohibiting” a firm from providing any interstate or intrastate telecommunications service. ***We believe that this provision commands us to sweep away not only those state or local requirements that explicitly and directly bar an entity from providing any telecommunications service, but also those state or local requirements that have the practical effect of prohibiting an entity from providing service.***¹¹²

Likewise, Section 706 of the 1996 Act requires the Commission to act to “remove barriers to infrastructure investment.”¹¹³

¹¹¹ *TCI Cablevision*, 12 FCC Rcd. at 21440-42, ¶¶ 102-106 (emphasis added) (internal quotation marks omitted); see also *Puerto Rico Tel.*, 450 F.3d at 18-19 (recognizing likely impact of gross revenue fees across multiple jurisdictions).

¹¹² *Texas PUC Order*, 13 FCC Rcd. at 3470, ¶ 22 (emphasis added).

¹¹³ 47 U.S.C. § 1302(a).

C. The Commission Should Define Actions that Effectively Prohibit the Provision of Telecommunications Services

The current situation under the Eighth Circuit's and Ninth Circuit's decisions would force providers to prove, on a city-by-city, location-by-location basis, that local requirements make it impossible to provide any telecommunications services under any circumstances, regardless of the cost, the burden, the delay, or the impact on the ability to design and build a network beyond that local area. The Eighth Circuit's and Ninth Circuit's interpretation has effectively neutered Section 253 and in so doing thwarted the pro-deployment, pro-competitive, deregulatory intent of the 1996 Act.

The deployment of new technologies and competitive services requires a significant capital investment—potentially millions of dollars for each community. Uncertainty resulting from wholly subjective, discretionary local requirements creates so much risk that companies may not even undertake the investment involved in planning for new services in communities that assume they are authorized to deny consent or impose significant burdens on consent. Moreover, the expense of complying with local application and information requirements may alone be prohibitive. Likewise, the cumulative effect of local requirements can create a prohibition of service, even if any one of the requirements, alone, may not completely prohibit service.¹¹⁴

1. Subjecting New Entrants To A Different Process Than Other Rights-Of-Way Pole Users Violates Section 253(a)

A significant impediment that Crown Castle encounters around the country is the imposition of new, more burdensome requirements on Crown Castle than was imposed on the ILEC or even prior competitive telecommunications providers. As discussed above, preventing

¹¹⁴ See *Puerto Rico Tel.*, 450 F.3d at 18-19 (holding that risk of other communities all adopting a fee violates Section 253).

discrimination against new entrants was a primary purpose of Section 253. At a minimum, the Commission should adopt a rule that local regulations that impose different, more burdensome requirements and conditions on new entrants than all other telecommunications providers in the public rights-of-way violate Section 253(a).¹¹⁵ Such a rule – although stating what should be a fundamental principle – would significantly assist Crown Castle in the deployment of new facilities and services.

2. Moratoria

The Commission seeks comment on whether it should adopt rules prohibiting state or local moratoria on market entry or facilities deployment.¹¹⁶ As the Commission and multiple courts have recognized, the 1996 Act was intended to promote competitive technologies and prevent local governments from influencing market entry and success.¹¹⁷ Moratoria are a

¹¹⁵ It is axiomatic that if the requirements are a Section 253(a) violation because they are discriminatory, by definition they are not “competitively neutral” or “nondiscriminatory” management of the public rights-of-way under Section 253(c). *E.g.*, *Zayo Grp., LLC v. Mayor & City Council of Balt.*, No. JFM-16-592, 2016 WL 3448261, at *7 (D. Md. June 14, 2016) (“[T]he purported disparity in treatment between Verizon and its competitors, shows that the City’s action may be neither competitively neutral nor nondiscriminatory.”); *City of White Plains*, 305 F.3d at 80.

¹¹⁶ *NPRM*, ¶ 102.

¹¹⁷ Preamble, Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (describing the purpose of the 1996 Act as “[a]n Act [t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies”); *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 371 (1999) (*Iowa Utilities Board*) (the 1996 Act “fundamentally restructures local telephone markets” to facilitate market entry); *Reno v. American Civil Liberties Union*, 521 U.S. 844, 857-58 (1997) (“The Telecommunications Act was an unusually important legislative enactment ... designed to promote competition”). *See also United States Telecom Association v. FCC*, 290 F.3d 415, 417 (D.C. Cir. 2002); *New York & Public Service Comm'n of New York v. FCC*, 267 F.3d 91, 96 (2nd Cir. 2001); *Michigan Bell Tel. Co. v. Climax Tel. Co.*, 202 F.3d 862, 865 (6th Cir.1999); *Southwestern Bell Tel. Co. v. Connect Communications Corp.*, 225 F.3d 942, 944 (8th Cir.2000) (noting 1996 Act is intended to “jump-start” local competition); *2011 Pole Attachment Order*, ¶ 136.

fundamental barrier to deploying broadband infrastructure in the public rights of way, and the Commission should adopt a rule explicitly preventing such action. Indeed, such a declaration by the Commission would be consistent with the Commission's repeated prior holdings that Section 253 prohibits local governments from discriminating against new entrants or new technologies.

Crown Castle, has often encountered both *de facto* and explicit moratoria imposed by municipalities. For example, in the case of fiber deployment, Crown Castle has often been told that the municipality will not process any applications or permits related to the use of public rights of way until the municipality rewrites its ordinance. Additionally, on occasion, municipalities have enacted explicit moratoria on the deployment of fiber related to small cell networks.

No set of circumstances can justify a moratorium on deployment. It is an explicit prohibition on the ability of companies to provide telecommunications service, in violation of Section 253(a). In order to prevent the use of moratoria by municipalities, the Commission should adopt a rule outlawing moratoria and, at a minimum, codifying its interpretation of Section 253(a) in *California Payphone*: a local requirement prohibits the provision of telecommunications service in violation of Section 253(a) if it “materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.”¹¹⁸

3. Delays

The Commission also seeks comment on adopting rules to eliminate excessive delays in negotiations and approvals for right of way agreements and permitting.¹¹⁹ Indeed, the

¹¹⁸ *California Payphone*, 12 FCC Rcd at 14206, ¶ 31; *see also Texas PUC Order*, 13 FCC Rcd at 3470, ¶ 22.

¹¹⁹ *NPRM*, ¶ 103.

Commission asks “[f]or instance, would the Commission adopt a mandatory negotiation and/or approval time period. . . .”¹²⁰ As a threshold matter, the Commission should recognize that not all local governments require an “agreement” to access the public rights of way, and indeed, state laws sometimes prohibit local governments from requiring such an agreement.¹²¹ Thus, any rule adopted by the Commission must make clear that it does empower local governments to require an agreement; the rule would only apply if the local government has independent authority to require such an agreement and applies the requirement to all telecommunications providers.

Otherwise, Crown Castle supports the proposal to adopt a shot clock for the negotiation of agreements and/or approval of permits to prevent municipalities from effectively prohibiting the deployment of broadband infrastructure by creating unnecessary delays in violation of Section 253. Crown Castle has been forced to wait months and even years for municipal approval after submitting applications, which effectively prohibits Crown Castle from providing telecommunications services in violation of Section 253(a).¹²² Even if the local government eventually grants the application, the damage has already been done. During the delay, Crown Castle has been prevented from competing with ILECs and any other existing provider. In an industry where technology changes constantly and consumers demand immediate access to the most recent technologies and services, delays of a few months, much less years, are unacceptable and can fundamentally harm a company’s ability to compete and succeed in the long term and even beyond the particular local jurisdiction. Thus, municipal delay is fundamentally thwarting the purpose of the 1996 Act.

¹²⁰ *NPRM*, ¶ 103.

¹²¹ *See, e.g.*, Cal. Pub. Util. Code § 7901; Fla. Stat. § 337.401(3)(a); Ga. Code § 46-5-1(a)(2)(A).

¹²² *See AT&T Commc’ns of Southwest, Inc. v. City of Austin*, 975 F. Supp. 928 (W.D. Tex. 1997), *vacated on other grounds*, 235 F.3d 241 (5th Cir. 2000).

This concept is well established in case law. In *TCG New York, Inc. v. City of White Plains*, the Second Circuit affirmed the District Court’s ruling that the City’s unreasonable delay in negotiating a franchise agreement that the city demanded had the effect of prohibiting TCG from providing telecommunications services in violation of Section 253(a).¹²³ Likewise, in *City of Austin*, the court recognized that the telecommunications marketplace is highly competitive and constantly changing, and as a result, even the slightest delay can cause a provider to lose significant opportunities as compared to those already operating in the market.¹²⁴ In *Township of Haverford*, the court held that the challenged ordinance violated Section 253, among other reasons, because there was no guarantee that a franchise application “once submitted, will be processed *expeditiously*.”¹²⁵

The Commission likewise has recognized the potential adverse effects of local government delay. In the second *Classic Telephone* Order, addressing the defendant cities’ failure to act under the Commission’s first order, the Commission explained:

If a potential entrant is unable to secure the necessary regulatory approvals within a reasonable time, it may abandon its efforts to enter a particular market based solely on the inaction of the relevant government authority. . . . More specifically, in certain circumstances a failure by a local government to process a franchise application in due course may “have the effect of prohibiting” the ability of the applicant to provide telecommunications service, in contravention of section 253.¹²⁶

¹²³ *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002).

¹²⁴ *City of Austin*, 975 F. Supp. at 938.

¹²⁵ *Peco Energy Co. v. Township of Haverford*, 1999 WL 1240941, at *8 (emphasis added) (*Township of Haverford*).

¹²⁶ *Classic Telephone, Inc. Petition for Emergency relief, Sanctions and Investigation*, 12 FCC Rcd 15619, 15634, ¶ 28; see also *TCI Cablevision*, 12 FCC Rcd. at 21441, ¶ 105 (FCC concerned with “unnecessary delays” caused by local governments).

The Commission should be cautious about imposing a “shot clock” on the grant of right of way permits. In reality, the vast majority of standard right of way permits, particularly for fiber deployment are granted on a ministerial basis within a matter of a few days or perhaps a few weeks. The Commission does not want to inadvertently slow those processes by creating a “shot clock” that may lead local governments to simply fall into taking the entire time. Nonetheless, the Commission should define an outer limit for local government action.

For standard right of way access permits, Crown Castle supports a maximum time of 30 days. Local governments have already issued many such permits to other cable, telecom, and electric utilities over the course of decades. New installations, such as Crown Castle’s, do not raise issues that require significant additional time.

For local governments that require, and are permitted to require, a franchise/license/right of way agreement, the maximum reasonable time for local government negotiation of the agreement also should be 30 days. The shot clock should begin immediately upon submission of a written request for access to a right-of-way.

Local governments have no basis for taking any longer. First, if the local government requires an agreement, then it should have one already in place from every other telecommunications provider, including the ILEC. And those agreements are public documents that should be publically available. If the local government does have an agreement with existing providers, it cannot lawfully require one of the new entrant.¹²⁷

¹²⁷ *TCG NewYork, Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir.2002) (finding that the city violated Section 253 of the Communications Act by requiring a CLEC to pay franchise fees and other forms of compensation as part of a telecommunications franchise while excusing the ILEC from any comparable requirements).

4. Excessive Fees

The Commission seeks comment on whether to adopt rules prohibiting excessive fees and other costs.¹²⁸ In many respects, the issue raised in the NPRM are identical to the questions asked in the “Mobilitie Petition” docket.¹²⁹ Accordingly, Crown Castle incorporates by reference its comments in that Docket.¹³⁰

A significant issue that the Commission does not appear to focus on is the problem of fees and costs being imposed on new entrants, such as Crown Castle, that are not imposed on the ILEC or other companies that previously deployed telecommunications networks in the rights of way. Crown Castle far too frequently encounters this situation. Some local governments appear motivated to try to profit from the current deployment of telecommunications networks by imposing on new entrants fees that are not imposed on the ILEC or perhaps even prior telecommunications providers.

Accordingly, the Commission should adopt a rule that reiterates its holding in the *Texas PUC Order* that Section 253(a) bars state or local requirements that restrict the means or facilities through which a party is able to provide service, and moreover, that it bars local requirements that impose financial burdens on one set of providers that are not imposed on others.¹³¹ Indeed, the Commission has previously concluded that costs imposed only on new

¹²⁸ *NPRM*, ¶¶ 104-105.

¹²⁹ *Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling*, WT Docket No. 16-421.

¹³⁰ *See* Comments of Crown Castle International Corp., WT Docket No. 16-421 (filed on Mar. 9, 2017); *See* Reply Comments of Crown Castle International Corp., WT Docket No. 16-421 (filed on Apr. 10, 2017).

¹³¹ *Texas PUC Order*, 13 FCC Rcd at 3466, ¶ 13; *see also Minnesota Order*, 14 FCC Rcd 21708-09, ¶ 21.

entrants are classic barriers to entry.¹³² In a 1994 order implementing the 1992 Cable Act, the Commission defined a barrier to entry as ““a cost of producing (at some or every rate of output) which must be borne by a firm which seeks to enter an industry but is not borne by firms already in the industry.””¹³³ And the Ninth Circuit has held that “[t]he disadvantage of new entrants as compared to incumbents is the hallmark of an entry barrier.”¹³⁴ In its *Amicus Curiae* brief in *White Plains*, the Commission asserted that “[d]iscriminatory entry conditions . . . make competitive entry more difficult and unlikely, thereby undermining the local competition Congress sought to foster.”¹³⁵

Such a declaration is also supported by multiple courts. For example, the Southern District of New York, in *Montgomery County v. Metromedia Fiber Network, Inc.*, held that

*subjecting new market entrants . . . to a lengthy and discretionary application process, while exempting the incumbent provider. . . from such process, has the effect of prohibiting the provision of telecommunications services, because it “materially inhibits or limits the ability” of the new entrant “to compete in a fair and balanced legal and regulatory environment.”*¹³⁶

Similarly, the First Circuit explained that

Congress apparently feared that some states and municipalities might prefer to maintain the monopoly status of certain providers, on the belief that a single regulated provider would provide better or more universal service. Section 253(a) takes that choice away

¹³² See *Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC Rcd 7442, Appendix H at 7621-22, ¶ 29 (1994).

¹³³ *Id.* (quoting G. Stigler, *The Organization of Industry* 67 (1968)).

¹³⁴ *Los Angeles Land Co. v. Brunswick Corp.*, 6 F.3d 1422, 1428 (9th Cir. 1993).

¹³⁵ Brief for Federal Communications Commission and the United States as Amici Curiae, *TCG N.Y., Inc. v. City of White Plains*, No. 01-7213, 2001 WL 34355501, at *8 (2d Cir. filed June 13, 2001) (“FCC Br. in *City of White Plains*”).

¹³⁶ *Montgomery County v. Metromedia Fiber Network, Inc.*, 326 B.R. 483, 494 (S.D.N.Y. 2005), *vacated and remanded pursuant to joint motion* (05-4123) (Aug. 31, 2006) (first emphasis added).

from them, thus preventing state and local governments from standing in the way of Congress's new free market vision.¹³⁷

Accordingly, there is ample support for a Commission declaration that local fees that are imposed only on new entrants in the right-of-way violate Section 253.¹³⁸

5. Other Unreasonable Conditions and Actions Imposed by Local Governments

Additionally, Crown Castle has encountered some cities that have used access to the right-of-way as a bargaining chip for other unreasonable demands, such as free telecommunications service or "charitable donations" even where charging fees for use of the right-of-way are specifically prohibited by law. One jurisdiction stated that if Crown Castle's network were to be approved it would have be required to install police video surveillance cameras for the City to utilize for law enforcement purposes. Other jurisdictions have required Crown Castle construct additional conduit for municipal utility projects while others simply seek free access to fiber strands. Recently one jurisdiction offered discounted permitting fees with a sizeable charitable donation to the municipality's charitable organization.

6. Other Prohibitive Local Requirements

The Commission also seeks comment on other issues where the Commission might adopt rules to preempt local requirements that have the effect of prohibiting the provision of telecommunications services.¹³⁹ One issue the Commission identifies is whether the

¹³⁷ *Cablevision of Boston, Inc. v. Pub. Improvement Comm'n of City of Boston*, 184 F.3d 88, 98 (1st Cir. 1999).

¹³⁸ As noted above, such discriminatory requirements would violate not only Section 253(a), but would not be competitively neutral and nondiscriminatory, as required by Section 253(c).

¹³⁹ *NPRM*, ¶ 108.

Commission should adopt rules addressing the transparency of local application processes.¹⁴⁰

Crown Castle supports such a rule.

Too often, a significant impediment to deployment is the lack of clarity in a local government's requirements. Crown Castle too frequently encounters situations where there is no clear articulation of what the local government requires. A related, but even more problematic problem is situations where the local government either refuses to follow its own requirements or arbitrarily changes them as applied to Crown Castle. A Commission rule clarifying that local governments must make their right of way access rules readily and publically available, on the local government's internet site, would help remedy these situations that impede the deployment of telecommunications, and it would help prevent local governments from discriminating against new entrants with unwritten, arbitrary requirements.

D. Broadband Deployment Advisory Committee

Crown Castle is supportive of the efforts taken by the Commission to increase collaboration among federal, state, and local governments and industry. Crown Castle is hopeful that the Commission's newly-formed Broadband Deployment Advisory Committee ("BDAC") will lead to collaborative broadband deployment policies that promote the efficient deployment of broadband infrastructure.¹⁴¹ Crown Castle looks forward to eventual reports and conclusions from BDAC on the state of broadband deployment.

IV. CONCLUSION

Crown Castle appreciates the Commission's attention to the important issues raised in the NPRM and urges the Commission to adopt the proposed amendments addressed in these

¹⁴⁰ *Id.*

¹⁴¹ *FCC Announces the Membership and First Meeting of the Broadband Deployment Advisory Committee*, GN Docket No. 17-83, Public Notice, DA 17-328, 32 FCC Rcd 2930 (Apr. 6, 2017).

comments to help speed the deployment of competitive services and technologies to consumers.

Respectfully Submitted,

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June 15, 2017

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the Matter of

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Accelerating Wireline Broadband
Deployment by Removing
Barriers to Infrastructure Investment

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WC Docket No. 17-84

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**COMMENTS OF LUMOS NETWORKS INC., LUMOS NETWORKS OF WEST
VIRGINIA INC., AND LUMOS NETWORKS LLC**

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June 15, 2017

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BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the Matter of

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Accelerating Wireline Broadband
Deployment by Removing
Barriers to Infrastructure Investment

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WC Docket No. 07-245

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**COMMENTS OF LUMOS NETWORKS INC., LUMOS NETWORKS OF WEST
VIRGINIA INC., AND LUMOS NETWORKS LLC**

Lumos Networks Inc., Lumos Networks of West Virginia Inc., and Lumos Networks
LLC (collectively “Lumos”), by their attorneys, hereby file these comments in response to the

FCC's Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment in the above-referenced docket.¹

I. INTRODUCTION AND SUMMARY

As the Commission has correctly acknowledged in this proceeding, it is now more than ever critically important to remove artificially imposed barriers to infrastructure investment so that facilities-based providers of broadband services can build, maintain, upgrade and expand their existing fiber networks. As a leading fiber based telecommunications provider in the Mid-Atlantic region, Lumos presently has a total of 10,907 fiber route miles/503,616 total fiber strand miles located in Virginia, West Virginia, Pennsylvania, Maryland, Ohio, North Carolina and Kentucky. In addition, Lumos has over 3,400 total "on-net" locations and over 100,000 locations that are considered "near net" or located within one-half mile of our fiber network.

In order to facilitate the deployment of fiber optic facilities necessary for the provision of broadband services, Lumos is oftentimes dependent on the timely processing of pole attachments. Because it is not efficient or in some cases even possible for providers of broadband services to deploy their own poles, Lumos is oftentimes dependent on pole attachments placed on incumbent local exchange carrier ("ILEC") and/or electric utility poles. However, the process of gaining timely access to ILEC and/or electric utility poles on reasonable terms and conditions has historically been a challenge. These challenges have in large measure

¹See *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, FCC 17-37 (Apr. 21, 2017) ("NPRM").

been occasioned because ILECs and/or electric utilities have traditionally lacked the incentive to provide access to poles on reasonable terms and conditions.

On April 7, 2011, the FCC unanimously adopted an order that comprehensively overhauled its pole attachment rules.² Among other things, the *2011 Pole Attachment Order* spelled out more specific rights and obligations for pole owners and attachers regarding access, including the establishment of a four-stage timeline to govern most steps of the pole attachment application and make-ready processes for both wireline and wireless attachments.

With respect to the completion of the engineering survey, for example, the FCC retained and refined rule 47 C.F.R. § 1.1403(b) requiring pole owners to respond in detail to "complete" requests for access to poles within 45 days; along with the requirement that any denial of an application request must include a written explanation of the specific capacity, safety, reliability or engineering concern on which the pole owner based its denial.

The *2011 Pole Attachment Order* also required pole owners to tender an estimate of make-ready charges to potential attachers within 14 days of receiving the results of the engineering survey, and similarly allowed applicants 14 days to accept a tendered estimate of make-ready charges and provide payment. Once estimated make-ready charges had been paid by the attacher, pole owners were required to complete required make-ready work within 60 days (with exceptions for large orders or for "good and sufficient cause," such as emergencies requiring federal disaster relief). If make-ready was not subsequently completed within 60 days,

² *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, WC Docket No. 07-245, GN Docket No. 09-51, 26 FCC Rcd 5240, 5252, paras. 22-23 (2011) (*2011 Pole Attachment Order*).

a pole owner (prior to the expiration of the 60-day period) had to notify the attaching party that it intended to complete all remaining work within 15 days. In such cases, the pole owner had an additional 15 days to complete make-ready. If the work was still unfinished at the end of the 15-day extension, then the attacher could assume control of make-ready and hire an approved contractor to complete the remaining work. In this regard, pole owners are required to make available a list of contractors authorized to perform surveys and make-ready work in the communications space.

Without question, the four-stage timeline adopted in the *2011 Pole Attachment Order*, coupled with the ability to hire an approved contractor to complete delinquent engineering survey and make-ready work, was a tremendous step in the right direction toward improving competitive access to ILEC and electric utility poles. That said, there is still ample room for improvement, and Lumos is very much in favor of the timeline reductions being considered by the FCC in this proceeding.³ The streamlining of the current four stage timeline being proposed by the FCC, if ultimately adopted, will have a significant positive effect on the extent to which facilities-based service providers like Lumos are able to efficiently expand the deployment of broadband service to its customers.

II. THE FCC'S PROPOSED REVISIONS TO THE APPLICATION REVIEW AND SURVEY PERIODS ARE REASONABLE AND SHOULD BE ADOPTED.

³ It worth noting that in the *2011 Pole Attachment Order* the FCC acknowledged that the four-stage timeline was established as a maximum, and that necessary work could often proceed more rapidly, especially at the estimate and acceptance stages, or for relatively routine requests. Moreover, the FCC stated that "it would not be reasonable behavior for a utility to take longer to fulfill any requests simply because a timeline with maximum timeframes is being adopted." See *2011 Pole Attachment Order* at Paragraph 23.

Under the FCC's current rule, 47 C.F.R § 1.1403(b), a utility is required to grant access to poles and conduit within 45 days of receiving a request for such access. In its NPRM, however, the FCC inquired as to whether it should require a utility to review and make a decision on a completed pole attachment application within a timeframe shorter than the current 45-day period.⁴ Indeed, the FCC asked rhetorically in the NPRM whether a 30 day, or perhaps even a 15 day timeframe as presented in the revised language of § 1.1403(b) in Appendix A, would be a reasonable one for utilities to act on a completed pole attachment application.⁵

After thoughtful consideration of the FCC's proposed timeframe reductions, Lumos agrees with the proposition that a timeframe shorter than the current 45 days is abundantly reasonable for utilities to act on a completed pole attachment application, especially with respect to smaller or more routine attachment requests, which should require a far lesser period of time to complete than the currently allotted 45 days. Perhaps a graduated timeframe that would allow 15 days for projects involving fewer than 100 poles, 30 days for projects involving fewer than 500 poles, and the retention of the current 45 day timeframe for projects involving more than 500 poles would be a reasonable compromise and would serve the interests of both the pole owner and the prospective attacher.

Regardless of the timeframe(s) ultimately adopted by the FCC for completion of the engineering survey, however, it is absolutely critical that the FCC preserve the ability of

⁴ See *NPRM* at Paragraph 8.

⁵ *Id.*

attaching entities to engage outside contractors to complete the engineering survey if the pole owner fails to do so. Indeed, in the case of the application evaluation and engineering survey, Lumos recommends that if the pole owner fails to respond to a requested application and/or complete the necessary engineering survey within the designated timeframe, whether that timeframe be 15 days, 30 days or 45 days, the attaching entity should be able to hire the third party engineering contractor to either approve or deny the pending application based upon applicable engineering standards like the National Electrical Safety Code (NESC). If the application involved should then be confirmed, Lumos would further recommend that said third party engineering contractor then be empowered to provide a good faith estimate of all make-ready costs that may be associated with the underlying application.

In addition, Lumos would fully support the implementation of new rules permitting new attachers to perform make-ready work in lieu of the pole owner or existing attacher performing such work, especially in situations in which the required make-ready work is routine or commonplace.⁶ Allowing the new attacher to perform such make-ready work would undoubtedly save time over the current FCC prescribed timeframe, would reduce make-ready costs substantially, and would ensure the consistency and reliability of the new attacher's network across multiple deployments.

Although the NPRM notes potential concerns involving safety, facility integrity, or the prospect of third-party access resulting in unqualified workers compromising the pole owner's

⁶ See *NPRM* at Paragraph 18.

networks,⁷ Lumos does not anticipate significant difficulties being encountered. To begin with, pole owner's own practices demonstrate that use of third-party contractors is a widespread and common practice, and in addition to the generally accepted industry standards that would be applicable to such outside contractor activity, pole owners would also be free to establish reasonable complimentary standards for those working on its poles. Finally, if there is information about poles and facilities to which only the pole owner has access, the pole owner can obviously share that information with the qualified third-party contractor. Presumably, pole owners that rely on third-party contractors for their own work do this already.

III. THE PROPOSED REVISION TO THE COST ESTIMATE PERIOD IS REASONABLE AND SHOULD BE ADOPTED BUT THE CURRENT PERIOD FOR ACCEPTANCE OF SAID COST ESTIMATE SHOULD BE MAINTAINED AS IS.

Under the FCC's current rules, 47 CFR § 1.1420(d), where an application request is not denied, a pole owner is required to present an estimate of charges necessary to perform all necessary make-ready work within 14 days of providing a response to such application in accordance with § 1.1420(c). In turn, the attaching entity under 47 CFR § 1.1420(d)(1) and (2) essentially has another 14 day period in which to accept the make-ready cost estimate. In its NPRM, however, the FCC inquired as to whether it should require a timeframe for these steps that is shorter than the combined 28 day period or perhaps combine them into a condensed 14 or 10 day period.⁸

⁷ See *NPRM* at Paragraph 18.

⁸ See *NPRM* at Paragraph 10.

Based upon its experience, Lumos is of the opinion that while a reduction in the current 14 day timeframe for the production of a cost estimate to 7 days is reasonable, a corresponding reduction in the current 14 day timeframe for acceptance of the cost estimate is not. Because Lumos carefully scrutinizes all pole attachment cost estimates in order to determine their reasonableness, and if necessary, endeavors to meet with the pole owner in an effort to negotiate estimated costs down to a more acceptable level, Lumos believes that a reduction in the current 14 day acceptance period is not advisable at this time. In its experience, Lumos normally needs every one of those 14 days currently allotted to properly evaluate and finalize cost estimates associated with its pole attachment applications.

IV. THE PROPOSED REVISION TO THE MAKE-READY PERIOD IS REASONABLE AND SHOULD BE ADOPTED. IN ADDITION, ATTACHERS HAVING TO UTILIZE OUTSIDE CONTRACTORS TO COMPLETE MAKE READY WORK SHOULD BE ELIGIBLE FOR A REFUND OF MAKE-READY COST PAYMENTS MADE IN ADVANCE TO POLE OWNERS.

In the NPRM, the FCC sought input on approaches to shorten the make-ready timeframe. At present, pursuant to 47 CFR § 1.1420(e)(1)(ii), pole owners are required to give existing attachers a period not to exceed 60 days after the make-ready notice is sent to complete work on their equipment in the communications space of a pole. In the NPRM, the FCC also noted in the *2011 Pole Attachment Order* it recommended as a “best practice” a make-ready period of 30 days or less for small pole attachment requests and 45 days for medium-size requests.⁹

⁹ *2011 Pole Attachment Order* at Paragraph 32.

Consequently, the NPRM inquires as to whether the FCC should now formally adopt the aforementioned “best practices” timeframes set forth in the *2011 Pole Attachment Order*.

Probably more so than any other aspect of the pole attachment application process, the issue of both the validity of make-ready costs and the timely completion of necessary make-ready work have been the most contentious in Lumos’ experience. Prior to the *2011 Pole Attachment Order*, there was no timeframe specified in the FCC’s rules governing the completion of make-ready work. As a result, pole owner completion of make-ready work became a time consuming and arduous process that in some cases took between 4-6 months or sometimes longer to complete, if it was completed at all -- which was especially frustrating given the fact that Lumos has paid in advance for the timely completion of this work. By comparison, ILECs and electric utilities continued to act much more quickly when installing their own facilities, thereby achieving an unfair and undeserved competitive advantage over Lumos, which would have undoubtedly continued but for the reforms contained in the FCC’s *2011 Pole Attachment Order*.

The FCC’s *2011 Pole Attachment Order* established firm timelines for the completion of make-ready work, and provided attachers with the ability to utilize outside contractors to complete the make-ready if the pole owner did not. Although Lumos only attempts to utilize outside contractors to complete survey or make-ready projects as a last resort, it has indeed utilized this option to great effect on multiple occasions.

Prior to being able to exercise self-remedy, it is important to note that Lumos has already paid the make-ready cost estimates provided to it in advance for each pole attachment application. When Lumos subsequently performs the make-ready itself through the use of an

outside contractor, Lumos likewise pays for the cost of this work. However, Lumos does not receive a refund of the upfront monies paid to the pole owner to do this same work. Thus, in some cases, Lumos has paid twice for make-ready work—once to the pole owner for work that was either never performed or never properly completed, and twice when Lumos paid an outside contractor to actually do the work. This is a situation that was apparently overlooked in the *2011 Pole Attachment Order*, but should now be addressed in the context of this NPRM so that attachers are not monetarily penalized by having to pay twice for the completion of the same make-ready work simply because the pole owner failed to adequately complete its obligations under the FCC's current rules.

As a result, Lumos would propose that if an attacher is required to perform survey or make-ready work by hiring any approved contractor as provided for under current FCC rules, the attacher would provide a notice of completion to the pole owner along with an invoice for the costs incurred by the attacher by the hiring of the approved contractor for the completion of the survey or make-ready work. The invoiced costs would then be reimbursed by the pole owner within 30 days of the date of the invoice, and also offset against the amounts previously remitted in advance by the attacher for the payment of the estimated survey and/or make-ready work cost. The pole owner would likewise be required to true up its actual costs incurred for the survey and/or make ready work, if any, that it completed prior to the attacher's hiring of an approved contractor. The pole owner shall then issue either a final invoice or refund to the attacher, as the case may be, for the final survey and/or make-ready work cost actually undertaken and completed by the attacher.

V. THE FCC SHOULD ENSURE THAT POLE OWNERS MAINTAIN AN ADEQUATE LIST OF OUTSIDE CONTRACTORS AUTHORIZED TO PERFORM SURVEY AND MAKE-READY WORK AND ALLOW ATTACHERS TO UTILIZE A QUALIFIED INDUSTRY EQUIVALENT CONTRACTOR IF NOT.

Pursuant to 47 CFR § 1.1422(a), the FCC requires pole owners to make available and keep up-to-date a reasonably sufficient list of approved contractors that Lumos can utilize to complete engineering and make-ready if the pole owner fails to do so. As Lumos noted earlier in these comments, the ability to utilize an outside contractor to perform survey and make-ready work not completed in a timely manner by the pole owner was one of the more important aspects of the *2011 Pole Attachment Order*. In at least one instance, however, Lumos has encountered a situation in which a pole owner provided the names of only two such contractors to Lumos, and when Lumos attempted to engage these two contractors to complete overdo make-ready work, the pole owner apparently intervened and forced one contractor to stop the engineering work for Lumos by threatening to cancel the contractor's existing contract with the pole owner.

Although market conditions in individual states obviously differ, Lumos would maintain that a pole owner's list of two approved contractors is not "reasonably sufficient" for purposes of compliance with 47 CFR § 1.1422(a). In order to avoid the type of anti-competitive situation referenced above or another in which utilization of the pole owner's approved contractors is not possible either due to the unavailability or reluctance of the pole owner approved contractors, Lumos would recommend that the attacher be permitted to select an otherwise qualified industry equivalent contractor to perform the work required – whether it be the engineering survey or the actual make-ready work – with notice to but without the consent of the involved pole owner.

The ability of an attacher to employ an outside contractor that may not be listed on the pole owner's approved list, if necessary under certain circumstances, would greatly enhance the ability of an attacher to facilitate the completion of time sensitive broadband deployment projects. In making this recommendation, Lumos would note that the outside contractor utilized under this scenario would be an industry qualified contractor and would still be required to follow the standards established by the pole owner for those working on its poles.

VI. POLE OWNERS SHOULD BE REQUIRED TO PROVIDE DETAILED MAKE-READY COST ESTIMATES AND MAINTAIN STANDARD PRICE LISTS OF COMMON MAKE-READY CHARGES.

In the NPRM, the FCC asks whether it would be prudent to require utilities to provide potential new attachers with a schedule of common make-ready charges to create greater transparency for the assessment of make-ready costs.¹⁰ The current NPRM inquiry runs contrary to the decision arrived at in the *2011 Pole Attachment Order* in which the FCC decided against requiring utilities to provide schedules of common make-ready charges upon request.¹¹ For the reasons noted below, Lumos is strongly in favor of pole owners having to maintain price lists of common make-ready charges, and in addition, Lumos believes that pole owners ought to be required to provide detailed make-ready estimates as opposed to single line invoices.

At present, there is no way potential attachers can effectively resist or dispute pole owner payment demands associated with make-ready cost estimates provided during the pole

¹⁰ See NPRM at Paragraph 33.

¹¹ *2011 Pole Attachment Order* at Paragraph 86.

attachment application process. Given real world time constraints attendant to the provision or expansion of broadband services, providers like Lumos typically have little choice but to pay a pole owner's make-ready cost estimate invoice, no matter how high or unreasonable the charges appear, because the pole owner will not process the attacher's application until this payment is received. In addition to having to pay the pole owner up front regardless of the perceived reasonableness of the make-ready costs involved, attachers face the prospect of even more charges at a later date since pole owners generally reserve the right to adjust estimated make-ready charges afterwards based on "actual" costs incurred.

More importantly, the FCC should require that for any make-ready charges to attachers based on pole owner's costs of performing surveys or make-ready work, pole owners should be required to provide detailed documentation that is sufficient to allow attachers to determine the basis for such charges. Without this kind of make-ready cost detail, which is not routinely provided today or only provided at additional cost, attachers must either pay the make-ready estimates even when they appear excessive or withhold payment while maintaining an outstanding balance in the hopes that the utility will either adjust the charges or ultimately provide adequate documentation justifying the charges. Requiring adequate supporting documentation up front will allow competitors to better monitor work done by utilities on their behalf and hold utilities accountable for any charges that exceed reasonable industry levels.

Far from being something unique, the FCC has previously found that the provision of this type of detailed make-ready invoicing is reasonable. In the case of *Knology v. Georgia Power Company*, the FCC held that attachers have a right to billing detail for make-ready charges, and

further that such detail should be provided at no additional cost to the attachers.¹² Specifically, the FCC's order in this case found in paragraph 61 that "*Georgia Power had an obligation to provide a reasonable amount of information sufficient to substantiate its make-ready and do not view this as an "extra" administrative service for which a separate charge should apply.*"¹³ In short, the FCC held that Knology was entitled to adequate billing back up information in order to evaluate the reasonableness of Georgia Power's underlying charges, and further that Knology should not have to pay for the backup billing information. As a result, Georgia Power was directed by the FCC to provide backup billing information to Knology.

There also is no reason why pole owners cannot maintain schedules or price lists relative to charges imposed by pole owners for field and manhole surveys, record searches, and common make-ready work to protect attachers from arbitrary, excessive and inflated charges. Indeed, the establishment of such schedules for these types of charges would expedite the performance of necessary make-ready while maintaining cost certainty and ensuring non-discriminatory treatment of attachers.

VII. THE FCC SHOULD ENSURE THAT MAKE-READY COSTS AND OTHER EXPENSES CHARGED BY POLE OWNERS ARE REASONABLE AND RECOVER ONLY ACTUAL COSTS

Another aspect of the pole attachment process that could be improved in order to foster broadband deployment involves the proper assessment of make-ready costs. Lumos has

¹² *Knology, Inc. v Georgia Power Company*, File No. PA 01-006, FCC Order No. 03-292 adopted November 14, 2003, released on November 20, 2003.

¹³ *Id.*, at ¶ 61.

encountered situations in which it has been made to absorb the entire cost of survey and make-ready work merely because it happened to be the first attacher requesting access to a certain route or to certain pole lines. As a result of the work done by the pole owner in conjunction with Lumos' initial access request, providers coming after Lumos requesting similar access are not subject to the same level of survey and make-ready costs.

In other instances, Lumos has been made to pay for make-ready work to correct pre-existing deficiencies and substandard conditions that Lumos believes should have rightly been part of a pole owner's regular maintenance activities, which Lumos is already paying for pursuant to the underlying pole attachment agreement. For example, if the pole owner has a pre-existing safety violation which is discovered only when it is required to rearrange its attachment, the new attacher should not be required to pay for the expense of fixing such safety violation. All too often, however, rather than charge the existing attacher for remediation of this safety violation, the pole owner takes the path of least resistance and simply charges the new attacher. In order to remedy this practice, the FCC should mandate that pole owners notify an existing attacher when its improperly placed attachment is preventing a new attacher from attaching on the pole and, if neither the existing attacher nor the pole owner fixes the error within 10 days, permitting the new attacher to correct the violation through the use of an authorized outside contractor and bill the existing attacher for resolution of the non-compliant attachment.

Either scenario is clearly contrary to existing Commission policy, as evidenced by the Commission's resolutions of past disputes.¹⁴ Yet, pole owners' continuing recalcitrance with

¹⁴ This practice is clearly contrary to existing Commission policy. See *Knology, Inc. v. Georgia Power Company*, Memorandum Opinion and Order, 18 FCC Rcd 24615 ¶ 37 (2003) (“[I]t is an unjust and unreasonable term and

regard to this requirement clearly indicates that adjudication alone does not suffice to produce adequate deterrence. As a result, both of these survey and make-ready billing issues need to be addressed through pertinent modifications made to the current pole attachment rules.

Additionally, Lumos has found that certain pole owners drive up costs by billing entities seeking new attachments for the make-ready costs of moving existing 3rd party attachments on their poles, while the pole owner then notifies the owners of these existing 3rd party attachments that the 3rd party must perform this make ready-work. Thus, the pole owner reaps an undeserved monetary benefit by billing the newly attaching entity for all make-ready work, while at the same time shifting the actual work completion to the existing attached 3rd party entities.

In this situation, the pole owner can get away with this practice simply by omitting the name of the newly attaching entity from their make ready notice to the existing 3rd party attached entity. The existing 3rd party attached entity has no idea who is generating the make ready work, and will oftentimes assume this work is due to maintenance the pole owner is doing for its own purposes. It is also important to note for purposes of this discussion that most pole attachment contracts do not allow 3rd party attached entities to be compensated for work that the pole owner does for their own purposes.

This practice also allows the pole owner to inflate the cost of make-ready to be paid by the newly attaching party. For example, an ILEC/pole owner in one of Lumos' current operating

condition of attachment, in violation of section 224 of the Act, for a utility pole owner to hold an attacher responsible for costs arising from the correction of other attachers' safety violations."); *Kansas City Cable Partners v. Kansas City Power & Light Co.*, Consolidated Order, 14 FCC Rcd 11599 ¶19 (1999) ("Correction of the pre-existing code violation is reasonably the responsibility of KCPL and only additional expenses incurred to accommodate Time Warner's attachment to keep the pole within NESC standards should be borne by Time Warner.").

jurisdictions will routinely bill a newly attaching party for cable movement work at a rate 800% higher than would have otherwise been paid had the newly attaching party directly paid existing 3rd parties to move their cables to accommodate the new attachment. Undoubtedly, this type of practice is neither just nor reasonable and should likewise be addressed in this proceeding through appropriate adjustments made to the FCC's current pole attachment rules.

VIII. CONCLUSION

For all of the foregoing reasons, Lumos Networks respectfully requests that reforms to the FCC's current pole attachment rules recommended herein should be adopted.

/s/

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June 15, 2017

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

In the Matter of)	
)	
Accelerating Wireline Broadband Deployment	)	WC Docket No. 17-84
by Removing Barriers to Infrastructure)	
Investment)	
)	

**COMMENTS OF
THE USTELECOM ASSOCIATION**

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* * *

SUMMARY

The best way to ensure that broadband is available to every business and consumer throughout the nation is with a light-touch regulatory environment that supports innovation and the development and deployment of modern, fiber and IP-based technologies. Removing regulatory barriers at the federal, state, and local level will spur broadband providers to build, maintain, and upgrade networks. We are pleased that with this Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment (Notice), the Commission apparently seeks to impose only those regulations necessary to create the right incentives, in a minimally regulatory environment, that will allow providers to help achieve the nation's reasonable broadband deployment goals.

The Commission's proposal to adopt reforms that reduce pole attachment costs would remove significant barriers to broadband infrastructure deployment and create a more balanced competitive landscape to the benefit of broadband consumers. Adoption of certain of the Commission's targeted reforms to its current pole attachment framework would be a crucial step towards realizing more robust broadband deployment.

If we are to fully enjoy the greater benefits that modern, all-IP networks will make possible, providers must also be given a meaningful opportunity to upgrade their networks in a manner that will allow them to reap the benefits of their prudent investments in a timely manner. Consumers have systematically been moving away from copper to fiber networks for some time, and USTelecom members have followed suit. This shift is both prudent (given the cost of maintaining copper infrastructure, especially where fiber plant exists), and necessary if we are to have any chance of achieving broadband deployment consistent with the Commission's stated goals. Moreover, consumers and businesses have largely embraced newer technologies and services, and fewer than a fifth of Americans still rely to some extent on traditional, copper-based, wireline telephone service. Among those, most use other services such as wireless and over-the-top applications such as VoIP in addition to their legacy phone service. Clearly, it is time to move on.

Especially where providers are merely replacing legacy copper facilities with fiber but will provide the same service to its customers over fiber, there is no need to encumber that process with additional notice requirements. Even where facilities are being replaced and customers may experience some changes in the features and functionality they get with their legacy services, the Commission should not unreasonably delay such transitions under the guise of consumer protection because it is consumers who ultimately will benefit from having better services.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

In the Matter of)	
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Accelerating Wireline Broadband Deployment)	WC Docket No. 17-84
by Removing Barriers to Infrastructure)	
Investment)	
)	

**COMMENTS OF
THE USTELECOM ASSOCIATION**

USTelecom¹ is pleased to submit its comments to the important issues raised by the Federal Communications Commission (Commission) on its rulemaking proceeding (Notice) proposing a number of actions designed to accelerate the deployment of next-generation networks and services by removing barriers to infrastructure investment.² These proposals include reforms to the Commission’s regulations governing pole attachments, expediting copper retirement and the change notification process, and streamlining the section 214 discontinuance process. USTelecom supports many of the Commission’s tentative conclusions contained in the Notice and urges it to move quickly to update its rules to reflect today’s competitive environment.

¹ USTelecom is the premier trade association representing service providers and suppliers for the telecommunications industry. USTelecom members provide a full array of services, including broadband, voice, data, and video over wireline and wireless networks.

² Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, *Notice of Proposed Rulemaking*, WC Docket No. 17-84 (rel. April 21, 2017) (*Notice*).

I. POLE ATTACHMENT REFORMS.

A. Introduction.

USTelecom is the nation's oldest and largest association for providers of wired communications, and the overwhelming majority of its members offer broadband in rural and urban areas across the United States. The industry has changed dramatically in the association's 120 years of existence, but members' shared goal of connecting Americans coast-to-coast remains the same. In the late 19th century USTelecom's members were focused on connecting American consumers to nascent telephony networks, but today, broadband is the engine that powers the global economy, and as the Commission recently observed, broadband access is "necessary for even basic participation in our society and economy."³

USTelecom agrees with the Commission's observation in its Notice that "reforms which reduce pole attachment costs and speed access to utility poles would remove significant barriers to broadband infrastructure deployment and in turn increase broadband availability and competition in the provision of high-speed services."⁴ The Commission should therefore move forward with certain aspects of the rulemaking by adopting important but targeted reforms to its pole attachment framework.

In 2011, the Commission took positive steps towards reforming pole attachment rates in a more equitable and positive way. Among other things, it implemented reforms that brought greater parity to pole attachment rates between telecommunications providers and cable providers, and afforded incumbent local exchange carriers (LECs) an opportunity to file pole attachment complaints if they believed a particular rate, term or condition was unjust or

³ Lifeline and Link Up Reform and Modernization, *Order*, 30 FCC Rcd 7818, ¶ 5 (Jun. 22, 2015) (*Lifeline Order*).

⁴ *Notice*, ¶ 3.

unreasonable. The Commission also established guidance regarding its approach to evaluating such complaints, and what the appropriate rate should be.⁵ In its subsequent 2015 *Rate Parity Order*, the Commission also expanded the modification of the telecommunications rate formula so that the cost adjustment factor was interpolated based on average attaching entity count instead of the fixed values in the 2011 order.⁶

While these changes have been beneficial, USTelecom maintains that further reforms are necessary to ensure the presence of greater rate parity among all categories of broadband providers. With the current Notice, the Commission appropriately seeks to establish greater rate parity, and adoption of certain of its proposals will help to ensure that the shared goal of accelerating wireline broadband deployment is best achieved.

Even with the Commission's 2011 and 2015 reforms, the general rate structure for pole attachment rates remains in a silo-based framework that does not adequately address the realities of today's converged broadband marketplace. While cable and telecommunications attachers benefit from a more uniform attachment rate under the 2011 and 2015 orders, ILECs remain at an artificial regulatory pricing disadvantage regarding access to essential critical infrastructure. Moreover, the Commission's decision to resolve ILEC pole attachment complaints on a case-by-case basis has proven to be unwieldy, ineffective and has burdened ILEC attachers and the Commission with an unnecessary and cost and time-prohibitive complaint-based framework for resolving pole attachment pricing issues for ILECs.

⁵ Implementation of Section 224 of the Act, *Report and Order and Order on Reconsideration*, 26 FCC Rcd 5240 (April 7, 2011) (*2011 Pole Attachment Order*).

⁶ Implementation of Section 224 of the Act, *Order on Reconsideration*, 30 FCC Rcd 13731 (2015) (*Rate Parity Order*).

Creating a presumption for “just and reasonable” rates for ILECs, while shifting the evidentiary burden to pole owners, will greatly enhance broadband infrastructure deployment by removing uncertainty from the marketplace, while decreasing the burdens associated with the current complaint process. These narrow reforms will introduce greater parity and certainty into the Commission’s current pole attachment framework, while further improving the Commission’s initial 2011 and 2015 reforms.

The Commission should also address the difficulties encountered by broadband providers in accessing poles, ducts, conduits, and rights-of-way owned by entities that are not subject to section 224 of the Communications Act (Act), such as municipalities and electric cooperatives.⁷ Such barriers exist in today’s marketplace, and are increasingly problematic and acute for broadband providers. These pricing barriers are particularly severe with respect to rates charged to ILECs by electric cooperatives in order to attach to their utility poles.

USTelecom also supports certain limited reforms to the Commission’s make-ready process. While meeting current make-ready timelines remains a challenge for pole-owners, limited adjustments that balance the legitimate needs of pole owners, with the Commission’s desire to speed the process, may be appropriate. In addition, USTelecom strongly supports the Commission’s proposal to adopt a shot-clock for pole attachment complaints relating to both utility pole attachment rates and access. Increased broadband deployment is a shared goal of the Commission and USTelecom’s members, and adoption of certain of the Commission’s targeted reforms to its current pole attachment framework would be a crucial step towards realizing more robust broadband deployment.

⁷ *Notice*, ¶¶ 100–112.

B. Compelling Public Policy Reasons Exist for the Commission to Implement Meaningful Reforms to its Broadband Pole Attachment Regulations.

Broadband deployment has been – and remains – a federal policy priority for Congress, the Commission, the Executive Branch and industry, and the Commission should view further pole attachment reforms through the prism of these longstanding policies that promote broadband deployment and empower more consumers with the multitude of benefits stemming from increased broadband access. As the Commission has previously observed, one of its “central missions” is to make “available ... to all the people of the United States ... a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges.”⁸ The Commission has further noted, that broadband services have “become crucial to our nation’s economic growth, global competitiveness, and civic life.”⁹

Through its current proceeding, the Commission seeks to meet Congress’ express goal of ensuring ubiquitous deployment of high speed broadband communications networks to all Americans. The increasing availability of, and value from, broadband infrastructure is a direct result of federal policies that promote the deployment and adoption of broadband to, and by, all

⁸ 47 U.S.C. § 151. *See also*, Federal Communications Commission, Connecting America: The National Broadband Plan, at xi, 3 (rel. Mar. 16, 2010) (*National Broadband Plan*); *see also* Connect America Fund, *et al.*, *Report and Order and Further Notice of Proposed Rulemaking*, 26 FCC Rcd 17663, ¶ 2 (2011) (*USF-ICC Transformation Order*).

⁹ *USF-ICC Transformation Order*, ¶ 3. Today, Americans spend an average of more than three hours per day online while at home, with that total rising rapidly as broadband penetration grows and internet use displaces traditional media and other activities. *See, e.g.*, Leichtman Research Group, Inc., *Research Notes: Actionable Research on the Broadband, Media & Entertainment Industries*, at 5 (4Q 2014) (available at: http://www.leichtmanresearch.com/research/notes12_2014.pdf) (visited June 8, 2017). The average U.S. consumer now spends less than \$500 per year to access the internet, and in return receives an average annual benefit of approximately \$3,000. *See, e.g.*, David Dean et al., Boston Consulting Group, *The Internet Economy in the G-20*, at 50 (Mar. 2012) (available at: <https://www.bcg.com/documents/file100409.pdf>) (visited June 8, 2017).

Americans.¹⁰ Given that the internet has become our core platform for communications, it is clear that the Commission should seek additional market-oriented reforms that further this federal policy goal.¹¹

USTelecom agrees with the Commission that reducing pole attachment costs and speeding access to utility poles will “remove significant barriers to broadband infrastructure deployment and in turn increase broadband availability and competition in the provision of high-speed services.”¹² The Commission should therefore adopt its proposal to create a “presumption” for “just and reasonable” ILEC rates calculated using the most recent telecommunications rate formula. Such a presumption will introduce greater rate parity, while also removing the substantial uncertainty surrounding the Commission’s current case-by-case approach. Establishing a formula for just and reasonable ILEC rates will greatly improve the Commission’s current complaint framework, which is a time-consuming, costly and highly adversarial Commission process that is the sole recourse for ILECs seeking to obtain reasonable pole attachment rates.

¹⁰ See, e.g., 47 U.S.C. § 1302 (directing the FCC and state commissions with regulatory jurisdiction over telecommunications services to affirmatively “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms.”)).

¹¹ See, e.g., *Lifeline Order*, ¶ 4 (stating that “broadband is essential to participate in society,” and that “[d]isconnected consumers . . . are at an increasing disadvantage as institutions and schools, and even government agencies, require Internet access for full participation in key facets of society.” See also, *id.*, ¶ 5 (stating that “[b]roadband is necessary for even basic communications in the 21st Century,” and that “[b]roadband access thus is necessary for even basic participation in our society and economy.”); see also *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, 2016 Broadband Progress Report*, 31 FCC Rcd 699, ¶ 2 (rel. Jan. 29, 2016) (stating that “Americans continue to turn to advanced telecommunications capability for every facet of daily life, and use fixed and mobile services for distinct but equally important purposes. . . . Fixed and mobile broadband services are both critical means by which Americans communicate.”).

¹² *Notice*, ¶ 3.

While the Commission's existing pole attachment framework has brought greater uniformity between cable and CLEC attachers, ILEC attachers do not currently benefit from this rate parity. The lack of regulatory parity between ILECs and their cable and CLEC counterparts in the provision of broadband services complicates investment decisions for ILECs and has undoubtedly inhibited broadband deployment in the United States. The Commission's Notice appropriately focuses on establishing a closer technology-neutral and ownership-neutral approach to pole attachment rate regulation, which USTelecom maintains will help to spur accelerated broadband penetration rates in the United States.

In broadband related proceedings, the Commission has focused on regulatory parity as the linchpin for deployment. For example, in the *Wireline Broadband Order*, the Commission eliminated legacy restrictions for facilities-based wireline broadband Internet access service providers. In arriving at its decision, the Commission emphasized its intent to "regulate like services in a similar manner so that all potential investors in broadband network platforms, and not just a particular group of investors, are able to make market-based, rather than regulatory-driven, investment and deployment decisions."¹³

Parity in pole attachment rate regulation is the best way for the Commission to ensure that providers of wireline broadband services compete on an even playing field, all to the ultimate benefit of consumers. The Commission's proposal for greater pole attachment rate parity will help to eliminate the artificial pricing inequity in pole attachment rates paid by different classes of providers, despite their deployment of identical services. There is simply no sound policy basis for maintaining such an inequitable pricing mechanism that is hindering

¹³ Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, *Report and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd 14853, ¶ 45 (rel. Sep. 23, 2005) (*Wireline Broadband Order*).

competition in the broadband marketplace through unbalanced regulatory treatment of certain classes of broadband providers over others.

USTelecom agrees that all providers of like services should be treated in the same manner regardless of the technology that they employ. Establishing such parity among all providers of broadband services will help ensure increased broadband competition to the ultimate benefit of consumers in the form of lower prices, increased consumer choices and availability of more advanced services. USTelecom therefore encourages the Commission to move forward with certain of its pole attachment reforms in as expeditious manner as possible.

C. The Commission Should Adopt its Proposal to Implement a Presumption of “Just and Reasonable” Rates Using the Most Recent Telecommunications Formula for ILECs.

Given today’s highly competitive broadband marketplace, there is simply no logical policy basis on which to justify forcing ILECs to pay higher pole attachment rates than those paid by their cable and telecommunications competitive counterparts. From a consumer policy perspective, such an approach is indefensible as it denies consumers the benefits of a level competitive playing field. It can hardly be challenged that “just and reasonable rates” should mean the same thing for providers of fundamentally identical services making fundamentally similar attachments. As the Commission has repeatedly emphasized, similar services should be regulated similarly.¹⁴

¹⁴ See, e.g., *Wireline Broadband Order*, ¶ 45 (quoting statement by the Commission regarding an intention to “regulate like services in a similar manner so that all potential investors in broadband network platforms, and not just a particular group of investors, are able to make market-based, rather than regulatory-driven, investment and deployment decisions”); Statement of Commissioner Ajit Pai, *Assessment and Collection of Regulatory Fees for Fiscal Year 2015*, Notice of Proposed Rulemaking, Report and Order, and Order, 30 FCC Rcd 5354 (2015) (noting that intermodal competitors faced radically different fee requirements based on little more than historical accident, which “violates the bedrock principle that similar services should be regulated similarly.”).

The time is therefore ripe for the Commission to end the “repeated disputes” and longstanding “controversy” surrounding the disparate pole attachment rates paid by ILECs, and to expeditiously adopt its proposal for a “just and reasonable rate” charged to ILEC attachers.¹⁵ USTelecom agrees with the Commission that any just and reasonable rate charged to ILEC attachers should be based on a rate using the most recent telecommunications rate formula.¹⁶ The Commission should also adopt its proposal that an ILEC would receive the telecommunications rate unless the utility pole owner can demonstrate with “clear and convincing evidence” that the benefits to the ILEC far outstrip the benefits accorded to other pole attachers.¹⁷

After declining to adopt a pole attachment rate formula for ILECs in its 2011 Pole Attachment Order,¹⁸ the Commission opted instead to evaluate ILEC complaints on a case-by-case basis. As discussed later in greater detail, the Commission’s approach has resulted in a lengthy, unpredictable and costly complaint process that creates a substantial drag on broadband deployment efforts. The Commission’s proposal for a just and reasonable rate is far more preferable than its current case-by-case approach applicable to ILECs.

A presumptive just and reasonable ILEC rate will introduce greater certainty into the marketplace for ILEC attachers, investor-owned utility pole owners and the Commission. The Commission’s current case-by-case approach creates an unforgiving marketplace for ILEC attachers by forcing them to choose between two unsatisfactory options: agree to the disparate (and exorbitant) pole attachment rates charged by investor-owned utilities (IOUs), or partake in

¹⁵ *Notice*, ¶¶ 44–45.

¹⁶ *Id.*, ¶ 45.

¹⁷ *Id.*

¹⁸ *2011 Pole Attachment Order*, ¶ 8.

the Commission’s lengthy (and costly) complaint process. While the former choice leads to increased infrastructure costs for ILECs that may ultimately be passed on to consumers, the latter often results in extensive delays to broadband infrastructure deployments. Neither of these choices is efficient, and in both instances consumers lose – whether through delayed broadband deployments, increased consumer costs, or potentially both.

In light of these marketplace realities, the Commission should adopt its proposal to afford ILEC attachers the telecommunications rate unless the utility pole owner can demonstrate with “clear and convincing evidence” that the benefits to the ILEC far outstrip the benefits accorded to other pole attachers.¹⁹ USTelecom maintains that such an approach would limit the complaint burdens on both industry and Commission staff by appropriately narrowing potential disputes only to those supported by the “clear and convincing” standard. Whereas the Commission’s “case-by-case” approach resulted in an ambiguous and broader standard for making a determination on whether to file a complaint, the proposed clear and convincing standard provides much-needed certainty to all relevant stakeholders.

The Commission also seeks comment on what evidence would be sufficient for an IOU pole owner to show that an ILEC attacher should not be entitled to the telecommunications rate formula.²⁰ USTelecom encourages the Commission to establish appropriate and relevant bright-line tests. Such established standards will help to dissuade IOU pole owners from engaging in unnecessary and frivolous litigation. One such criterion could entail the Commission’s proposal

¹⁹ *Id.*

²⁰ *Notice*, ¶ 45.

that an ILEC owning a majority of poles would constitute a reasonable standard for clear and convincing evidence.²¹

Where the utility pole owner can demonstrate with clear and convincing evidence that the benefits to the ILEC far outstrip the benefits accorded to other pole attachers, the resultant ILEC rate should be no higher than the pre-2011 telecommunications rate. USTelecom maintains that establishment of such an upper bound will provide further certainty within the pole attachment marketplace, and help to further limit pole attachment litigation.

D. The Commission Should Address Prohibitive Pole Attachment Rates Charged by Municipalities and Cooperatives.

In its Notice, the Commission seeks comment on difficulties encountered by broadband providers in accessing poles, ducts, conduits, and rights-of-way owned by entities that are not subject to section 224, such as municipalities and electric cooperatives.²² Although section 224 does not apply in such instances, the exclusion in federal law has unfortunately enabled electric cooperatives to increasingly charge excessive pole attachment rates when ILECs and other broadband providers seek to attach to their owned or controlled poles or conduit.

As the Commission observed in its National Broadband Plan, the cost of deploying a broadband network hinges on the “costs that service providers incur to access conduits, ducts, poles and rights-of-way on public and private lands. Collectively, the expense of obtaining permits and leasing pole attachments and rights-of-way can amount to 20% of the cost of fiber optic deployment.”²³ The economics of a carrier’s deployment in an area served by a

²¹ *Id.*

²² *Id.*, ¶ 30.

²³ *National Broadband Plan* at 109.

cooperative are no different than in areas where an investor owned utility or a local exchange carrier own the poles.

While the unreasonable rates charged by electric cooperatives have long been an issue for broadband providers, the problem has recently become increasingly acute. In particular, despite federal policies promoting broadband deployment, recent actions by the Tennessee Valley Authority (TVA) are knowingly undermining these important federal policy goals. The TVA's recent actions are particularly ironic given it is a federally owned corporation in the United States created by congressional charter.²⁴

TVA is impeding broadband deployment through its decision last year to adopt a board resolution that substantially increased its pole attachment rates.²⁵ The rates adopted by the TVA Board of Directors are several times those that are federally regulated, and requires all of its participating TVA cooperatives to charge these rates. TVA's action increases pole attachment rates to an average of \$30/pole, involve more than 150 rural electric cooperatives covering seven

²⁴ See TVA website, *About TVA* (available at: <https://www.tva.gov/About-TVA>) (visited Jun. 15, 2017) (noting that the TVA is a "corporate agency of the United States."); see also, GAO Report, *Tennessee Valley Authority, Full Consideration of Energy Efficiency and Better Capital Expenditures Planning Are Needed*, GAO 12-107 (Oct. 2011) (noting that the TVA is a "federally owned electric utility") (available at: <http://www.gao.gov/assets/590/586006.pdf>) (visited Jun. 15, 2017).

²⁵ TVA Board Resolution (available at: https://www.tva.gov/file_source/TVA/Site%20Content/About%20TVA/Guidelines%20and%20Reports/tva_determination_on_regulation_of_pole_attachments.pdf) (visited Jun. 7, 2017) (*TVA Board Resolution*).

states,²⁶ and will impact more than 9 million consumers.²⁷ Several USTelecom member companies have already been approached by TVA-related coops seeking to renegotiate existing agreements. These actions by the TVA will have a broad and negative impact on millions of consumers across multiple states.

Moreover, given the location of electric cooperatives, it will have a particularly acute impact on rural consumers. As the Commission noted in its *2015 Rate Parity Order*, “large and sudden” pole attachment rate increases can “destabilize[e]” broadband deployment plans.²⁸ It was “particularly mindful” of these harms in rural areas, where the Commission noted are the “least served areas in the nation, and where the most additional pole attachments are needed to reach additional customers.”²⁹

The TVA’s decision is directly contrary to well-established federal policy and acts as a significant barrier to broadband deployment, particularly in rural areas where faster speeds are especially needed. Indeed, the TVA expressly acknowledges its dismissal of federal broadband policy, by noting that while the Commission’s pole attachment formulas are “designed to further the policy goal of encouraging broadband investment, particularly in rural areas,” the formulas “do not appropriately compensate the electric utility for the attachment.”³⁰ Such dismissiveness

²⁶ See TVA Website, *TVPPA Membership* (available at: <http://www.tvppa.com/membership/member-directory/regular-members/>) (visited Jun. 13, 2017); see also TVA Website (available at: https://www.tva.gov/file_source/TVA/Site%20Content/Energy/tva_lpc_map.pdf) (identifying the TVA cooperative members’ service territories covering seven states: Kentucky, Tennessee, Mississippi, Alabama, Georgia, Virginia, and North Carolina) (visited Jun. 13, 2017).

²⁷ See TVA Website, *About TVA* (available at: <https://www.tva.gov/About-TVA>) (visited Jun. 13, 2017).

²⁸ *Rate Parity Order*, ¶ 27.

²⁹ *Id.*

³⁰ *TVA Board Resolution*, Attachment B, at 1.

by a federally chartered agency is astounding, given that the Supreme Court and numerous appellate courts have repeatedly found that the Commission's pole attachment rate formulas are both reasonable and sufficiently compensatory for pole owners.³¹

Moreover, in addition to its decision to substantially increase pole attachment rates for broadband providers throughout its seven state service territory, the TVA also subsequently approved a \$300 million strategic fiber initiative that will expand its fiber capacity.³² The initiative will take five to 10 years to complete and will include 3,500 miles of fiber to enable broadband connections for more of TVA's generating plants and as well as more of its customers. In essence, as the TVA takes affirmative steps to price broadband competitors out of the market, it seeks to deploy its own competitive broadband service.

Further, the Commission has expended substantial time and resources in promoting efficient and carefully targeted broadband deployment in rural areas through its Connect America Fund (CAF).³³ These efforts, which are now beginning to bear fruit, are properly focused on stimulating investment by making available public funds necessary to deploy broadband in areas that would be otherwise uneconomic to serve. The higher rates charged by

³¹ See, e.g., *Alabama Power Co. v. FCC*, 311 F.3d 1357, 1370–71 (11th Cir. 2002), cert. denied, *Alabama Power Co. v. FCC*, 540 U.S. 937 (2003) (“[A]ny implementation of the [Commission’s cable pole attachment rate] (which provides for much more than marginal cost) necessarily provides just compensation.”); *FCC v. Florida Power Corp.*, 480 U.S. 245, 253–54 (1987) (finding that it could not “seriously be argued, that a rate providing for the recovery of fully allocated cost, including the actual cost of capital, is confiscatory”).

³² TVA Website, *TVA Board Approves \$300 Million Strategic Fiber Initiative*, May 11, 2017 (available at: <https://www.tva.com/Newsroom/Press-Releases/TVA-Board-Approves-300-Million-Strategic-Fiber-Initiative>) (visited Jun. 7, 2017).

³³ *USF-ICC Transformation Order*, ¶ 1 (noting the Commission’s goal to establish a “framework to distribute universal service funding in the most efficient and technologically neutral manner possible.”); see also *Connect America Fund, et al., Report and Order and Further Notice of Proposed Rulemaking*, 29 FCC Rcd 8769 (2014).

TVA electric cooperatives will detrimentally impact these CAF broadband deployment efforts by forcing broadband providers to pay exorbitant and unreasonable rates to these cooperatives in order to obtain access to essential infrastructure. As a result, the unreasonable rates expended for access to cooperative poles for any CAF buildouts substantially increases the cost and reduces the funds available for additional broadband deployment.

To address the adverse actions of the TVA, USTelecom strongly encourages the Commission to coordinate with appropriate federal agency stakeholders and legislative committees holding TVA oversight. While the TVA asserts that its sole obligation is to ensure that electric rates be kept “as low as feasible”³⁴ for electric ratepayers, such rates should not come at the expense of the broader federal policy goal of increased broadband deployment. The Commission should therefore work with other federal stakeholders to ensure that the shared federal goal of increased broadband deployment is not derailed by the narrower goals of a single federal entity.

Finally, USTelecom agrees with the Commission’s assertion that its authority under section 253 of the Act can be used to regulate access to municipally-owned poles when the actions of the municipality are deemed to be prohibiting or effectively prohibiting the provisions of telecommunications service.³⁵ Section 253(a) stipulates that “[n]o State or local statute or regulation, or other State or local legal requirement, *may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.*”³⁶ The only obligation for the Commission to exercise such preemption is to provide

³⁴ *TVA Board Resolution*, Attachment B, at 1.

³⁵ *Notice*, ¶ 109.

³⁶ 47 U.S.C. § 253(a) (emphasis added).

“notice and an opportunity for public comment,”³⁷ subsequent to which it may “preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.”³⁸

Municipal control of local rights-of-way and critical infrastructure such as poles often translates into onerous rules at the local level that add additional expense and delay to broadband infrastructure projects – rules that are ripe for Commission action. Just last year, Chairman Pai stated that “where states or localities are imposing fees that are not ‘fair and reasonable,’” the Commission should preempt them, and “where local ordinances erect barriers to broadband deployment” the Commission “should eliminate them.”³⁹

Moreover, such concerns are not merely theoretical. As then-Commissioner Pai pointed out when discussing Google Fiber’s deployment in Kansas City, “too many providers who try to obtain [rights of way] are confronted with daunting sets of federal, state, and/or municipal regulations that often delay and sometimes deter infrastructure investment and broadband deployment.” AT&T also experienced considerable regulatory interference with the roll-out of its U-verse service at the hands of localities in California and Connecticut – among others.⁴⁰ The

³⁷ 47 U.S.C. § 253(d).

³⁸ *Id.*

³⁹ See Remarks of FCC Commissioner Ajit Pai at the Brandery, “A Digital Empowerment Agenda,” Cincinnati, Ohio, p. 7 (Sep. 13, 2016) (available at: https://apps.fcc.gov/edocs_public/attachmatch/DOC-341210A1.pdf) (visited Jun. 8, 2017).

⁴⁰ See Comments of AT&T, WT Docket No. 11-59, at 5-7 (filed Jul. 18, 2011) (noting that “[t]he practices of many local jurisdictions continue to hinder and delay carrier access to rights of way, and other sites needed to expand broadband capacity and coverage”); see also Comments of Verizon & Verizon Wireless, WC Docket No. 11-59, at 16-25 (filed Jul. 18, 2011) (detailing localities’ “abuse [of] their authority over public rights-of-way” and other onerous regulations that “result in unreasonably high compliance costs”).

Commission should therefore exercise its authority under section 253 in instances where the municipality is deemed to be prohibiting or effectively prohibiting the provisions of broadband.

E. If Reforms Are Necessary, the Commission Could Implement Targeted Reforms to its Make Ready Process

Make ready timelines are already a challenge to meet for pole owners and attachers, especially ILEC pole owners who own a small percentage of poles and whose core business is unrelated to pole ownership. While USTelecom supports the important efforts to reform the broader pole attachment framework, it encourages the Commission to carefully balance the need for reforms to its make ready framework, with the legitimate concerns and interests of pole owners. To the extent the Commission believes reforms to its make ready process are necessary, such reforms should be implemented only in a narrow and targeted manner. While narrowly tailored reforms may be necessary, the Commission should nevertheless be cautious about further expediting its proposed timelines.

Commission rules allow pole owners to assert a right to an additional 15 days to complete make-ready work that existing attachers failed to complete within the required timeframe.⁴¹ In many instances, this extra time is not used and adds complexity without benefit. The Commission could therefore consider reducing the make-ready timeline by eliminating the 15-day period for a pole owner to complete make-ready work after an existing attacher fails to meet its make-ready deadline. Instead, at that point, the new attacher could invoke its self-help remedy and perform the make-ready work with a pole owner approved contractor.

USTelecom takes no position regarding the Commission's proposal to mandate one-touch make-ready.⁴² However, in considering whether such an approach would be advisable, the

⁴¹ 47 C.F.R. § 1.1422(e)(1)(iv).

⁴² *Notice*, ¶¶ 21–24.

Commission must consider several issues relevant to any one-touch make-ready framework. For example, paramount to the Commission's consideration of one-touch make-ready is how best to address liability issues for make-ready work done by contractors. Given the potential that non-compliant, or improperly installed attachments can threaten the safety of linemen as well as the general public, the Commission would need to clearly delineate which party (*i.e.*, the new attacher or the contractor) would assume liability in such instances.

In addition, the Commission would need to ensure the presence of a thorough and robust process for confirming that any make-ready contractors have received suitable and sufficient training. Make-ready processes can be extremely complex and technical in nature with separate and exacting requirements established by the National Electrical Safety Code (NESC), state public utility commissions and public service commissions. Such codes often govern a broad range of issues, such as the manner in which lines and equipment are to be attached, to how many inches of separation must exist between wires and equipment. Given the importance of satisfying these stringent and important make-ready requirements, the Commission would need to ensure that suitable training has been completed by authorized contractors operating under a one-touch make-ready framework.

USTelecom also opposes any proposal that would require pole owners to provide potential new attachers with a schedule of common make-ready charges.⁴³ The Commission's proposal ignores the reality that make-ready rates often vary depending on a broad range of factors. For example, is the utility pole being replaced anchored in soil (less expensive), or bedrock (more expensive)? Are the attachments needing make-ready work attached to a pole on a suburban street (more accessible; less expensive), a remote fire-trail (less accessible; more

⁴³ *Id.*, ¶ 33.

expensive), or a highly trafficked road (more accessible; increased safety requirements; more expensive)? Each of these examples could feasibly occur in a single service provider's territory, and illustrates the multiple factors that can go into any given make-ready work order. Given the complexity of make-ready charges, the Commission should reject proposals that would require pole owners to provide potential new attachers with a schedule of common make-ready charges.

F. The Commission Should Adopt a “Shot Clock” For Resolving Pole Attachment Complaints.

The Commission should adopt its proposal to establish a 180 day shot clock for pole attachment complaints, and such a process should apply to complaints regarding both access to poles, and pole attachment rates.⁴⁴ The Commission's current complaint process – which is not subject to any timeline – creates a substantial burden on wireline broadband providers, and results in unnecessary costs and delays to broadband deployment.

The Commission's current complaint process is far too lengthy, and drawn-out complaint proceedings are a substantial drag on broadband deployment efforts. ILECs availing themselves of the Commission's current complaint framework must dedicate substantial financial and personnel resources to participate in lengthy complaint proceedings. These proceedings can often times drag on for lengthy periods – sometimes spanning years.⁴⁵

Such inordinate delays have substantial impacts on broadband providers' planned deployments of wireline broadband infrastructure, with the ultimate impact felt by consumers. Even assuming that complaint proceedings are sometimes stayed, the absence of any established

⁴⁴ *Id.*, ¶¶ 47, 51.

⁴⁵ *See, e.g.*, Comcast Cable Communications Mgmt., LLC, *Order of Dismissal*, 26 FCC Rcd. 5158 (2011) (dismissing a pole attachment complaint after almost five years after the parties settled); *Cable Television Ass'n of Georgia, et. al., Order*, 17 FCC Rcd. 13807, ¶ 6. (2002) (complaint filed in 1998, and decision not issued until almost four years later); *Cable Texas Inc.*, 14 FCC Rcd. 6647, ¶ 2 (1999) (taking almost two years to resolve).

time horizon for resolving pole attachment complaints has a substantial negative impact on planned broadband deployments. The Commission's adoption of a 180-day shot clock will provide a much needed degree of certainty and urgency to resolving pole attachment complaints. Even in instances where the shot clock is paused for brief periods, such a framework will also provide wireline broadband providers with a general time estimate for broadband deployment purposes.

Regarding circumstances under which the shot clock could be stopped,⁴⁶ the Commission should utilize similar circumstances used during the agency's merger review process.⁴⁷ For example, as recommended in the Notice, the Enforcement Bureau could be afforded authority to stop the shot clock in instances where parties need additional time to provide "key information" requested by the Bureau.⁴⁸ Similarly, the shot clock could be paused in instances where additional information is necessary for the Commission to adequately consider the merits of a particular complaint.

G. The Commission Should Adopt its Proposal to Ensure Reciprocal Access to Poles for ILECs.

USTelecom supports the Commission's inquiry into whether section 224(a) prevents ILECs from gaining access to CLEC-controlled infrastructure. Although the Commission previously examined this issue during its implementation of the 1996 Act in the *1996 Local Competition Order*, it determined that section 251 cannot "[restore] to an incumbent LEC access

⁴⁶ Notice, ¶ 49.

⁴⁷ See Federal Communications Commission Website, *Informal Timeline for Consideration of Applications for Transfers or Assignments of Licenses or Authorizations Relating to Complex Mergers* (available at: <https://www.fcc.gov/general/informal-timeline-consideration-applications-transfers-or-assignments-licenses-or>) (visited Jun.14, 2017).

⁴⁸ Notice, ¶ 49.

rights expressly withheld by section 224.”⁴⁹ USTelecom agrees with CenturyLink’s assessment that the disparate treatment between ILECs and CLECs dampens the incentives for all local exchange carriers to build and deploy the infrastructure necessary for advanced services.⁵⁰

USTelecom maintains that the Commission’s current interpretation of section 224 creates asymmetrical burdens on ILECs by allowing CLECs (including those affiliated with cable companies) to demand access to ILEC-constructed poles, ducts, conduits, and rights-of-way while denying ILECs reciprocal access to such infrastructure. CenturyLink correctly observed in its recent biennial review comments that “[w]hatever public interest justifications may have been mustered for these one-sided obligations in the past, they are no longer valid.”⁵¹ USTelecom agrees that ILECs have no special advantages in deploying poles, ducts, conduits, and rights-of-way, and that “perpetuating the current asymmetric obligations to provide access to this infrastructure disserves the public interest and harms consumers by distorting both ILEC and CLEC incentives to construct infrastructure that can be used to provide advanced services.”⁵²

II. COPPER RETIREMENT AND NETWORK CHANGE REFORMS.

In the Notice, the Commission proposes changes to its Part 51 rules to allow greater flexibility to providers seeking to make network changes, including copper retirement, and seeks comment on those proposals. Legacy networks that rely on copper and TDM technology are fast

⁴⁹ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, ¶¶ 1226 – 1231 (1996). The Ninth Circuit Court of Appeals disagreed in dicta, noting that sections 224 and 251 could “be read in harmony” to support a right of access for ILECs on other LEC poles. *US West Communications, Inc. v. Hamilton*, 224 F.3d 1049, 1053-54 (9th Cir. 2000).

⁵⁰ CenturyLink Comments, WC Docket No. 16-132, at 12-13 (Dec. 5, 2016) (*CenturyLink Biennial Comments*).

⁵¹ *Id.*, at 13.

⁵² *CenturyLink Biennial Comments*, at 13.

becoming relics, serving fewer and fewer telecommunications users as newer broadband services and technologies systematically replace them. There is little to be gained by maintaining or adopting rules that make it harder for providers to make a timely transition. To the contrary, the Commission must enable them to reallocate resources that otherwise would be used to maintain aging and obsolete systems and use them to build systems capable of meeting our current and future broadband needs.

A. The Commission Should Revise Rules Adopted in 2015 That Impose Unnecessary Burdens on Copper Retirement.

USTelecom generally supports the repeal of recently adopted rules that inject unnecessary delay, resulting in wasteful capital expenditures on legacy infrastructure without a commensurate consumer benefit, and a return to prior short-term network change notification rules in place prior to adoption of the *2015 Technology Transitions Order*. There is scant evidence, anecdotal or otherwise, that the “fear” expressed by competitive LECs⁵³ that ILECs will use technology transitions to thwart competition is warranted, or that increasing the burden on ILECs to build new facilities while at the same time maintaining facilities used by a small and decreasing number of customers serves the public interest.

1. The Commission should revise any of its rules that will slow down transition efforts.

ILECs need flexibility as they upgrade and replace legacy networks. In seeking comment on whether to eliminate all or part of new section 51.332,⁵⁴ the Commission opens the door to allowing more flexibility to ILECs to again use the streamlined network change provisions in

⁵³ See *Technology Transitions, et al.*, 30 FCC Rcd 9372, ¶ 15 (2015) (*2015 Tech Transitions Order*).

⁵⁴ 47 C.F.R. § 51.332.

section 51.333⁵⁵ for copper retirement notices of less than six months. We support such a change. The short-term notification provisions incorporate adequate safeguards, including early direct notice to interconnecting service providers, to ensure that no competitor is denied an opportunity to adequately prepare for the impending retirement.

We likewise support a return to the pre-2015 timeframe for ILECs to implement copper retirements 90 days after notice rather than 180 days.⁵⁶ The Commission need not, however, reverse its decision to eliminate the process by which competitors could object to and delay copper retirements merely because it restores the shorter implementation time frame. To the contrary, the Commission must reaffirm its commitment to notice-based procedures for copper retirement and other network changes; allowing competitors to object to and seek to delay an ILEC's copper retirement plans is counterproductive to such a commitment. Elimination of the objection process was reasonable, given that competing providers could use it to engage in anticompetitive behavior by delaying copper retirements whether they had a sound basis for doing so or not.⁵⁷ Measureable costs to ILECs associated with prolonged maintenance to legacy networks are clear; less measurable are costs associated with delay in implementing much needed upgrades to offer better services. Both likely far outweigh any short-term benefits gained by competitors in putting off the inevitable.

Another potential cause of delay in the copper retirement process is the expansion of entities to which carriers seeking to retire copper must give direct notice. Given the overall

⁵⁵ See 47 C.F.R. § 51.333.

⁵⁶ Notice, ¶ 59; 47 C.F.R. § 51.332(f).

⁵⁷ Although an objection ultimately could only delay but not prevent copper retirement. See, *2015 Tech Transitions Order*, ¶ 28 (also explaining “that objections are deemed denied absent Commission action”).

increasing awareness that technology transitions are well underway, and the widespread acceptance and adoption of services based on newer technologies, it is not clear that providing direct notice to the Secretary of Defense, public utility commissions, state governors, and Tribal authorities has enhanced awareness among affected entities or otherwise improved the copper retirement process in a meaningful way. To be clear, we are not opposed to enhanced notice requirements where they improve the process for affected customers, but given the additional cost to ILECs they should be retained only if they can be shown to provide some measure of benefit that outweighs those costs.

Also, while we agree that communication during the transition process is important, written direct notice to generally more sophisticated non-residential retail customers may be more burdensome than warranted. We therefore encourage the Commission to allow carriers some flexibility in providing notice to all non-residential customers, but in particular to wholesale customers and interconnecting carriers with whom they typically have long-term contractual agreements that often include customer-specific termination provisions and the like. For these customers, ILECs should be able to provide notice via website posting. For the same reasons, we also support restoration of the requirement to provide notice only to telephone exchange service providers that directly interconnect rather than to every entity in the affected area.⁵⁸

Another adjustment that could ease ILEC burdens by giving them more flexibility in managing the copper retirement process is in the timing of the current certification required by the Commission, which must be made no later than 90 days after the Commission's public

⁵⁸ If the FCC retains portions of section 51.332, it should in any event restore this notice requirement only as to directly interconnecting carriers. *See Notice*, ¶ 63.

notice, regardless of the date of planned or actual copper retirement. The Commission should allow carriers to certify compliance with notice requirements at any time prior to the date of actual copper retirement. The certification is, in effect, a checklist, the completion of which does not trigger any other deadlines or actions, so this modification would ease compliance burdens on carriers without materially affecting the Commission's oversight.

2. The Commission should reverse the expanded definition of copper retirement that includes the feeder portion of copper loops and subloops and *de facto* retirement.

Another measure that likely has or will hamper transition efforts is the Commission's expansion of the definition of copper retirement to include *de facto* retirement.⁵⁹ Rather than "catalyz[ing] further fiber deployment," the Commission injected uncertainty into the copper retirement process with this provision, in particular for ILECs that continue to rely on their copper networks to provide service to customers. For these carriers, it would make little sense to allow those facilities to deteriorate or to stop servicing them before they are scheduled for retirement. That is not to say the occasional service issue does not arise, but there has been no broad finding that ILECS are deliberately and pervasively allowing their copper networks to deteriorate, as suggested by the Commission in adopting *de facto* definition.⁶⁰ ILECs continue to spend billions of dollars yearly to maintain these facilities,⁶¹ at the same time that they are also investing billions in new fiber infrastructure and at a time when only an estimated 16% of

⁵⁹ See 47 C.F.R. § 51.332(a) (defining *de facto* retirement is defined as "the failure to maintain copper loops, subloops, or the feeder portion of such loops or subloops that is the functional equivalent of removal or disabling").

⁶⁰ 2015 Tech Transitions Order, ¶ 90.

⁶¹ See, e.g., *Ex Parte Letter* from Melissa E. Newman, Senior Vice President, CenturyLink to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5, RM-11358 (Jul. 24, 2015).

Americans still rely on phone services that are using legacy copper facilities.⁶² Rather than adding complexity to copper retirement decisions, the Commission should be encouraging ILECs to retire and replace these little-used legacy facilities.

Expansion of the definition did not improve and does not facilitate the copper retirement process, but rather is a distraction. The Commission's existing enforcement rules are sufficient to address quality of service complaints for existing facilities that a carrier has no plans to retire, and for facilities that a carrier has decided to retire the expanded definition is largely irrelevant. In fact, we support the Commission's prior conclusion that carriers may address an individual customer's service quality issues by migrating that customer from its copper facilities to existing fiber facilities without submitting a copper retirement notice.⁶³

Moreover, in particular if the Commission decides to fully harmonize the different treatment between copper retirement and other network changes, it should consider doing away with a separate definition – expanded or otherwise – for copper retirement altogether. Copper retirement is merely one type of network change, and thus one set of rules could seamlessly be established to apply to all network changes. The fact that copper retirements have been occurring for more than a decade and fiber is becoming more prevalent, the need for copper retirement-specific rules will only diminish further with time.

⁶² See Patrick Brogan, USTelecom Research Brief, *Voice Competition Data Support Regulatory Modernization*, at 1, Nov. 25, 2014 (available at: http://www.ustelecom.org/sites/default/files/documents/National%20Voice%20Competition%202014_0.pdf) (visited Jun. 15, 2017) (*USTelecom Research Brief*).

⁶³ See *2015 Tech Transitions Order*, ¶ 93.

3. Effective date of network changes should be triggered by carrier filing date.

Another recurrence that can erect a barrier to infrastructure investment and deployment is the delay in issuance of public notice by the Commission. Under current rules, the implementation date and effective dates for copper retirement and other network changes must occur a specified number of days after issuance of the Commission's own public notice of the planned change. Thus, where the Commission does not act in a timely manner to issue such notice, ILECs can find themselves in a holding pattern, unable to execute planned changes until the Commission takes action. This can be a significant barrier to carriers' efforts to implement transitions even in instances where there are few or no customers utilizing the facilities at issue.

One way to address such presumably inadvertent delay to the copper retirement process would be to measure the required waiting period from the time of public notice by the carrier seeking to retire copper, rather than from the time of Commission public notice. That is, the deemed effective date would be no more than 90 days⁶⁴ after the implementing carrier provides the requisite notice. A carrier filing trigger would have the benefits of eliminating uncertainty and inconsistency that can occur when there is no established mechanism to ensure prompt Commission action, such as a shot clock, which the Commission should adopt if it does not move to a carrier filing trigger.⁶⁵ Having the option of not issuing a public notice for every planned copper retirement would have the added benefit of decreasing staff workload.

Moreover, because customers would still be provided the other safeguards established in the

⁶⁴ Specifically, we support repeal of the rule establishing approval of an ILEC's implementation date 180 days after public notice. 47 C.F.R. § 51.332(f).

⁶⁵ A self-imposed FCC public notice deadline of 10 business days, for example, after carrier notice to the FCC would not likely be unduly burdensome to staff. A shot clock combined with automatic trigger in the absence of FCC action would be especially helpful for notice under the short term notice provisions, given the abbreviated time frames therein. *See* 47 C.F.R. § 51.333.

Commission's rules, those benefits would not be outweighed by any harms or burdens to consumers.

The Commission could make customer notification even more meaningful by granting flexibility to carriers to notify customers a minimum of 90 days prior to when they will be migrated or can expect to experience a service modification resulting from a copper retirement. This would be especially helpful in instances where a planned copper retirement does not occur as soon as originally scheduled.

B. The Commission Should Further Streamline to Reduce Burdens on Network Changes Wherever Possible.

The frequency and prevalence of network changes, primarily in the form of migration from copper to fiber, make for a very different marketplace than when the Commission last revisited its network change rules in 2004.⁶⁶ Approximately 84% of Americans will not be affected by any future rules adopted to address copper retirement because they have transitioned away from telephone service that utilizes legacy ILEC facilities. For the other 16%, many likely will voluntarily transition in the future to take advantage of new services and capabilities rather than wait for their carrier to make a network upgrade. It is important to keep this perspective in mind as the Commission plans and regulates for a future in which copper retirements will become a rare occurrence.

1. The Commission should accelerate copper retirements that will not affect existing customers.

We strongly support an accelerated and streamlined procedure for copper retirements that will not affect any existing customers. For example, no carrier should have to wait more than 30 days (or less, as appropriate) after providing notice to the Commission to retire copper facilities

⁶⁶ See Notice, ¶ 66.

where no customers are using the facilities. Likewise, copper retirements necessitated by natural disasters and other unforeseen emergency events should be subject to accelerated and streamlined procedures to allow restoration of service using replacement facilities to occur as quickly as possible.

2. ILECs should be allowed to disclose information about planned network changes.

The prohibition in section 51.325(c)⁶⁷ on ILECs disclosing information about planned network changes to affiliated or unaffiliated entities prior to providing public notice is an unnecessary restriction on the carriers' ability to adequately plan and prepare customers for network replacements and upgrades. Often (unless necessitated by natural disaster or other unexpected emergency event) carriers plan far in advance for network replacements and upgrades, and would, if allowed, give early notice to customers and others that might be affected when or if those changes happen. The potential disadvantage to entities such as federal government agencies is especially notable because they claim to have budgeting constraints that prevent them from purchasing new equipment or changing internal systems without significant lead time.⁶⁸

Robust competition from multiple service providers has eliminated the need for this restriction. The Commission therefore should eliminate the prohibition on ILECs discussing planned network changes prior to the required notice period with any person or entity to which disclosure may be useful, at the carrier's discretion.

⁶⁷ 47 C.F.R. § 51.325(c).

⁶⁸ See Petition for Reconsideration or Clarification of the National Telecommunications and Information Administration, GN Docket No. 13-5, WC Docket No. 13-3, RM-11358, at 3-4 (Oct. 12, 2016) (explaining that some federal government agencies "can convert their networks and services only in stages and only after considerable planning, prioritizing, and testing").

3. ILECs seeking to retire copper should not be required to ensure continuing terminal equipment operation.

Innovative companies routinely upgrade their offerings in response to technological advances, regulatory requirements, and customer preferences. For example, Microsoft every few years comes out with a new Windows operating system and, after a brief transition period, stops providing support for previous versions. Their customers are notified *en masse*, and each user responds by installing the new operating system, or suffering the consequences of not having full compatibility and the latest offerings and protections for their computer or other device.

ILECs (whose services are subject to substantially more competition from multiple providers than Microsoft's operating system) seeking to upgrade their facilities and offerings are held to a very different standard. They must first glean whether any customer's equipment will become incompatible after a network change,⁶⁹ and if so then separately notify those customers and give them "an opportunity to maintain uninterrupted service" before executing the change.⁷⁰ That is not how Windows upgrades work, nor is it how the real world works.

It is inevitable that antiquated, analog-based equipment will become obsolete and incompatible with newer networks. But that eventuality need not stop technology transitions in their tracks. An obsolete fax machine can easily be replaced with a cellphone camera and a text or email message. Alarm and medical monitoring systems that are now largely web-based can replace systems that still rely on wired telephone service.

Rather than looking backward, the Commission can embrace the inevitable by relieving ILECs seeking to replace legacy facilities with new technology of these obligations, which no

⁶⁹ The FCC has never adequately explained how a carrier would know or reasonably predict which customers have terminal equipment that will become incompatible after a network change.

⁷⁰ 47 C.F.R. § 68.110(b).

longer make sense from a marketplace perspective. The Commission must eliminate section 68.110(b) to send an unequivocal message that it will not favor a few isolated customers to the detriment of carriers that are focused on achieving ubiquitous broadband deployment.

III. SERVICE DISCONTINUANCE REFORM.

For the same reasons the Commission must eliminate regulations that unreasonably hamper ILECs in their efforts to replace and upgrade their legacy copper networks, streamlining discontinuance of legacy services must also be prioritized. Requiring “exit approval” may have made sense decades ago at a time when ILECs held telephone monopolies, there was no or nascent wireless service, and cable providers only offered video services. But that is no longer the case. Widespread competition for voice and data services warrants a different regulatory approach to govern providers that must seek approval to discontinue legacy services if the goal is to make sure they continue to invest in broadband infrastructure.

A. Applications to Grandfather Legacy Services Should be Streamlined.

As discussed earlier, more and more ILECs are retiring copper facilities and migrating to modern facilities that are capable of providing higher-speed voice and data services. As a result, demand for the low-speed services that typically are provided over legacy networks is decreasing as consumers demand more robust high-speed services to meet their broadband needs. The Commission therefore should make it easier for carriers seeking to replace their legacy services with much-desired higher-speed services, especially to the extent that such discontinuances and transitions do not harm those using the services, as is the case with grandfathering.

1. The burden on carriers seeking to discontinue and grandfather legacy services should be minimized.

The section 214 discontinuance provisions are intended to protect existing communities by ensuring they are not subject to severe service disruptions or loss of service. But they are not

intended as a means to force providers to continue providing legacy services forever. As competition continues to grow and carriers and others provide new and better services over modern broadband facilities, it is less likely that customers will experience a harmful service loss or be unable to secure a reasonable substitute service. Therefore, to the extent an ILEC seeks section 214 authority to discontinue offering a legacy service but seeks to maintain or grandfather the service for existing customers, the discontinuance process should be streamlined and simplified.

It would be appropriate, therefore, to reduce the public comment to 10 business days (or less) for all applications that seek to grandfather low-speed legacy services.⁷¹ There is no apparent rationale for granting disparate relief between so-called “dominant” and non-dominant” carriers, given national marketplace trends that show ILECs face widespread competition from intermodal competitors.⁷² The Commission also seeks comment on whether higher-speed services should be afforded the same treatment.⁷³ Because those services likely face even more competition from non-ILEC providers, there is no apparent reason not to reduce notice periods for all discontinued services that will be grandfathered as well.⁷⁴

Significantly, because current customers are not subject to a service loss with grandfathering, they would have little reason to complain about or oppose such applications. Moreover, although non-customers, as potential future customers, would be precluded from later

⁷¹ See Notice, ¶ 73 (proposing a uniform 10-day public comment period for all applications seeking to grandfather low-speed services).

⁷² Cf. Technology Transitions, *et al.*, *Declaratory Ruling, Second Report and Order, and Order on Reconsideration*, 31 FCC Rcd 8283 (2016) (*Declaratory Ruling*) (declaring that ILECs are non-dominant in their provision of interstate switched access services).

⁷³ Notice, ¶ 75.

⁷⁴ *But see infra* § III.A.2., proposing that only lower-than DS-1 legacy services be subject to any section 214 discontinuance procedures.

purchasing the service, providers have no duties with regard to those potential customers, thus they would have standing to complain or oppose a service discontinuance.

We also support streamlining of the period after which an application would be automatically granted. The proposed auto-grant period of 25 days should provide ample time for the Commission to review these applications, which will largely if not entirely be unopposed by affected customers. In fact, the Commission should consider adopting a shorter period in instances where no comments opposing the discontinuance are filed. For the same reasons it makes sense to start the notice and auto-grant periods for copper retirements with the carrier filing date, the Commission should consider counting the discontinuance notice and auto-grant periods from the carrier filing date, and/or should self-impose a shot clock to ensure that ILECs seeking to discontinue a service do not experience unreasonable delays.

Given that discontinuances in which services are grandfathered pose no harm to existing customers, it would be appropriate to further lessen the burden on providers under certain circumstances by requiring less information in the application or even eliminating the requirement to file a section 214 application altogether. For example, where reasonable alternative service from any provider is available, regardless of technology (fiber, IP-based, wireless), there will be no actual reduction or impairment of service to a community, and thus there should be no need for a section 214 application.

2. Only legacy low-speed services should be subject to section 214 discontinuance applications.

Because of widespread competition among providers, especially for higher speed services, the Commission should limit the scope of services for which a section 214 application must be filed. The Commission asks whether any streamlined discontinuance process should apply only to grandfathered TDM services at lower-than-DS1 speed (1.544 Mbps), or whether

streamlining should also apply to higher-speed legacy copper-based or TDM services. As a general matter, carriers that provide these higher-speed legacy services should not have to seek discontinuance authority for services equivalent to those their competitors can and routinely do provide over newer facilities.⁷⁵ Thus, rather than subject higher-than-DS1 speed services to streamlined discontinuance, those services should be exempt, through forbearance or otherwise, from the application process.

3. No special rules are necessary to accommodate government users, especially where their services will be grandfathered.

Despite any “particular challenges” faced by federal government agencies and any other government customers of legacy telecommunications services, concerns about these users experiencing service disruptions without reasonable warning are unwarranted. In the normal course of business, our member companies discuss service changes with their government customers that will impact them well before the changes are implemented. In this regard, repeal of the restriction in section 51.325(c) prohibiting ILECs from disclosing information about planned network changes prior to providing public notice would eliminate the need for any government-specific notice and communication provisions.⁷⁶

In particular where services subject to discontinuance are being grandfathered, existing government and other customers will not be subject to a loss of service.⁷⁷ Grandfathering has the

⁷⁵ We note that ILECs are the most prevalent providers of legacy services over copper and TDM-based facilities, so most of the burden to file for discontinuance of these services disproportionately falls on them.

⁷⁶ *See supra* § II.B.2.

⁷⁷ *See, e.g.*, Petition for Reconsideration or Clarification of the National Telecommunications and Information Administration, GN Docket No. 13-5, WC Docket No. 13-3, RM-11358 (filed Oct. 12, 2016) (describing concerns about the harm federal government customers may face when services are discontinued without ample notice).

added advantage of putting customers on notice that, at some point in the future, the service will no longer be available, which in turn allows these customers to begin transition planning well in advance of an eventual service discontinuance.

ILECs that provide services supporting mission-critical activities like safety, emergency preparedness and response, and national security are well aware that they do. Contract terms and agreements with government customers routinely cover mission-critical requirements including continuity of service, and routine communications about proposed network changes and plans to ensure continuity already occur on a case-by-case basis as needed. Government customers that have experienced service disruptions affecting their mission-critical activities without sufficient notice should demonstrate on the record that a specific problem exists, after which the Commission can properly assess whether it needs to take remedial action. In the alternative, instead of adopting additional rules that may be overly restrictive and unnecessary in all but a small number of instances, the Commission could develop best practices for governing carrier-government customer communications when legacy services used to support mission-critical activities are subject to discontinuance.

4. Applications to discontinue previously grandfathered legacy services carry even less risk of harm to customers.

As noted above, grandfathering a service is the ultimate notice mechanism. When a customer is informed that a legacy service he or she subscribes to will no longer be offered to new customers because it is being discontinued, there is no mystery about the provider's future plans regarding that service. With technology transitions well underway, no customer will reasonably be surprised by the eventual discontinuance of grandfathered legacy services to make way for newer services and technologies. Thus, the Commission's proposal to streamline notice, comment period, and auto-grant for all carriers and legacy services previously grandfathered is a

reasonable and necessary response that balances the protection of customers with the need to encourage ILECs to keep investing in broadband infrastructure. For the same reasons discussed in the previous section, the Commission need not adopt special rules to apply to carrier-government customer relationships, although some additional notice where demonstrated harm to mission-critical activities, the public interest, or safety is at stake may be appropriate.

B. The Commission’s Clarification Regarding Carrier-Customers’ End Users was Improper and Unlawful.

The Commission’s expansion of the scope of end users that a carrier must consider in determining whether to seek section 214 discontinuance authority was inconsistent with statutory intent and contrary to Commission precedent, and thus unlawful. As explained in USTelecom’s brief to the D.C. Circuit court in a challenge to this and other rules adopted by the Commission in the 2015 Technology Transitions Order,⁷⁸ Congress, in enacting section 214, was concerned with ensuring continuity of service to a community, not to ensuring particular carriers an enduring source of wholesale supply.⁷⁹ Yet the Commission imposed this new obligation without regard to whether a discontinuance would leave a community without service, insisting that a section 214 application and Commission approval are required if a carrier-customer’s end users would be affected, even when those end users can readily switch to other providers.⁸⁰

Under the Commission’s rules, each carrier seeking to discontinue a service is required to file a section 214 application and to notify its customers of the planned discontinuance.⁸¹ ILECs

⁷⁸ See Brief for Petitioner USTelecom, Case No. 15-1414, D.C. Cir. (filed Jun. 14, 2016) (*USTelecom Brief*). The FCC rightly (and tellingly) asked the court to hold in abeyance a court challenge by USTelecom and others to give it an opportunity to revisit that ill-conceived ruling.

⁷⁹ See *USTelecom Brief* at 41.

⁸⁰ See, *2015 Tech Transitions Order*, ¶ 116.

⁸¹ See 47 C.F.R. § 63.71; see also 47 U.S.C. § 251(c)(5).

are also required to notify competing carriers when they will make changes that will affect the interoperability of competitors' facilities and networks, ostensibly to enable them to comply with section 214 by providing notice to their own customers.⁸² The Commission never adequately explained how the obligation to seek discontinuance falls on the ILEC rather than on the carrier-customer when the carrier-customer's end users are affected. Nor can it explain how, because there is no such obligation in the Act, or in the Commission's rules or precedent. A carrier-customer discontinuing a service must fulfill its § 214(a) obligations to its own retail customers, even if the discontinuance results from an ILEC discontinuing a wholesale input used by carrier-customer to provide service to its own retail customers. The Commission should therefore adopt its proposal to interpret section 214(a) to require a carrier to take into account only its own end user customers when evaluating whether a discontinuance application must be filed.

C. The Commission should further streamline discontinuances provisions in Part 63.

Under the plain language of section 214(a), the availability of one or more alternative services to a community or part of a community should obviate the need to file a discontinuance petition. We support a finding by the Commission that discontinuance of a legacy service will not adversely affect the public convenience and necessity where a fiber, IP-based, or wireless alternative service is available to the affected community.⁸³ Given the widespread adoption by consumers of these alternative services,⁸⁴ there is no basis for requiring an alternative service be identical to or provide the exact same features and functionality as legacy services. Consumers

⁸² 47 C.F.R. § 51.325(a) (requiring an ILEC to provide public notice of any network change that will affect a competing provider's service).

⁸³ *Notice*, ¶¶ 95-96.

⁸⁴ USTelecom estimates that only 16% of customers still subscribe to legacy voice services. *See USTelecom Research Brief*, at 1.

have overwhelmingly already chosen wireless and other services based on new technology over legacy services, thus they should be deemed adequate substitutes on that basis alone.

At most, the Commission could adopt some guidelines to determine what services would be deemed adequate substitutes for legacy services. For example, services that support voice and other real-time applications should be deemed adequate. Moreover, a service should not be disqualified merely because it may not support analog terminal equipment and functionality; such a condition would discourage technology transitions. A provider seeking to discontinue a legacy service where one or more other services are available should be able to submit a streamlined application describing the services that will be available to the community after discontinuance with an abbreviated public notice period (e.g., 10 business days).

We likewise support the Commission's proposal to allow streamlined discontinuance for services that have had no customers for 6 months.⁸⁵ Applications for discontinuance of such services should have an abbreviated notice period of no more than 60 days. We also urge the Commission to revise section 63.71(i) to allow auto-grant discontinuance to CLECs that must discontinue due to ILEC copper retirement after a notice period of no more than 6 months. We also support retaining modifications to section 63.71(a) and (b), which permit carriers to provide email notice to customers.

Finally, we encourage the Commission to support and work toward regulatory parity in recognition of the competitive nature of today's telecommunications markets. Not all carriers are not required to seek approval to enter and exit the marketplace. Any action the Commission can take, using forbearance or other means, to eliminate this disparity by removing barriers inherent to the discontinuance process, which disproportionately affects ILECs because they

⁸⁵ *Notice*, ¶ 97.

provide most of the existing legacy services subject to technology transitions, would encourage and likely accelerate broadband deployment.

IV. THE COMMISSION SHOULD USE ITS PREEMPTION AUTHORITY AS APPROPRIATE TO ACCELERATE BROADBAND DEVELOPMENT.

In the *Notice of Inquiry*, the Commission seeks comment on whether to enact rules to promote broadband infrastructure deployment “by preempting state and local laws that inhibit broadband development.”⁸⁶ Use of the express authority provided in section 253 of the Act may be necessary to prevent unreasonably burdensome restrictions on carriers seeking to build new and expand existing network footprints. But, as recently demonstrated by the reversal of a Commission order purporting to preempt state provisions restricting municipalities from expanding their broadband services beyond their own territories,⁸⁷ the Commission’s preemption power is not unfettered. The Commission nevertheless should be vigilant about the need to ensure that states and municipalities are not erecting barriers by establishing additional conditions and restrictions for carriers to comply with after they have met Commission requirements.

We generally support the Commission’s efforts to identify potential state and local barriers by seeking comment on issues such as deployment moratoria and excessive fees.⁸⁸ In addition to those issues, our member companies have experienced other state and municipal restrictions that the Commission should be aware of in case the need arises to take preemptive action. These include road move legislation requiring 100% carrier contribution; unfunded state

⁸⁶ *Id.*, ¶ 100.

⁸⁷ *State of Tennessee, et al. v. Federal Communications Commission*, 32 F.3d 597 (6th Cir. 2016).

⁸⁸ *See Notice*, ¶¶ 102-108.

carrier of last resort (COLR) obligations; and mandatory state pole databases. We also believe the Commission has authority to adopt rules to prospectively define the scope of state and local laws that would prohibitively erect barriers to broadband deployment,⁸⁹ although it is doubtful that such rules could entirely replace the need to review some preemption petitions on a case-by-case basis.

State laws and local ordinances also may prevent incumbent carriers that seek to retire copper from doing so, even if they meet Commission requirements. Where such requirements impact copper maintenance or retirement by requiring more or different actions by carriers, they can serve as barriers to broadband deployment, especially if carriers are forced to delay or change plans to move forward with fiber deployment. In such instances, the Commission should step in to the extent it has authority.

The Commission seeks comment on whether section 253 provides the requisite authority to preempt state and local laws and regulations governing service quality, facilities maintenance or copper retirement when they serve as barriers to broadband deployment.⁹⁰ The scope of that preemption appears to be limited to correcting violations or inconsistencies in state or local provisions that prohibit or have the effect of prohibiting an entity from providing telecommunications service.⁹¹ There are also exceptions that limit the Commission's authority to preempt requirements imposed on a competitively neutral basis by states and localities to protect the public interest and manage public rights of way.⁹²

⁸⁹ *Id.*, ¶ 109.

⁹⁰ *Id.*, ¶ 114.

⁹¹ *See* 47 U.S.C. § 253(a).

⁹² *See* 47 U.S.C. § 253(b), (c).

Copper retirement involves the removal of infrastructure, so it is unclear how the Commission could plausibly argue that restrictions on removing facilities inhibit, rather than enable, the provision of telecommunications. Should the Commission determine that it is without authority to preempt state and local restrictions on copper retirement, it should endeavor to work collaboratively with states and localities, including through the newly-formed Broadband Deployment Advisory Committee, to create consensus in the form of best practices and model codes to help eliminate barriers that may stymie broadband deployment efforts.

V. THE COMMISSION MUST REVERSE ITS REDEFINITION OF SERVICE UNDER SECTION 214.

A. The “functional test” standard is unlawful.

In holding that a “service” may no longer be defined by its provider (in, for example, a tariff or product guide), but instead should now be defined using an amorphous “functional test that takes into account the totality of the circumstances from the perspective of the relevant community or part of a community,”⁹³ the Commission introduced uncertainty into section 214 discontinuance process. ILECs have been left guessing whether particular changes they may make to their services – or changes they may make to their facilities that have ancillary effects on their services – trigger a Section 214 application process. The resulting uncertainty complicates and will almost certainly impede the ongoing process of upgrading consumers to next-generation networks and services.

⁹³ *Declaratory Ruling*, ¶ 117.

USTelecom filed a petition for reconsideration,⁹⁴ which was denied by the Commission, followed by application for review in the D.C. Circuit court of appeals.⁹⁵ The arguments raised in those two challenges, which we will not reiterate here, make clear that the functional test is a new rule. An agency cannot change existing rules simply by adopting a new test or by issuing guidance under the guise of a clarification or interpretation, as the Commission has attempted to do here.

There is no question that in this instance, the Commission has changed the rules of the game. The Commission did not “clarify” existing rules or interpretations; it substantively changed the rules by adding presumptions and factors to the section 214 process, including (for the first time) in the definition of “service” features and functionalities not included in the tariff definition that “the community or part of a community reasonably would view as the service provided by the carrier.”⁹⁶ With this never-before articulated or applied test, the Commission overturns the long held view that a provider offering a “service” is the one that defines that service. Instead, the service will now be defined by post hoc determinations based on the presence of third-party services and devices that a provider may not even know exist.

The Commission must reverse this amorphous standard and reinstate the long-standing principles regarding what constitutes a service for section 214 discontinuance purposes. This effective rule change was improperly adopted by declaratory ruling, so the Commission can reverse in the same manner.

⁹⁴ Petition for Reconsideration of the United States Telecom Association, PS Docket No. 14-174, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25, RM-10593 (filed Dec. 23, 2014) (*USTelecom Petition for Recon*).

⁹⁵ A notice of appeal was filed on November 12, 2015.

⁹⁶ *USTelecom Petition for Recon*, at 4.

B. “Service” to a Community Is Not Limited to a Single Offering.

USTelecom and its member companies have consistently advocated for relief from discontinuance restrictions where no actual loss of service to a community or part of a community would occur, a concept that is dictated by the statutory text in section 214.⁹⁷ Strict adherence to the statutory text would require the Commission to define “service” to mean all offerings in a particular community or part of a community such that no application for discontinuance would be necessary if another service will be available in the community following discontinuance, whether from the carrier seeking discontinuance or a competitor.⁹⁸ Interpreting “service” to mean a single offering or product is inconsistent with the statute, and is an unnecessary restriction on carriers’ ability to retire legacy services in favor of newer services capable of supporting and providing broadband. The Commission therefore should adopt its proposed interpretation as another step toward removing barriers to broadband investment and deployment. Because the Commission’s interpretation would involve construction of a statutory provision for the purpose of “terminating a controversy or removing uncertainty,”⁹⁹ it could properly act by declaratory ruling.

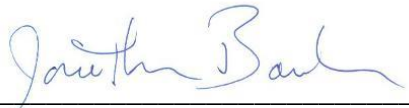
⁹⁷ See 47 U.S.C. § 214(a).

⁹⁸ We acknowledge that the Commission has authority to determine whether a particular service is of similar enough type and quality to be considered an adequate substitute for the service being discontinued. See *supra* § III.C.

⁹⁹ 47 C.F.R. §1.2.

Respectfully submitted,

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June 15, 2017

**Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

In the Matter of)
)
Accelerating Wireline Broadband Deployment by) WC Docket No. 17-84
Removing Barriers to Infrastructure Investment)

**INITIAL COMMENTS OF
LIGHTOWER FIBER NETWORKS**

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SUMMARY

As described herein, there are still many areas of law that need improvement in order to create a regulatory environment supportive of increased wireline infrastructure investment because, under today's legal framework, receiving all the necessary approvals for deployment takes too long and costs too much, which has a chilling effect on investment.

Lightower has experienced significant delays to deploying wired broadband infrastructure due to an inability to access utility poles and municipal public right-of-way ("ROW") in a timely manner. Utility pole owners and pre-existing attachers regularly fail to comply with the make-ready timeframes set out by the Commission. Similarly, many local jurisdictions fail to approve access to the ROW within reasonable periods of time. Lightower encourages the Commission to establish predictable timeframes with adequate remedies when those timeframes are exceeded.

Additionally, Lightower has experienced barriers due to a lack of cost transparency. Utility pole owners often send bulk make-ready invoices without any explanation. Without clear itemization, Lightower has no way to evaluate whether these charges are fair or accurate. Likewise, many jurisdictions demand arbitrary amounts of money or "donations" in exchange for access to the ROW with no clear relationship to ROW management costs. Lightower encourages the Commission to clarify that all fees be transparent, non-discriminatory and based on actual underlying costs borne by pole owners and local jurisdictions in relation to Lightower's network.

In order to have robust broadband access, regulatory reforms and new regulations are needed so that those who invest in broadband infrastructure will be able to predict how long it will take to obtain all necessary approvals and how much they can expect to spend on such. With better certainty, the Commission will be ensuring continued invest in broadband networks.

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I. INTRODUCTION

High-speed broadband is, and will continue to be, an extremely important tool for effective personal, business, and automated communications in this country and throughout the world. As noted in the April 21, 2017 Notice of Proposed Rulemaking initiating this docket, high-speed broadband serves as a “gateway to jobs, health care, education, information, and economic development,”¹ and will play a vital role in connection with the deployment of next-generation networks and services in the upcoming years. To that end, it is extraordinarily important that unnecessary barriers to the deployment of wireline broadband infrastructure and the investment therein be eliminated in the near term.

Lightower Fiber Networks I, LLC, Lightower Fiber Networks II, LLC, and Fiber Technologies Networks, L.L.C. (collectively, “Lightower”) are competitive providers of fiber network services that serve enterprise, government, carrier and data center customers. Lightower has over 17 years of experience providing all-fiber solutions to its customers, and its network consists of approximately 30,000 route miles, providing access to over 20,000 service locations in the Northeast, Mid-Atlantic and Midwest. Lightower also extends its network by approximately 2,000 route miles per year. As part of its services, Lightower also deploys wireless infrastructure, including small cells and DAS nodes, in public rights-of-way (“ROW”).

Lightower’s wireline and wireless deployment efforts and its position as both an owner of utility poles and an attaching party to others’ utility infrastructure allow it to present a unique perspective on the necessity of reforms to existing wireline attachment rules and the preemption of state and municipal laws and policies that inhibit the deployment of broadband infrastructure.

¹ See *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, Adopted April 20, 2017 (hereinafter, “Wireline NPRM/NOI”).

Lightower appreciates the opportunity to submit the comments offered herein on the Wireline NPRM/NOI, and the Commission's initiation of both this docket and the Wireless NPRM/NOI.²

II. COMMENTS ON PROPOSED POLE ATTACHMENT REFORMS

A. Reforms to Current Pole Attachment Timelines are Needed to Ensure Speedy Access to Poles and Eliminate Barriers to Deployment.

For broadband deployment to proceed at the pace innovation has dictated, improvements must be made to the existing attachment rules to (1) speed access and attachment timeframes, and, at the same time, (2) meaningfully encourage both pole owners and attaching parties to comply with the adopted timeframes and processes, whatever form they may ultimately take. Accelerated deployment timeframes alone will not likely hasten the infrastructure deployment that serves as the necessary backbone for next-generation networks. As explained herein, for the rules to work most efficiently, pole owners and attaching parties should be subject to penalties for non-compliance with attachment timeframes. When paired with a meaningful downside for noncompliance, accelerated timeframes and/or attachment processes will likely produce the desired effect of accelerated deployment of telecommunications infrastructure. Unfortunately, without the existence of a real, economic impact for failure to comply with attachment timelines, Lightower and others trying to construct new broadband distribution facilities will continue experiencing delays, and the speedy infrastructure deployment envisioned will not come to fruition.

² *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, Notice of Proposed Rulemaking and Notice of Inquiry, Adopted April 20, 2017 (“*Wireless NPRM/NOI*”).

1. Many pole owners and attachers are not complying with the existing attachment timelines, as there is no significant negative outcome associated with failure to comply.

The primary impediment to construction of broadband infrastructure in the United States is the fact that many municipalities and utilities ignore federal and state statutes and regulations that establish timeframes for compliance.³ Seemingly, they ignore these rules because to date there have been no adverse consequences for non-compliance. Until there is a risk associated with non-compliance, municipalities and utilities will continue to ignore the timeline requirements and will continue to impede the development of broadband facilities.

Utilities more often than not ignore the binding attachment timelines in 47 CFR Section 1.1420. The mere possibility that infrastructure providers might exercise the self-help remedies authorized by the rules or file a complaint alleging non-compliance with the rules has not sufficiently encouraged pole owners and pre-existing attachers to comply with the attachment timelines. While the attachment rules⁴ have provided timeframes for compliance, the remedies afforded to new attachers have not been forceful enough to effectuate actual compliance by numerous pole owners and attachers. The self-help and complaint procedures in the survey, estimate, and make-ready construction phases have simply not had the desired effect of spurring pole owners and pre-existing attachers to comply with the timeframes.

³ E.g., ORC § 4939.03(C)(2)–(6) (stating that Ohio municipalities will act on new request from public utilities in the ROW within 60 days and not withhold consent unreasonably); Michigan METRO Act (requiring approval within 45 days of application).

⁴ 47 CFR 1.1401 et seq.

2. The timelines proposed by the Commission in the Wireline NPRM/NOI represent a positive step toward accelerating broadband deployment.

The Commission has proposed changes to 47 CFR 1.1420⁵ that reflect positive steps toward accelerating broadband deployment and addressing current barriers thereto. As a general matter, Lightower supports the adoption of one-touch make-ready (“OTMR”) rules by the Commission, as it believes OTMR (utilizing a utility-approved contractor) represents the speediest path to attachment, produces predictable delivery timelines for customers, and takes all stakeholders’ attachment and safety concerns into account. Lightower also supports the Commission’s proposed changes to 1.1420(c), (d), and (e), addressed in turn *infra*, as the proposed rules shorten many of the operable timeframes and eliminate the delay that is seemingly built into the current rules.

a. Proposed 1.1420(c)

Proposed 1.1420(c) provides a utility 15 days from the date of receiving a new attacher’s “complete application” to complete its survey. The current survey timeline is 45 days. The shortened timeline will be beneficial in that it eliminates a significant period of delay that is unnecessary for the performance of a survey. What is concerning, however, is the discretion that remains in the rule regarding what constitutes a “complete application.” The pertinent language of the rule states that “[a] complete application is an application that provides the utility with the information necessary under its procedures to begin to survey the poles.” Although this language, as included in proposed 1.1420, remains unchanged from the current version of the rule, in practice, utilities have adopted different policies as to what constitutes a “complete application,” as is discernible from the text. For example, some utilities require a “field survey”

⁵ For purposes of these comments, hereafter, existing Commission rules, codified as 47 CFR 1.1401 et seq., will be referenced solely by their sections (e.g., 1.1403); in contrast, rules proposed in connection with the Wireline NPRM will be identified as Proposed ____ (e.g., Proposed 1.1403).

and receipt of a payment for the costs associated with the same before they deem an application to be a “complete application.” After this initial field survey, another survey takes place. In essence, the “procedures” adopted by a number of utilities have been used to prevent or toll application of the attachment timelines, and thus generate additional revenue. The spirit of the rule is compromised when utilities are in receipt of all necessary information to process attachment applications, but refuse to do so until their discretionary procedures (often including receipt of preliminary payment in excess of the application fee) are complied with by Lightower. The imposition of these types of “pre-application” requirements—under the guise that they are simply utility “procedures”—constitutes a barrier to deployment. Lightower requests that the Commission clarify this issue and eliminate this loophole by defining that all applications in the “form” required by the utility constitute “complete applications.” Lightower also suggests that the Commission eliminate the phrase “under its procedures” from proposed 1.1420(c) because those “procedures” are often expensive, time consuming, and in excess of the complete application itself.

b. Proposed 1.1420(d) and Proposed 1.1416

Proposed 1.1420(d) provides utilities with a seven day period, shortened from the 14-day period in the current rule, during which it must present an estimate of charges to perform all necessary make-ready work. Like the proposed change to 1.1420(c), this proposed change also eliminates unnecessary time that is presently built into the existing rule and will be helpful in speeding wireline and wireless infrastructure deployment. Because the make-ready costs identified in the engineering survey are scenarios that pole owners very typically encounter, providing a price for the necessary make-ready engineering should not take an extended period of time. The requirement in Proposed 1.1416(d) that utilities performing make-ready make

schedules of their common make-ready charges available to parties requesting attachment also supports the shortened estimate timelines in Proposed 1.1420(d) and promotes cost transparency.

In connection with the changes in Proposed 1.1420(d) and Proposed 1.1416(d), and in the spirit of transparency, the Commission should also require that estimates presented under 1.1420(d) must be itemized and the costs of engineering reflected therein must be clearly discernible. Numerous pole owners regularly present Lighttower with bulk estimates for make-ready, alleging that their systems do not permit itemization of make-ready costs. This practice makes it difficult for applicants, such as Lighttower, to assess the reasonableness of the estimated costs comprising the bill. Allegations that such companies' accounting systems are "unable to itemize" costs associated with engineering make-ready for new applications to attach are dubious at best. Thus, Lighttower urges the Commission to adopt regulations that require make-ready engineering costs to be itemized and clearly defined. To the extent that a utility's system currently does not support this itemization, the proposed rule change will reasonably require the system to be updated. Adoption of this requirement will also enable applicants to meaningfully challenge make-ready costs they disagree with. Applicants' attempts to challenge make-ready costs appearing in bulk make-ready estimates are largely unfruitful. The lack of success attachers have had when protesting such costs is one reason a number of utilities have not moved toward itemizing their estimates. Transparency is needed throughout the make-ready process, and Lighttower's proposed rule change would assist with this goal.

c. Proposed 1.1420(e)

Proposed 1.1420(e), like Proposed 1.1420(c) and (d), will assist in streamlining the extended pole attachment process by shortening the timeline for completion of make-ready for standard pole attachment "orders." Proposed 1.1420(e) provides that "[u]pon receipt of payment

specified in paragraph (d)(2) of this section, a utility shall notify immediately and in writing all known entities with existing attachments that may be affected by the make-ready.” Although this requirement has not changed under Proposed 1.1420(e), a number of utilities have attempted to deviate from this requirement by shifting the burden to the new attacher to inform existing attachers of their make-ready obligations and applicable timelines.

This common practice of shifting to the applicant the notification requirement under 1.1420(e) does not comport with the responsibilities clearly outlined in the pole attachment rules, and the Commission should clarify that any attempts by utilities to deviate from this requirement, by subsequent contract or otherwise, are unenforceable. This is important to the parties’ relative positions with respect to the ability to attach and the knowledge of all existing (and any other pending) attachments for notice purposes.

Proposed 1.1420(e)(1)(ii) directs utilities to set a date for completion of make-ready that, for standard orders, is no later than 30 days after the notification discussed *supra* is sent. At half of the sixty days presently allocated for completion of make-ready under 1.1420(e), the thirty day timeline envisioned by Proposed 1.1420(e)(1)(ii) represents a significant improvement over the current rule’s timeframe and, if adopted by the Commission, will mark an important development in speeding attachment timelines.

d. Additional Proposed Timeline: Power Delivery for Wireless Attachments

Lightower has repeatedly found that, even after completion of make-ready involving the attachment of wireless equipment to a pole, obtaining timely power delivery to the pole for the attached/appurtenant equipment is a difficult and time-consuming task. In many circumstances, Lightower (and other attachers) may have completed all make-ready and installed the equipment necessary for the deployment of small wireless technologies, but then must wait months for the

utility to deliver power to the site. The extended periods of time for which wireless deployments await power delivery constitute additional barriers to deployment.

Some may argue that power delivery is already governed by state regulations; however, there are two problems with this argument. First, if states effectively governed power delivery timeframes, then there would not be a problem receiving power connections. Second, to the extent states govern power connection at all, there is an inconsistent patchwork of requirements, often sending attachers into individual electrical utility tariffs that can be over 1000 pages in length.

As such, Lightower proposes that the Commission streamline power delivery on a nationwide level by adopting a seven-day timeline for delivery of power to a pole on which make-ready is complete and wireless equipment has been fully attached. Once power delivery has been requested by the party deploying wireless infrastructure, this timeline should be triggered by the passing of an electrical inspection conducted by the local governing entity's electrical inspector. In Lightower's experience, the period of time spent waiting for power delivery once municipal inspection is obtained has been a significant source of delay in wireless infrastructure deployment, and Commission guidance on applicable timelines for the same is necessary to eradicate this additional barrier to deployment.

3. Economic penalties for non-compliance with pole attachment timelines are necessary in order to effectuate compliance with the timelines and produce predictable deployment schedules.

In view of the fact that pole owners and existing attachers typically bill new attachers for make-ready whether or not the make-ready is performed within the applicable attachment timelines, there seems to be no real incentive for complying with those timelines. Applicants do not have the ability to withhold payment for non-compliance with make-ready timelines as a

method of addressing non-compliance therewith, as they may face additional delays from pole owners or existing attachers when submitting subsequent applications as a result of non-payment. In order to formally (and completely) eliminate non-compliance with make-ready timelines by pole owners and pre-existing attachers, the Commission must adopt rules that have “teeth” – i.e., there need to be penalties for non-compliance. Without an economic disincentive for non-compliance, the offending pole owner/attacher has no real reason to comply with attachment timelines. Lighttower and other builders of fiber communications infrastructure have timeframes for deliverables to their customers and limited resources for expensive litigation of these issues and, thus, the failure of utilities and existing attachers to observe required make-ready response time requirements penalizes the applicant and delays the build-out of telecommunications facilities.

In order to even the playing field, the Commission should impose strict penalties for non-compliance with attachment timeframes. Enforcement of these penalties would effectuate rapid deployment of broadband infrastructure and bring violating pole owners and pre-existing attachers into compliance with attachment timelines and processes. So long as the parties violating the Commission’s rules incur no cost for non-compliance, the delays in building needed infrastructure will continue and the Commission’s goals will be frustrated. Accordingly, Lighttower respectfully requests that the Commission establish penalties for non-compliance with attachment timelines.

B. Clarification of Definition of “Necessary” Make-Ready Costs is Needed in Connection with Proposed 1.1416.

Proposed 1.1416(b) states that a “cable television system operator or telecommunications carrier requesting attachment shall be responsible only for actual costs of make-ready made necessary solely as a result of its new attachments.” Lighttower appreciates the incorporation of

this important concept in the proposed rules. However, further clarification is needed concerning what constitutes make-ready “made necessary solely as a result of its new attachments.”

1. Costs of make-ready when utility or pre-existing attacher fails to meet timelines.

Often, in the course of the make-ready process, either the utility’s or an existing attacher’s non-compliance with the attachment timelines makes it necessary for an applicant to hire a utility-approved contractor to complete the survey and/or make-ready. Hiring a contractor often results in two sets of costs: those already incurred prior to hiring a contractor, and those incurred in connection with the contractor completing the designated work. Arguably, one of these categories of costs is not “made necessary solely as a result of” an applicant’s new attachments.

By way of illustration, imagine that a utility has not complied with the survey timeline in 1.1420. The rules provide that an applicant for attachment may hire a utility-approved contractor in order to complete the survey in a timely manner. However, an applicant that hires a contractor to perform the survey is expected to pay the contractor for completion of the same and, additionally, the utility typically bills the applicant for any survey work the utility performed. This type of “double-dipping” means the costs to the applicant are significantly greater than what they would have been if the utility had adhered to the timelines. Hiring a contractor to complete the survey would not have been necessary if the utility had complied with the timeline for the survey. Given these circumstances, either the costs associated with survey billed by the utility or the costs of survey billed by the contractor are arguably not “made necessary *solely* as a result of the [applicant’s] new attachments.” The new applicant should not have to pay for both.

The Commission should clarify if the applicant pays for conducting its own survey because the utility fails to do so in a timely manner, then it should not pay the utility the costs the

utility assesses for the survey phase in this scenario regardless of whether or not the costs were driven by a pre-existing attacher's non-compliance with timelines causes the applicant to have to hire a contractor to timely complete the make-ready survey.

2. Costs of make-ready triggered by existing attachers' internal procedures and practices.

Another issue that arises under Proposed 1.1416(b) is whether the redundant costs imposed by existing attachers when an application requires relocation of existing attachments constitute "costs of make-ready made necessary solely as a result of" the new attachments. For example, certain pre-existing attachers have adopted procedures demanding that a new attacher apply directly to them for rearrangement of their facilities, even after the utility's 1.1420(e) notice has been served upon all pertinent parties. Once such application is made, and in spite of the fact that the make-ready the pre-existing attacher must do has been (1) specifically identified by the pole owner, and (2) provided along with the 1.1420(e) notice, said pre-existing attacher will typically conduct its own survey, bill the new attacher for the same, and then, only after payment is received, rearrange its attachment. This additional layer of engineering is entirely redundant, typically takes a great deal of unnecessary time, and is utilized by the existing attacher, under the guise of safety, to produce an additional stream of revenue.

The Commission should recognize this practice for what it is and clarify that the costs imposed by pre-existing attachers pursuant to these types of internal procedures are not "costs of make-ready made necessary solely as a result of" new attachments in order to eliminate additional economic barriers to broadband deployment. The additional costs to applicants from these types of unnecessary requirements from existing attachers can be significant, especially given that multiple pre-existing attaching parties are often present on poles when a new attacher applies to attach. Use of these practices should be eliminated, and clarification by the

Commission that make-ready costs resulting from such practices are not authorized would eliminate this practice.

3. Costs associated with pre-existing NESC or engineering standard violations.

Another scenario under Proposed 1.1416(b) for which Lighttower requests Commission clarification occurs when an applicant applies to attach to a pole that has pre-existing National Electric Safety Code (“NESC”) or utility engineering standard violations. For a significant percentage of these poles, the non-compliant condition is not the result of “grandfathered” attachments; thus, at least one or more of the existing attachers caused the non-compliant condition when they attached and should have previously paid for the costs of bringing the pole into compliance. Given this situation, not all of the costs of make-ready triggered by the new attachment application are “made necessary solely as a result of” the new attachment. Although the pole must be brought into a compliant condition prior to attachment, the costs associated with resolving the violation should not be borne by the new attacher, which is a common practice wherein Lighttower will have all progress on its applications stalled until it relents and agrees to pay for pre-existing violations.

The pole owner, as the party ultimately responsible for policing attachments, should be the party responsible for resolving the non-compliant conditions and seeking remuneration from the pre-existing attacher(s) that caused the violation. Lighttower has experienced a number of situations, however, in which the pole owner either (1) expects the new attacher to pay all of the costs of make-ready, including remedying the violation, and then seek remuneration from the party or parties that caused the pre-existing violation, or (2) simply denies access to the pole based on safety concerns arising from the existing violation. Lighttower requests that the Commission clarify that pole owners may not adopt either of the aforementioned policies under

the rules, and that the applicant is responsible only for the costs of make-ready that is still necessary after the non-compliant condition has been remedied.

The Commission's adoption of the requirement in Proposed 1.1416(d), discussed above, that utilities performing make-ready must make schedules of common make-ready charges available to new attachers upon request would represent an important step toward eliminating barriers to deployment associated with make-ready costs. This requirement, along with the additional clarifications to Proposed 1.1416 would allow Lightower to understand if a utility is attempting to charge Lightower for pre-existing violations, and thus assist in lifting the veil on make-ready costs and eliminating this longstanding deployment roadblock.

C. The Commission Should Clarify that the Self-Help Rights for New Attachers Apply Regardless of Policies Against the Same Adopted by Utilities or Existing Attachers.

Lightower applauds the Commission's inclusion, in Proposed 1.1422(a), of a requirement for a utility to identify, on its list of approved contractors, the contractors it authorizes to perform make-ready above the communications space on its utility poles. Lightower requests, however, that the Commission clarify that the space "above the communications space" includes both the power space and the pole top. This clarification will eliminate doubt that work in the power space by a utility-approved contractor is permitted and will provide an important and meaningful self-help remedy for attachers whose make-ready necessarily requires work in the power space.

Lightower also seeks explicit clarification from the Commission that when, due to non-compliance with attachment timelines, an applicant utilizes the self-help remedies authorized by the rules, and has provided the utility and any existing attachers with a reasonable opportunity to accompany and consult with the authorized contractor and the applicant pursuant to Proposed 1.1422(c), the applicant may lawfully use the selected utility-approved contractor to complete make-ready in spite of any utility/existing attacher's internal procedures or policies preventing

the use of a contractor to carry out the utility/existing attacher's own make-ready in question. Specifically, Lighttower urges the Commission to explain that the self-help rights afforded to applicants may be exercised in spite of any collective bargaining or other internal utility/existing attacher's policies or contracts prohibiting the same. Clarification on this issue is sought due to contentions previously expressed to Lighttower that its self-help rights are limited by other attachers' collective bargaining agreements, in spite of missed attachment timelines.

D. Commission Clarification of Duty to Provide Access is Necessary in Connection with Proposed 1.1403.

Proposed 1.1403 shortens utility timelines for responding to requests for access to a utility's poles, ducts, conduits, or rights of way from 45 days to 15 days. This timeframe modification is a positive step toward eliminating barriers to wireline deployment, and Lighttower strongly supports it. Certain clarifications are necessary from the Commission, however, surrounding practices that have arisen in the context of the current rules and whether they constitute permissible utility practices under 1.1403(a) and (b).

1. Access when pre-existing NESC or other violations are present.

Proposed 1.1403(a) provides (as does current 1.1403), in pertinent part, that a utility may deny "access to its poles, ducts, conduit, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity or for reasons of safety, reliability and generally applicable engineering purposes." Many utilities over the years have utilized pre-existing violations of NESC standards or their internal engineering standards at the time of a new attachment application submission to deny the applicant access on safety and reliability grounds. Lighttower contends that this practice violates the spirit of the rules and a utility's obligation to maintain its pole plant in a safe, compliant manner. Lapse by a utility to maintain its pole plant in an NESC-compliant manner is not a reasonable rationale for denial of an attachment application.

Accordingly, the Commission should clarify that utilities may not deny access to prospective attachers by citing pre-existing violations on poles as grounds for denial.

2. Access when capacity is at issue.

The Commission should additionally clarify that if, in the ordinary course of business, a utility allows for the replacement of its poles when capacity issues prevent a proposed new attachment from being approved, that it may not deny a new attacher's application on the grounds of insufficient capacity. This change is critical to America having robust wired and wireless broadband infrastructure because many utility pole lines have already hit capacity. Being able to deny for reason of "capacity" would have a chilling effect on new investment.

Moreover, to the extent that pole replacement is permitted as a make-ready solution for new attachers in circumstances of insufficient capacity on existing infrastructure, the make-ready timelines in 1.1420 continue to apply. Clarification that standard make-ready timelines still apply in instances where pole replacement is a necessary make-ready remedy will eliminate a significant barrier to deployment, in that it will keep the clock ticking to facilitate attachment across utility territories, whether they have aging or new pole infrastructure.

3. Conduit availability

Although conduit access is subject to the same timeline for access under Proposed 1.1403 as poles, obtaining important information from utilities pertaining to conduit capacity and infrastructure can prove extremely difficult. Physical inspection of conduit infrastructure and availability is typically not an option, given its underground location. Utilities are also often reticent to provide access to their conduit records or produce drawings demonstrating whether conduit is available. Because of the importance of conduit as a means through which broadband infrastructure may be deployed and the ever-increasing preference by municipalities to utilize

underground versus aerial deployment paths, the Commission should clarify the responsibilities of utilities in providing conduit availability, stressing the need for transparency. Such clarification will assist in ensuring that necessary information is accessible to those who are actively seeking to advance broadband deployment by underground means.

E. The Commission Should Adopt a Ninety-Day “Shot Clock” for Resolution of Pole Attachment Complaints.

Proposed 1.1425 provides that except in extraordinary circumstances, in which the Commission is permitted to pause the review period, final action on a complaint for denial of access “to a pole, duct, conduit, or right-of-way owned or controlled by a utility should be expected no later than 180 days from the date the complaint is filed with the Commission.” Lightower appreciates the Commission’s attempt to expedite the complaint process for access denials by means of Proposed 1.1425; however, it asks the Commission to go further and apply a 90-day shot clock to access complaints. In many situations surrounding the filing of a complaint for denial of access, the party seeking access has expended a significant amount of time and resources attempting to gain access before filing its complaint. The expiration of an additional six months for resolution of the issue is unlikely to effectively promote broadband deployment; however, resolution of the issue within three months would promote more timely deployment in situations where access is determined to be lawful and is a reasonable amount of time for thorough review of the complaint and application of all necessary administrative procedures thereto. Lightower therefore requests that the Commission shorten the 180-day review period in Proposed 1.1425 to 90 days.

III. COMMENTS ON NOTICE OF INQUIRY PERTAINING TO PROHIBITING STATE AND LOCAL LAWS INHIBITING BROADBAND DEPLOYMENT

The Commission has requested comment on whether, consistent with its authority under 47 USC 253 (“Section 253”), it should adopt rules to promote the deployment of broadband infrastructure by preempting state and local laws that inhibit broadband deployment. As an initial matter, Lightower posits that the Commission has the requisite authority to adopt such rules pursuant to the language of Section 253 and its authority under 47 USC 201(b) to “prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions” of the Telecommunications Act of 1934. Likewise, the adoption of general rules pertaining to Section 253(a) is not inconsistent with the provisions of Section 253(d) directing the Commission to preempt the enforcement of particular state or local statutes, regulations, or requirements “to the extent necessary to correct such violation or inconsistency,” in that rules implementing and interpreting Section 253(a) will provide clarification on what constitutes a state or local regulation or practice that may prohibit or have the effect of prohibiting the provision of telecommunications service.

Additionally, the notice and comment opportunities presented in a Commission proceeding to take enforcement action following a violation of Section 253(a), as detailed in rules implementing the same, would be sufficient to satisfy the requirements of Section 253(d). Thus, as explained in comments and reply comments submitted in other Commission dockets⁶ and herein, the Commission should adopt rules interpreting and implementing the pronouncement of Section 253(a) against state and local regulations that prohibit or have the

⁶ See *In the Matter of Streamlining Deployment of Small Cell Infrastructure By Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition For Declaratory Ruling*, WT Docket No. 16-421, Initial and Reply Comments of Lightower Fiber Networks, submitted, respectively, March 8, 2017 and April 7, 2017; see also *Wireless NPRM/NOI*, WT Docket No. 17-79, Initial Comments of Lightower Fiber Networks, submitted June 15, 2017.

effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service in order to assist parties in identifying and eradicating these significant barriers to deployment.

As suggested in the Notice of Inquiry in this docket, there are a number of specific categories of actions/items for which Commission rules are needed to prevent states and localities from enforcing laws and/or engaging in practices that may prohibit or have the effect of prohibiting the ability of entities to provide telecommunications service. The need for rules in each of these categories is discussed in turn below.

A. The Commission Should Adopt Rules Prohibiting State and Local Deployment Moratoria, whether Actual or Effective.

The Commission should adopt rules under Section 253(a) to prohibit the imposition, by state and local governments, of deployment moratoria in circumstances where such moratoria are unrelated to safety. It is important that the Commission clearly states in any such rules that deployment moratoria, whether actual/pronounced, or effective, constitute regulations that may prohibit or have the effect of prohibiting the ability of any entity to provide telecommunications services.

Over the years, Lightower has encountered situations in which local governments have explicitly imposed moratoria on processing applications necessary for the deployment of broadband infrastructure; it has also been involved in a number of scenarios in which, in spite of no pronouncement by local government that a moratorium has been imposed, the governmental entity is simply not moving forward in such a way as to process applications related to the deployment of broadband infrastructure. The latter scenario may be characterized as an effective prohibition. In Lightower's experience, moratoria have most often not been tied to safety or driven by events requiring construction stoppages; rather, moratoria often appear to have been

put into place in order to arbitrarily exempt governmental entities from processing applications, etc. These types of moratoria, when imposed, amount to delay tactics without correlation to safety or specific events that would warrant delay.

The Commission should adopt rules prohibiting the imposition of both explicit and effective deployment moratoria in circumstances where safety concerns are not the operative consideration. It seems evident that periods of time, whether limited or otherwise, that permit state and local authorities to hold pending applications related to deployment in abeyance, represent real barriers to entry. Although the Commission has previously clarified that the shot clock timeframe for wireless siting applications runs regardless of any moratorium, the Commission has not made the same pronouncement in association with wireline deployment applications. Adopting a rule prohibiting state and local moratoria on the deployment of broadband infrastructure, with very narrow exceptions, would formalize the existing Commission holding for wireless siting applications, and would extend the same protections to wireline deployment applications, thereby eliminating an obvious barrier to broadband infrastructure deployment.

B. The Commission Should Adopt Rules to Eliminate Excessive Delays in Negotiations and Approvals for Rights-of-Way Agreements and Permitting for Telecommunications Services.

Often, the timelines applicants face when seeking state and/or local approval of the various applications necessary for deployment of broadband infrastructure are extremely prolonged and unpredictable. The adoption of rules by the Commission setting forth binding timeframes for consideration of the same would assist telecommunications providers in achieving deployment within a reasonable, predictable amount of time.

In Lighttower's experience, securing a local franchise for the deployment of telecommunications infrastructure often takes in excess of six months from the date of tendering an application for the same to the applicable governmental entity. Given that broadband infrastructure is extraordinarily important to the vitality of local governments in relation to public safety, consumers and the businesses located therein and the ability to attract and retain new customers, and that such customers expect connectivity within a finite (and sometimes quite a short) period of time, the delay associated with granting telecommunications providers franchise agreements and approving deployment applications represents a significant deployment barrier. In order to combat this issue, the Commission should adopt rules placing time limits on local consideration of applications for telecommunications franchises, much as those recently adopted in the context of cable franchises. Lighttower recommends a review period of 90 days for typical telecommunications deployment proposals.

Further, Lighttower often encounters unwillingness by localities to concurrently process franchise applications and other applications necessary for deployment. In order to facilitate the timely deployment of telecommunications infrastructure, the Commission should issue a rule directing that state and local governments must process an applicant's application to occupy the ROW and any other necessary applications during the same timeframe in which an applicant's franchise application is being considered.

For instance, Lighttower recently submitted franchise applications and applications to occupy public rights-of way in two municipalities of roughly the same size that are located geographically close to one another. One of the municipalities reviewed and considered Lighttower's franchise application at the same time it considered its right-of-way occupancy application; the other municipality indicated that it was unwilling to process the right-of-way

occupancy application until the franchise process was complete. The former municipality approved Lighttower's franchise and issued its permit to occupy rights-of-way within days of one another; in the latter municipality, however, several months elapsed from the time the franchise was approved until the ROW occupancy permit was issued. From this example, it is clear that concurrent consideration of all necessary permit applications will shorten resulting timeframes for deployment of telecommunications infrastructure. Lighttower respectfully requests that the Commission direct state and local governments to consider any applications submitted by the same applicant related to the deployment of telecommunications infrastructure on a concurrent basis.

C. The Commission Should Adopt Rules Prohibiting Excessive Fees and Costs, the Imposition of Unreasonable Permit Conditions, and Bad Faith Negotiation Conduct, as Each of these Practices by State and Local Jurisdictions May Prohibit or Have the Effect of Prohibiting the Provision of Telecommunications Service.

Lighttower has encountered a number of scenarios in which local jurisdictions have imposed unreasonable conditions for approval of deployment applications and, by means of those unreasonable conditions, have imposed excessive costs for deploying telecommunications infrastructure in their jurisdictions. In connection with these scenarios, in situations where Lighttower has contested the conditions or costs, jurisdictions have often refused to continue processing or grant pending deployment applications. The Commission should prohibit these practices.

1. Importance of cost transparency.

As Lighttower has previously noted in other dockets, many jurisdictions demand arbitrary fees for use of public rights-of-way for telecommunications infrastructure with no clear relationship to the jurisdiction's costs of management of the rights-of-way. Lighttower strongly

suggests that any forthcoming Commission rules interpreting Section 253(a) specify that all jurisdictional fees associated with telecommunications infrastructure in public rights-of-way be based on or otherwise verifiably connected to actual costs incurred by the jurisdiction to regulate telecommunications providers' use of the same. Additionally, there is often no available evidence that all telecommunications providers are being charged in an equitable manner, so it is important that any rules implementing Section 253(a) call for full cost transparency so that providers can ascertain that they are being treated fairly and in the same manner as other such providers.

2. Requirement for “donations” and other excessive costs.

Lightower has also encountered local jurisdictions that have requested significant “donations” before they will agree to approve a telecommunications franchise or equivalent agreement. Other times, such jurisdictions will simply refuse to process an application or grant a franchise until payment of some sort of arbitrary fee has been received. Regardless of the form these arbitrary fees or donations take, they significantly delay deployment of telecommunications facilities, and the Commission should adopt rules proscribing these practices.

D. The Commission Should Adopt a Residual Rule Preempting any State or Local Legal Requirement or Practice that May Prohibit or Have the Effect of Prohibiting the Provision of Telecommunications Service.

To the extent that the Commission determines that it should adopt rules interpreting and implementing Section 253(a), Lightower strongly recommends incorporation of a residual section that proscribes practices that, while not fitting squarely within any enumerated category of prohibited regulations, practices, or requirements, may prohibit or have the effect of prohibiting the ability of an entity to provide telecommunications service. Clearly, the practices discussed above, which should be prohibited by the Commission, do not represent an exhaustive

list. New practices, regulations, and other procedures resulting in extensive deployment delays and prohibitions seem to be implemented every month. In order to ensure against a workaround, any rules interpreting and implementing Section 253(a) should include a residual section proscribing practices that may prohibit or have the effect of prohibiting the ability of entities to provide telecommunications service.

IV. CONCLUSION

As discussed *supra*, Lightower recommends adoption of the Commission's proposed pole attachment rule revisions, with minor changes to a number of the same. Lightower further recommends the assessment of penalties upon parties who have not complied with attachment timelines. Lightower additionally requests Commission clarification of a number of items, and recommends that the Commission adopt rules interpreting and implementing Section 253(a). Lightower thanks the Commission for the opportunity to submit comments in this important proceeding.

Respectfully submitted,

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November 21, 2017

Ex Parte

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

RE: Accelerating Wireline Broadband Deployment by Removing Barriers to
Infrastructure Investment, WC Docket No. 17-84

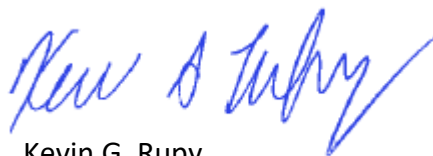
Dear Ms. Dortch:

The attached report titled “2017 USTelecom Pole Attachment Rate and Pole Ownership Report” (USTelecom Report) is submitted in the above-referenced proceeding. The USTelecom Report strongly shows that the Federal Communications Commission (Commission) should move forward with its proposal to create a presumption that ILECs are entitled to competitively neutral rates when attaching to investor-owned utility (IOU) poles, which in turn will remove significant barriers to broadband infrastructure deployment thereby increasing broadband availability and competition in the provision of high-speed services.

USTelecom supports efforts by the Commission to utilize data to inform its consideration of Commission policies, including those relating to the agency’s infrastructure rules. With the goal of providing the Commission with detailed data to further inform its deliberations in this proceeding, the USTelecom Report includes survey results from a broad range of USTelecom’s members regarding the status of nationwide pole attachment rates and pole ownership, including in states governed by the Commission’s pole attachment regulations. The report also includes survey results on rates charged by electric cooperatives throughout the country, including in seven states governed by the Tennessee Valley Authority.

Please contact the undersigned with any questions.

Sincerely yours,



Kevin G. Rupy
Vice President, Law & Policy

USTelecom Pole Attachment Rate and Pole Ownership Report

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November 21, 2017

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**USTelecom Pole Attachment
Rate and Pole Ownership Report
Executive Summary**

USTelecom completed a detailed survey (2017 USTelecom Survey) of a broad range of its members regarding the status of nationwide pole attachment rates and pole ownership, including in states governed by the Federal Communications Commission's (Commission) pole attachment regulations. USTelecom contrasted the results from the 2017 USTelecom Survey with similar survey results submitted to the Commission in 2008 (2008 USTelecom Survey). The results of the 2017 USTelecom Survey show that the Commission should expeditiously move forward with its proposal to create a presumption that ILECs are entitled to competitively neutral rates when attaching to investor-owned utility (IOU) poles.

ILECs Remain at a Significant Rate Disadvantage, Despite the Commission's 2011 Reforms.

The 2017 USTelecom Survey results show that: 1) the rate goals for ILECs set in the Commission's 2011 Pole Attachment Order remain unrealized; 2) due to the continuing disparity between IOUs and ILECs in pole ownership, ILECs remain in a lopsided bargaining position; and 3) significant disparities remain in pole attachment rates paid by ILECs to IOUs and those paid by CLEC and cable broadband competitors to ILECs. Analyzing the same states from the 2008 USTelecom Survey, the 2017 USTelecom Survey found that the broad disparity in pole attachment rates not only continues, but in most instances has *increased*. The 2017 USTelecom Survey identified instances where ILECs continue to pay vastly disparate rates for pole attachments compared to what their cable counterparts pay the ILECs – in some instances, these rates are 1,800% higher. The disparity between rates paid by ILECs and CLECs remains significant – in some instances greater than 1,000%.

On average, ILECs surveyed in the 2017 USTelecom Survey pay IOUs nearly 9 times what ILECs charge cable providers, and almost 7 times the rates ILECs charge CLECs – results even more imbalanced than those from the 2008 USTelecom Survey (8 times and 6 times, respectively). In dollar terms, these ILECs pay an average of \$26.12 to IOUs today in Commission-regulated states (an *increase* from \$26.00 in 2008), compared to cable and CLEC provider payments to ILECs, which average \$3.00 and \$3.75, respectively (a *decrease* from \$3.26 and \$4.45, respectively, in 2008). These findings clearly demonstrate that the Commission's 2011 Pole Attachment Order has not achieved its desired goal of ensuring just and reasonable pole attachment rates for ILECs.

Pole Ownership Imbalance Between IOUs and ILECs Continues.

Data from the 2017 USTelecom Survey also shows a significant difference in the ratio between the number of IOU poles to which ILECs attach and the number of ILEC poles to which IOUs attach. In the 46 states surveyed, USTelecom's data show that for every ILEC pole to which IOUs attach, ILECs attach to three IOU poles (*i.e.*, ILECs attach to approximately 13.9 million IOU poles, whereas IOUs attach to only 4.6 million ILEC poles). In Commission regulated states, that pole ratio is 3.2:1, with ILECs attaching to approximately 9.7 million IOU poles, and IOUs attaching to approximately 3.1 million ILEC poles. With ILECs needing to attach to so many more IOU poles than the reverse, bargaining power is heavily skewed to the IOUs. USTelecom

analyzed 13 states, demonstrating a consistent – and substantial – disparity in this ratio on a state-by-state basis.

This disparity in bargaining power can also be seen in terms of the relative rates paid by ILECs and IOUs and net annual payments. Despite the fact that electric utility attachments occupy well over five times the average amount of space occupied by ILEC attachments, IOUs pay nearly the same rates on average. Thus, ILECs paid aggregate pole attachment rates of approximately \$351.8 million to IOUs in 46 states, but received only \$125.8 million from IOUs. For the 29 out of 30 Commission-regulated states for which USTelecom received data, ILECs paid aggregate pole attachment rates of approximately \$251.3 million to IOUs, but received only \$82.9 million from IOUs. In Commission-regulated states, this resulted in a net payment from ILECs to IOUs of approximately \$168.4 million. Contrary to assertions by IOUs in this proceeding that the decrease in ILEC pole ownership has been intentional, the increase in IOU pole ownership has been driven by a number of factors that are not in the ILECs' control, including greenfield deployment of IOU networks, national disaster recovery efforts, and IOU pole replacement activities.

Prohibitive Pole Attachment Rates Charged by Cooperatives.

The 2017 USTelecom Survey also illustrates the acute nature of the recent actions by the Tennessee Valley Authority (TVA) that could significantly undermine the important federal policy goals of accelerating and promoting broadband deployment. TVA's decision to adopt a resolution that substantially increases pole attachment rates charged by electric cooperatives will exacerbate an already challenging rate structure for broadband providers operating in TVA states.

The 2017 USTelecom Survey collected data on rates charged by electric cooperatives throughout the country, including in all seven TVA states. In all but one TVA state, the rates charged by cooperatives for ILEC attachments exceed the national average cooperative rate of \$21.05, and in four TVA states, the rates charged by cooperatives significantly exceed the national average of \$25.23 charged by IOUs to ILEC attachers. Moreover, the cooperative rates in the 2017 USTelecom Survey reflect *current* rates, and not the rates adopted by the TVA Board, which are scheduled to be implemented in 2018. TVA's decision will increase pole attachment rates to an *average* of \$30, involving more than 150 rural electric cooperatives covering more than 9 million consumers. Given the location of electric cooperatives, the TVA's unilateral decision will have a particularly acute impact on rural consumers.

The 2017 USTelecom Survey Results Demonstrate That the Commission's Proposed Rate Reforms Are Necessary.

Despite the well-intentioned goals of the Commission's 2011 Pole Attachment Order, the 2017 USTelecom Survey demonstrates that pole attachment rates for ILEC attachers have increased, whereas the rates ILECs charge CLEC and cable competitors have significantly *decreased*. Moreover, the imbalance in pole ownership and the ILEC's lack of bargaining power that was integral to the Commission's decision to institute rate reforms in 2011, continues today. Based on these findings, the Commission should expeditiously move forward with its proposal to institute a presumptive just and reasonable rate formula for ILEC attachers.

USTelecom Pole Attachment Rate and Pole Ownership Report

USTelecom recently completed a detailed survey (2017 USTelecom Survey) of a broad range of its members regarding the status of nationwide pole attachment rates and pole ownership, including in states governed by the Federal Communications Commission's (Commission) pole attachment regulations. The survey results clearly demonstrate that despite the Commission's well-intentioned efforts in its 2011 proceeding (2011 Pole Attachment Order)¹ to "reduce the potentially excessive costs of deploying telecommunications, cable, and broadband networks," greater pole attachment rate parity for incumbent local exchange carriers (ILECs) remains unrealized.

In fact, the survey shows that pole attachment rates paid by ILECs to investor-owned utilities (IOUs) have *not* declined despite the Commission's expectations in the 2011 Pole Attachment Order. In contrast, pole attachment rates ILECs charge cable and competitive local exchange carriers (CLECs) with whom they compete have *decreased*.² Thus, the "wide disparity in pole rental rates,"³ that the Commission recognized as a barrier to broadband deployment in 2011, has in fact widened. By introducing greater rate parity in its pole attachment regulations, the Commission can energize and further accelerate broadband deployment, helping to close the digital divide by further extending broadband networks, consistent with its intention in the 2011 Pole Attachment Order and this proceeding.

USTelecom both appreciates and shares the Commission's desired goals for its 2011 Pole Attachment Order, and those in its current Notice of Proposed Rulemaking (Notice).⁴

¹ Report and Order and Order on Reconsideration, *Implementation of Section 224 of the Act*, 26 FCC Rcd. 5240, 76 FR 40817, FCC 11-50, ¶ 1 (released April 7, 2011) (*2011 Pole Attachment Order*). See also, Order on Reconsideration, *Implementation of Section 224 of the Act*, 30 FCC Rcd. 13731, 81 FR 7999, FCC 15-151 (released November 24, 2015) (*2015 Pole Attachment Order*).

² USTelecom does not have access to the pole attachment rates that IOUs charge cable and CLEC attachers, but notes that the same formulas apply to the rates for pole attachments on ILEC poles.

³ *2011 Pole Attachment Order*, ¶ 3.

⁴ Notice of Proposed Rulemaking, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84 (released April 21, 2017) (*Notice*).

However, the results of the 2017 USTelecom Survey,⁵ which reflect data from the current marketplace, suggest that the Commission needs to move forward with certain further reforms proposed in its Notice. In particular, it is time for the Commission to create a presumption that ILECs are entitled to competitively neutral rates when attaching to IOU poles, thereby ensuring that such reductions in pole attachment rates do indeed “remove significant barriers to broadband infrastructure deployment and in turn increase broadband availability and competition in the provision of high-speed services.”⁶

I. Background and Overview of 2017 USTelecom Survey

Nearly a decade ago, in response to a Petition filed by USTelecom,⁷ the Commission initiated a proceeding to consider comprehensive reforms to its framework governing pole attachment regulation (2007 Pole Attachment Rulemaking).⁸ That proceeding ultimately resulted in the 2011 Pole Attachment Order, adopting measures “to improve the efficiency and reduce the potentially excessive costs of deploying telecommunications, cable, and broadband networks, in order to accelerate broadband buildout.”⁹ During that rulemaking, USTelecom completed a broad survey of rates paid by its members to IOUs for pole attachments and of rates received from cable providers and CLECs attaching to ILEC-owned poles (2008 USTelecom Survey).¹⁰ At the time, the survey results confirmed the existence of a wide disparity in pole attachment rates, with rates paid by ILECs 8 times higher than rates paid by other attachers.

The 2017 USTelecom Survey results, which are further detailed in this filing, reveal that the Commission’s reforms have made progress in reducing pole attachment rates for cable and CLEC attachers. The average pole attachment rates paid by ILECs, however, have actually increased. Among the findings from the 2017 USTelecom Survey are the following:

- In Commission-regulated states, the weighted average pole attachment rate paid by ILECs to IOUs for pole attachments has *increased* from \$26.00 in 2008, to \$26.12 today.

⁵ The Appendix attached to this filing provides an overview of the survey, the methodology used in the analysis, as well as various summary data from the 2017 USTelecom Survey.

⁶ Notice, ¶ 3.

⁷ United States Telecom Association Petition for Rulemaking, RM-11293 (filed Oct. 11, 2005).

⁸ Notice of Propose Rulemaking, *Implementation of Section 224 of the Act*, 22 FCC Rcd. 20195, 73 FR 6879, FCC 07-187 (released November 20, 2007) (*2007 Pole Attachment Rulemaking*).

⁹ *2011 Pole Attachment Order*, ¶ 1.

¹⁰ See, Comments of the United States Telecom Association, WC Docket No. 07-245, RM-11293, RM 11303, pp. 6 – 9 (submitted March 7, 2008) (*2008 USTelecom Comments*).

- Conversely, the weighted average regulated rate paid by cable attachers for attachments to ILEC poles has *decreased* 8 percent from \$3.26 in 2008, to \$3.00 today.¹¹
- Similarly, the weighted average regulated rate paid by CLEC attachers for attachments to ILEC poles has *decreased over 15* percent from \$4.45 in 2008, to \$3.75 today.
- On average, ILECs surveyed pay IOUs almost 9 times the rates ILECs charge cable providers for pole attachments, and nearly 7 times what ILECs charge CLECs.

Thus, the wide disparity in pole rental rates recognized by the Commission in its 2011 Pole Attachment Order has only worsened. This increasing disparity demonstrates that ILEC minority pole ownership does not give ILECs the genuine ability to negotiate just and reasonable rates that reflect today's competitive marketplace.

II. USTelecom's Most Recent Pole Attachment Survey Demonstrates That Further Reforms to the Commission's Pole Attachment Regulations Are Needed.

Recently, the Commission's priorities have been focused on programmatic and regulatory changes to enhance the deployment of broadband services. These include comprehensive reforms through its Connect America Fund (CAF) program, as well as in other proceedings, including the wireline reforms in its current Notice. Each of these efforts is designed to accelerate the deployment of next-generation networks and services by both removing barriers to infrastructure investment and maximizing capital expenditures to the greatest extent possible. The Commission's Notice states that pole attachments are a "key input for many broadband deployment projects," and that "reduc[ing] pole attachment costs and speed[ing] access to utility poles would remove significant barriers to broadband infrastructure deployment and in turn increase broadband availability and competition in the provision of high-speed services."¹²

Each of these major initiatives, along with the Commission's proposed reforms to rate regulation of ILEC pole attachments will achieve the shared goals of reducing critical infrastructure costs, thereby speeding the deployment of such services. USTelecom agrees with the Commission that consumers will benefit from such reforms through enhanced competition and superior voice, video and broadband services, while at the same time creating a level playing field for providers of essentially identical services making fundamentally similar attachments.

¹¹ USTelecom only has visibility into rates cable and CLEC attachers pay to attach to ILEC poles, not utility poles owned by IOUs, municipalities and/or cooperatives.

¹² Notice, ¶ 3.

A. The 2017 USTelecom Survey Demonstrates that ILECs Remain at a Significant Rate Disadvantage, Despite the Commission’s 2011 Reforms.

As was the case when USTelecom last submitted pole attachment survey data in 2008, the disparity in pole attachment rates paid by ILECs to IOUs versus the rates paid by CLECs and cable providers to ILECs remains “significant, consistent and widespread.”¹³ The 2017 USTelecom Survey results shows, for example, that: 1) the rate goals for ILECs set in the Commission’s 2011 Pole Attachment Order remain unrealized; 2) due to the continuing disparity between IOUs and ILECs in pole ownership, ILECs remain in a lopsided bargaining position; and 3) significant disparities remain in pole attachment rates paid by ILECs to IOUs and those paid by CLEC and cable broadband competitors to ILECs. As USTelecom noted at the time of its 2008 USTelecom Survey, there is no sound policy basis for maintaining such an inequitable pricing mechanism, which continues to hinder competition and hinder deployment in the broadband market through unbalanced regulatory treatment of certain classes of broadband providers over others.

The 2008 USTelecom Survey provided a sampling of thirteen states where the Commission regulated pole attachments.¹⁴ The 2017 USTelecom Survey included these same states and revealed that the wide disparity in pole attachment rates not only continues but, in most instances, has *increased*. The 2017 USTelecom Survey identified instances where ILECs continue to pay vastly disparate rates for pole attachments compared to what their cable counterparts pay the ILECs – in some instances, these rates are 1,800% higher. The disparity between rates paid by ILECs and CLECs while not as high as the disparity between ILECs and cable, remain significant – in some instances greater than 1,000%. Such glaring disparity in pole attachment rates between competing broadband providers lacks any sound public policy basis.

On average, ILECs responding to the 2017 USTelecom Survey pay IOUs nearly 9 times what ILECs charge cable providers and almost 7 times the rates ILECs charge CLECs – results even more imbalanced than those from the 2008 USTelecom Survey (8 times and 6 times, respectively).¹⁵ In dollar terms, these ILECs pay an average of \$26.12 to IOUs today (an *increase* from \$26.00 in 2008), compared to cable and CLEC providers payments to ILECs, which average \$3.00 and \$3.75, respectively (a *decrease* from \$3.26 and \$4.45, respectively, in 2008). The Table below compares data at a more granular state level from the 2008 USTelecom Survey and the 2017 USTelecom Survey, and reveals persistent disproportionate gaps in rates paid for pole attachments.

¹³ 2008 USTelecom Comments, p. 8.

¹⁴ *Id.*

¹⁵ *Id.*, p. 7.

Table 1: Pole Attachment Rate Comparisons from 2008 and 2017 USTelecom Surveys¹⁶

State	ILEC Rate Paid to IOUs		Cable Rate Paid to ILECs		CLEC Rate Paid to ILECs	
	2008	2017	2008	2017	2008	2017
State 1	\$51.76	\$29.39	\$3.43	--	\$5.20	--
State 2	\$43.71	\$29.46	\$3.61	\$3.17	\$5.43	\$3.02
State 3	\$34.08	\$13.14	\$3.27	--	\$14.30	--
State 4	\$34.95	\$45.97	\$3.60	\$2.38	\$3.44	--
State 5	\$37.55	\$51.47	\$4.62	\$5.30	\$9.85	\$5.22
State 6	\$34.53	\$44.92	\$4.28	\$4.22	\$6.30	--
State 7	\$29.12	\$54.66	\$3.99	\$4.30	\$6.01	--
State 8	\$26.17	\$36.67	\$3.79	\$3.44	\$6.90	\$3.25
State 9	\$20.00	\$16.52	\$3.17	\$2.93	\$3.57	\$3.13
State 10	\$19.30	\$24.15	\$3.24	\$2.96	\$5.07	\$2.75
State 11	\$22.13	\$23.38	\$5.12	\$3.96	\$19.52	\$5.71
State 12	\$13.34	\$12.07	\$2.90	\$2.32	\$3.08	\$2.70
State 13	\$7.99	\$12.92	\$2.43	\$0.92	\$3.02	--

These findings clearly demonstrate that, while the Commission's 2011 Pole Attachment Order recognized an ILEC's right to just and reasonable pole attachment rates, the changes implemented in that Order and the subsequent 2015 Pole Attachment Order have not achieved the Commission's desired goals.¹⁷ After finding that the Commission had the "authority to ensure that incumbent LECs' attachments to other utilities' poles are pursuant to rates, terms

¹⁶ The data in the 2017 USTelecom Survey and table reflects: 1) pole attachment rates paid by ILECs to IOUs; and 2) pole attachment rates paid by cable and CLEC attachers to ILECs. USTelecom does not have data reflecting rates paid by cable and CLEC attachers to IOUs. In addition, the data reflects instances where three or more USTelecom members provided data to USTelecom. Instances in Table 1 reflecting "--" indicates that there are an insufficient number of survey respondents to permit disclosure of that data.

¹⁷ See, 2015 Pole Attachment Order, ¶ 1 (stating that the order "build[s] on the Commission's prior efforts to harmonize pole attachment rates that cable and telecom service providers pay utility pole owners," and that "The 2011 revisions sought to bring the telecom and cable rates into parity. In the intervening time, we have seen that our revisions did not fully achieve that objective. Today, we take the next logical step in achieving the goals set forth in 2011.").

and conditions that are just and reasonable,”¹⁸ the Commission reasoned that the guidance it provided in the 2011 Pole Attachment Order, subject to case-by-case oversight through the Commission’s complaint process, would “reduce input costs, such as pole rental rates,” which in turn would “expand opportunities for investment.”¹⁹ Unfortunately, that has not occurred.

Contrary to the stated goal in its 2011 Pole Attachment Order, the Commission’s current complaint process has not achieved the Commission’s desired goal of “greater clarity to the industry,” nor has it improved the “administrability of Commission complaint proceedings involving incumbent LEC attachers.”²⁰ As USTelecom noted in its comments in this proceeding, the Commission’s decision to resolve ILEC pole attachment complaints on a case-by-case basis has instead “proven to be unwieldy, ineffective and has burdened ILEC attachers and the Commission with an unnecessary and prohibitive complaint-based framework for resolving pole attachment complaints.”²¹ Moreover, the existing framework has resulted in a continued – and growing – rate imbalance between ILEC attachers and their cable and CLEC competitors.

B. ILECs’ Minority Pole Ownership Gives Them Inadequate Bargaining Power With IOU Pole Owners to Obtain Just and Reasonable Pole Attachment Rates.

In its 2011 Pole Attachment Order, the Commission found that ILECs appeared to own approximately 25 – 30 percent of poles and electric utilities appeared to own approximately 65 – 70 percent of poles.²² The Commission further recognized that ILECs were often not “in an equivalent bargaining position with electric utilities in pole attachment negotiations in some cases.”²³ Moreover, the Commission determined that when examining pole ownership imbalances, the appropriate measure should be evaluated on the basis of attachments between IOUs and ILECs, and not overall pole ownership.²⁴ Specifically, the Commission noted at the time:

“As a hypothetical illustration, if the electric company owned 90% of poles in an area and the incumbent LEC owned 10%, and if the best outside alternative for each party was deploying the remaining needed poles (and having the legal right to do so), the electric

¹⁸ *2011 Pole Attachment Order*, ¶ 208 (emphasis added).

¹⁹ *Id.*

²⁰ *Id.*, ¶ 203.

²¹ Comments of the USTelecom Association, WC Docket No. 17084, p. 3 (submitted June 15, 2017) (*2017 USTelecom Comments*).

²² *2011 Pole Attachment Order*, ¶ 203.

²³ *Id.*, ¶ 206.

²⁴ *Id.*, ¶ 206, nn. 617 – 618.

utility would face the cost of deploying 10% of poles, while the incumbent LEC would face the cost of deploying 90% of poles.²⁵

The Commission further noted in the above scenario that the ILEC would ultimately “have less bargaining power than the electric utility,” and only if less-costly alternatives were available to the ILEC for pole deployment, would there be any reduction in the disparity in the relative bargaining power of the parties.²⁶ Recently, a nearly two-to-one IOU pole ownership advantage was found to be evidence of the ILEC’s inferior bargaining position.²⁷ The results of the 2017 USTelecom Survey demonstrate that the pole ownership imbalance between ILECs and IOUs remains significant and generally is much higher than 2 to 1.

Data from the 2017 USTelecom Survey shows a significant difference in the ratio between the number of IOU poles to which ILECs attach and the number of ILEC poles to which IOUs attach. In the 46 states surveyed, USTelecom’s data show that for every ILEC pole to which IOUs attach, ILECs attach to three IOU poles. Specifically, ILECs attach to approximately 13.9 million IOU poles, whereas IOUs attach to only 4.6 million ILEC poles. In Commission regulated states, that pole ratio is 3.2:1, with ILECs attaching to approximately 9.7 million IOU poles, and IOUs attaching to approximately 3.1 million ILEC poles. ILECs clearly “need” the IOUs more than the IOUs need the ILECs, and thus, bargaining power is heavily skewed to the IOUs. The following table highlights data from the 13 states referenced in the chart above, and shows the consistent – and substantial – disparity of this ratio on a state-by-state basis.

Table 2: Pole Attachment Ratios (IOUs vs. ILECs)²⁸

State	Number of IOU Poles To Which ILECs Attach	Number of ILEC Poles To Which IOUs Attach	ILEC/IOU Ratio of Attaching Poles
All States	13,866,175	4,551,742	3.0:1
FCC States	9,665,689	3,051,533	3.2:1

²⁵ 2011 Pole Attachment Order, n. 618.

²⁶ *Id.*

²⁷ Verizon Virginia, LLC et al v. Virginia Electric and Power Company d/b/a Dominion Virginia Power, File No. EB-15-MD-006 ¶ 13 (released May 1, 2017) (“Recognizing the Commission’s concern that an incumbent LEC’s minority pole ownership status may negatively impact the incumbent LEC’s bargaining position, we find that Dominion’s nearly two-to-one pole ownership advantage, along with the significant disparity in the per-pole rates charged to each party, constitutes probative evidence of Verizon’s inferior bargaining position relative to Dominion.”).

²⁸ Instances in the table reflecting “--” indicates that there are an insufficient number of survey respondents that would permit disclosure of that data.

State	Number of IOU Poles To Which ILECs Attach	Number of ILEC Poles To Which IOUs Attach	ILEC/IOU Ratio of Attaching Poles
State 1	238,663	--	--
State 2	1,028,507	316,530	3.2:1
State 3	477,113	200,019	2.4:1
State 4	229,215	62,292	3.7:1
State 5	26,731	--	--
State 6	676,175	188,934	3.6:1
State 7	719,421	164,256	4.4:1
State 8	891,952	196,301	4.5:1
State 9	329,837	88,091	3.7:1
State 10	793,148	365,050	2.2:1
State 11	1,488,557	498,382	3.0:1
State 12	412,558	137,189	3.0:1
State 13	105,678	29,756	3.6:1

This disparity in bargaining power can also be seen in terms of the relative rates paid by ILECs and IOUs and net annual payments. Despite the fact that electric utility attachments occupy at least five times the average amount of space occupied by ILEC attachments, IOUs pay nearly the same rates on average. For example, the Coalition of Concerned Utilities has submitted evidence in this proceeding demonstrating that electric utility attachments typically utilize more than 7 feet of space.²⁹ Similarly, in a complaint proceeding at the Commission in 2014, Frontier submitted evidence into the record showing that IOU attachments typically use 8 feet of space.³⁰

²⁹ Comments of the Coalition of Concerned Utilities, WC Docket No. 17-84, Exhibit F, Attachment A, Appendix 3, Space Allocation Illustration (submitted, June 15, 2017) (demonstrating that electric utilities typically use 7.17 feet of space).

³⁰ See, Reply Affidavit of Susan L. Knowles, Commonwealth Telephone Company LLC d/b/a Frontier Communications Commonwealth Telephone Company, et al. v. Metropolitan Edison Company et al., File No. EB-14-MD-007, EB Docket No. 14-217, ¶ 42, n. 61 (noting that IOUs typically use 8 feet of space and stating that “This 8-foot amount is based on my experience reviewing hundreds of agreements and my experience reviewing pole inventory results. Based on this experience, the space allocated to and occupied by power companies is at least 8 feet.”) (submitted September 15, 2014) (available at: <https://ecfsapi.fcc.gov/file/60001045274.pdf>) (visited November 20, 2017) (*Knowles Reply Affidavit*).

Moreover, these IOU space requirements are conservative because they do not reflect the 40 inches of safety space, which the Commission has consistently viewed as usable space allocated to the IOU.³¹ In contrast, ILECs use far less than 2 feet. In the 2014 Commission complaint proceeding, Frontier submitted evidence based on recent inventories showing that its ILEC attachments occupied less than 1.25 feet on average.³² Even using the very conservative estimate of 7 feet for IOU attachments, IOUs occupy well over 5 times the space occupied by ILEC attachments.

Despite the wide disparity in the amount of space occupied by IOU and ILEC attachments, the 2017 USTelecom Survey showed that they paid nearly reciprocal average weighted rates to each other. In Commission-regulated states, ILECs paid an average of \$26.12 to attach to an IOU pole. On the other hand, IOUs paid an average of \$27.18 to attach to an ILEC pole. As a result, ILECs paid approximately \$351.8 million to IOUs in 46 states for pole attachments, but received only \$125.8 million from IOUs. For the 29 out of 30 Commission-regulated states for which USTelecom received data, ILECs paid aggregate pole attachment rates of approximately \$251.3 million to IOUs, but received only \$82.9 million from IOUs. In Commission-regulated states alone, this resulted in a net payment from ILECs to IOUs of approximately \$168.4 million.

Contrary to assertions by IOUs in this proceeding that the decrease in ILEC pole ownership has been intentional, this pole ownership disparity is primarily the result of marketplace realities whereby IOUs have intentionally and incrementally increased their pole ownership. As noted by various commenters in this proceeding, the increase in IOU pole ownership has been driven by a number of factors that are not in the ILECs' control, including greenfield deployment of IOU networks, national disaster recovery efforts, and IOU pole replacement activities.

For example, CenturyLink notes that when new neighborhoods are built, public power companies are the first to move into those areas. In addition to installing the new utility poles which they immediately claim as their own, they are unwilling to sell them. In other instances, IOUs will sometimes replace ILEC poles – often times without providing notice to the ILEC – in

³¹ See, *2011 Pole Attachment Order*, n. 559 (citing to Consolidated Partial Order on Reconsideration, Amendment of Commission's Rules and Policies Governing Pole Attachments, CS Docket Nos. 97-97, 97-151, 16 FCC Rcd 12103, 12130, ¶ 51 (rejecting utility arguments to remove the 40-inch safety space from the presumptive 13.5 feet of usable space and affirming the 2000 Fee Order, 15 FCC Rcd at 6467–68, ¶ 22 (finding that “the presence of the potentially hazardous electric lines . . . makes the safety space necessary and but for the presence of those lines, the space could be used by cable and telecommunications attachers,” and further that this “space is usable and is used by the electric utilities”).

³² *Knowles Reply Affidavit*, ¶¶ 48 – 49.

order to accommodate new power attachments or during storm restoration.³³ Once again, the IOUs will immediately claim sole ownership of the new poles. In other instances, municipal power companies have often placed new, taller poles on the opposite side of the road, and then used their statutory control over the public rights-of-way to force relocation from ILEC-owned poles to the new poles owned by the power company.³⁴

Moreover, CenturyLink notes that many IOUs are increasingly cancelling joint use agreements.³⁵ It notes that the termination notices sent to the ILECs by IOUs are typically coupled with demands that attachments be removed unless the ILEC enters into a new license agreement at higher rates. Verizon reported a similar trend in its comments, and notes that ILECs are faced with a “Hobson’s choice: live with insupportably high attachment rates that distort competition, or risk major disruption of their networks to obtain even the chance of a reasonable renegotiation.”³⁶

Although the American Public Power Association (APPA) filed comments in this proceeding claiming that “the traditional pole attachment negotiation process between public power utilities and the private sector is working,”³⁷ the record demonstrates that the ability of ILECs to enter into reasonable negotiations is increasingly challenging. For example, CenturyLink cited its attempts at negotiation with Vigilante Electric Cooperative (Vigilante). In those discussions, Vigilante informed CenturyLink that it declined *any* redline edits to the agreement, stating that, “you have submitted a red-lined revised agreement. We have standard language used throughout the country in our other joint use agreements with the other entities attaching to our poles. We intend to use that standard language.”³⁸ When parties in a negotiation are foreclosed from making any changes whatsoever to an agreement, such behavior by a pole owner belies the APPA’s claims the traditional pole attachment negotiation process “is working.”³⁹

When the Commission decided to review ILEC complaints on a case-by-case basis in its 2011 Pole Attachment Order, it stated that “to the extent that an incumbent LEC can demonstrate that it genuinely lacks the ability to terminate an existing agreement and obtain a new arrangement, the Commission can consider that as appropriate in a complaint

³³ See, Reply Comments of CenturyLink, WC Docket No. 17-84, pp. 3 – 4 (submitted July 17, 2017) (*CenturyLink Reply Comments*).

³⁴ *Id.*, p. 4.

³⁵ *Id.*

³⁶ See, Comments of Verizon, WC Docket No. 17-84, p. 11 (submitted June 15, 2017).

³⁷ See, Comments of the American Public Power Association, WC Docket No. 17-84, WC Docket No. 17-89, p. 18 (submitted June 15, 2017) (*APPA Comments*).

³⁸ *CenturyLink Reply Comments*, p. 4.

³⁹ *APPA Comments*, p. 18.

proceeding.”⁴⁰ Ample facts now exist to demonstrate that minority pole ownership does not give ILECs the ability to terminate an existing agreement and obtain a new arrangement with just and reasonable rates: 1) numerous Commission complaint proceedings with ILECs seeking just and reasonable rates; 2) IOU threats to force ILECs to remove attachments; and 3) the 2017 USTelecom Survey results showing that IOUs continue to extract unreasonable, nearly reciprocal rates from ILECs despite the fact that ILEC attachments occupy a fraction of the space occupied by IOU attachments and nearly the same amount of space as cable and CLEC attachers.

III. Data from the 2017 USTelecom Survey Demonstrate the Need for the Commission to Address Prohibitive Pole Attachment Rates Charged by Cooperatives.

USTelecom and others have commented in this proceeding on the difficulties encountered by broadband providers in accessing poles, ducts, conduits, and rights-of-way owned or controlled by entities that are not subject to Section 224 of the Communications Act, such as municipalities and electric cooperatives.⁴¹ Although Section 224 does not apply in such instances, the exclusion in federal law has unfortunately enabled electric cooperatives to increasingly charge excessive pole attachment rates when ILECs and other broadband providers seek to attach to their owned or controlled poles or conduit. While the unreasonable rates charged by electric cooperatives have long been an issue for broadband providers, the problem has recently become increasingly acute.

In particular, the 2017 USTelecom Survey illustrates the acute nature of the recent actions by the Tennessee Valley Authority (TVA) that could significantly undermine the important federal policy goals of accelerating and promoting broadband deployment. As detailed in the comments of USTelecom and others, the decision by the TVA Board of Directors to adopt a resolution that substantially increases pole attachment rates charged by electric cooperatives will exacerbate an already challenging rate structure for broadband providers operating in TVA states.⁴²

⁴⁰ *2011 Pole Attachment Order*, ¶ 216.

⁴¹ *See, Notice*, ¶ 30 (seeking comment on actions that the Commission might be able to undertake to speed deployment of next generation networks by facilitating access to infrastructure owned by entities not subject to Section 224). *See also*, Comments of Frontier Communications Corporation, WC Docket No. 17-84, pp. 9 – 10 (filed June 15, 2017) (*Frontier Comments*); Comments of Comcast Corporation, WC Docket No. 17-84, p. 23 (filed June 15, 2017) (identifying “unreasonable costs imposed for access to their poles,” as one of the two “primary barriers to broadband infrastructure deployment” in areas served by municipalities and cooperatives.).

⁴² *See e.g.*, Comments of USTelecom Comments, WC Docket No. 17-84, pp. 13 – 15 (filed June 15, 2017); *Frontier Comments*, p. 12.

The 2017 USTelecom Survey collected data on rates charged by electric cooperatives throughout the country, including in all seven TVA states (Alabama, Georgia, Kentucky, Mississippi, North Carolina, Tennessee and Virginia). The data show that in all but a single TVA state, the rates charged by cooperatives for ILEC attachments significantly exceed the national average cooperative rate of \$21.05.⁴³ Moreover, in four TVA states, the rates charged by cooperatives also significantly exceed the national average of \$25.23⁴⁴ charged by IOUs to ILEC attachers.

Table 3: Current TVA Rate Comparison

TVA States	Average Coop Rate	Coop Rate Exceeds Coop Nat. Avg. (\$21.05)	Coop Rate Exceeds IOU Nat. Avg. (\$25.23)
All 7 TVA States	\$26.64	YES	YES
Alabama	\$27.74	YES	YES
Georgia	\$28.73	YES	YES
Mississippi	\$29.58	YES	YES
North Carolina	\$19.61		
Tennessee	\$26.15	YES	YES
Virginia	\$23.16	YES	

It is important to note, however, that the cooperative rates in the 2017 USTelecom Survey reflect *current* rates, and not the rates developed under the new rules that have been adopted by the TVA Board, which are scheduled to be implemented in 2018.⁴⁵ As noted in USTelecom's comments, TVA's decision will increase pole attachment rates to an *average* of \$30, involving more than 150 rural electric cooperatives covering more than 9 million consumers.⁴⁶ In addition, the TVA Board resolution stipulates that the rates will be based on a

⁴³ See, Attachment C to Appendix. Although USTelecom collected data for the state of Kentucky, there were an insufficient number of survey respondents to permit disclosure of that data.

⁴⁴ See, Attachment C to Appendix.

⁴⁵ While many cooperatives have already adopted the TVA rate structure, the TVA does not mandate that the cooperatives it supplies adopt its exorbitant rate structure until 2018. Nonetheless, the unreasonable rates above illustrate that the TVA's decision is already impeding broadband deployment.

⁴⁶ See, TVA Website, TVPPA Membership (available at: <http://www.tvppa.com/membership/member-directory/regular-members/>) (visited November

formula methodology,⁴⁷ meaning that many of the rates reflected above may actually *exceed* the \$30 average. While the TVA has proposed a glide-path of up to five years for large rate increases,⁴⁸ such an approach simply delays the inevitability of substantially higher pole attachment rates in the rural areas served.

Although the TVA asserts that its resolution is not “intended” to apply to reciprocal or joint use agreements “at this time”,⁴⁹ such proclamations raise numerous concerns with respect to the Commission’s broadband policy goals. First, nothing prevents TVA members from terminating existing reciprocal or joint use agreements with ILECs within their respective territories. As discussed previously in this ex parte notice, utility pole owners (including IOUs, cooperatives and municipalities) are already seeking to terminate existing joint use agreements with ILEC attachers.⁵⁰ There is nothing in the TVA Board resolution to assuage such concerns. Even with the tenuous exception for joint use agreements, many ILECs providing service in TVA territories will likely see rate increases as a result of TVA’s action – either through the termination of such agreements, or in instances where such poles are exclusively owned by the TVA cooperative.

Second, cable and CLEC attachers – which are not subject to joint use agreements – will likely see their attachment rates skyrocket under the TVA’s resolution. As noted by the TVA when it published its proposed attachment rate reforms, the scope of its proposal included agreements between local power companies, “and third parties making or maintaining wireline attachments, such as cable or telecommunication (including broadband) providers.”⁵¹ Under the TVA’s adopted resolution, these attachers – and potentially ILECs that have seen their joint

20, 2017); *see also*, TVA Website (available at: https://www.tva.gov/file_source/TVA/Site%20Content/Energy/tva_lpc_map.pdf) (identifying the TVA cooperative members’ service territories covering seven states: Alabama, Georgia, Kentucky, Mississippi, North Carolina, Tennessee, and Virginia) (visited November 20, 2017); *see also*, TVA Website, About TVA (available at: <https://www.tva.gov/About-TVA>) (visited November 20, 2017).

⁴⁷ TVA Board Resolution, p. 2 (available at: https://www.tva.gov/file_source/TVA/Site%20Content/About%20TVA/Guidelines%20and%20Reports/tva_determination_on_regulation_of_pole_attachments.pdf) (visited November 20, 2017) (*TVA Board Resolution*). *See also*, *TVA Board Resolution*, Attachment A.

⁴⁸ *TVA Board Resolution*, Attachment A, Appendix 4. Under the specified transition guideline, attachment rates are permitted to rise by \$5 or more per year. (*e.g.*, a rate increase of \$11 to \$20 per year must be implemented in no more than 3 years.)

⁴⁹ *Id.*, Attachment A, p. 1, n. 1. The note also expresses TVA’s expectation that “appropriate costs will be borne by all participants in these reciprocal joint use agreements.”

⁵⁰ *See supra*, pp. 9 – 10.

⁵¹ *TVA Board Resolution*, Attachment B, Appendix 3, p. 1.

use agreements terminated – could see their rates immediately rise by up to \$5.00 upon implementation, and up to \$31.00 or more after no more than five years.⁵²

Given the location of electric cooperatives, the TVA’s unilateral decision will have a particularly acute impact on rural consumers. As noted in the Commission’s 2015 Rate Parity Order, “large and sudden” pole attachment rate increases can “destabiliz[e]” broadband deployment plans.⁵³ The Commission was “particularly mindful” of these harms in rural areas, noting that they are “the least served areas in the nation, and where the most additional pole attachments are needed to reach additional customers.”⁵⁴

Indeed, in its reply comments submitted in this proceeding, the National Rural Electric Cooperative Association (NRECA) noted its own survey of its members, which compared broadband penetration for rural areas served by IOUs versus rural areas served by electric cooperatives. NRECA found a “strong correlation between low household density per square mile and lower broadband penetration in rural parts of the country.”⁵⁵ NRECA emphasized that the “large difference in population density and its correlation to lower broadband penetration strongly suggests that the rural households served by electric cooperatives have less access to broadband simply because there are fewer people per square mile in these areas, *making it more expensive to provide service to these households.*”⁵⁶

Despite the realities highlighted by NRECA from its survey (*i.e.*, lower broadband penetration in rural areas served by cooperatives, and the higher costs associated with providing service to such households), NRECA nevertheless asserts that TVA’s increased pole attachment rates are “reasonable.”⁵⁷ The 2017 USTelecom Survey, however, demonstrates that the pending increase in TVA pole attachment rates will be particularly destabilizing, given the already exorbitant rates charged by TVA cooperatives.

Moreover, the challenges of deploying broadband in rural areas covered by the TVA’s seven-state service territory will be further exacerbated by the TVA’s decision to deploy its own broadband services in direct competition with existing providers. Specifically, the TVA recently

⁵² *Id.*, Attachment B, Appendix 3, Appendix 1.

⁵³ 2015 Pole Attachment Order, ¶ 27.

⁵⁴ *Id.*

⁵⁵ See, Reply Comments of the National Rural Electric Cooperative Association, WT Docket No. 17-79, WC Docket No. 17-84, p. 6 (submitted July 17, 2017).

⁵⁶ *Id.* (emphasis added).

⁵⁷ *Id.*, p. 12.

approved a \$300 million initiative to expand its fiber capacity.⁵⁸ The initiative will take five to 10 years to complete and will include 3,500 miles of fiber to enable broadband connections for more of TVA's generating plants as well as more of its customers. In essence, as the TVA takes affirmative steps to price broadband competitors out of the market, it seeks to deploy, enable and encourage competitive broadband service from the electric cooperatives it serves. To reiterate, a federal entity is not only blocking broadband deployment with extreme pole attachment rates in direct contravention to well-established federal policy, but also is using funding from those rates together with fees collected from electric rate payers to subsidize broadband overbuilding and undermine private investment, again in direct contravention to well-established federal policy.

In its initial comments in this proceeding, USTelecom also noted that the exorbitant TVA rates pose a serious threat to the Commission's goals under the Connect America Fund (CAF) program to promote efficient and carefully targeted broadband deployment in rural areas.⁵⁹ The higher rates charged by TVA electric cooperatives will detrimentally impact these CAF broadband deployment efforts by forcing broadband providers to pay exorbitant and unreasonable rates to these cooperatives in order to obtain access to essential infrastructure. As a result, the unreasonable rates expended for access to cooperative poles for any CAF buildouts substantially increase the costs and reduce the funds available for additional broadband deployment.

Since USTelecom last raised this issue in its comments in this proceeding, at least one TVA member – Newport Utilities⁶⁰ – is moving forward with plans to deploy broadband services to consumers⁶¹ that have already been targeted for CAF support. Specifically, the electric

⁵⁸ TVA website, *TVA Board Approves \$300 Million Strategic Fiber Initiative*, May 11, 2017 (available at: <https://www.tva.com/Newsroom/Press-Releases/TVA-Board-Approves-300-Million-Strategic-Fiber-Initiative>) (visited November 20, 2017).

⁵⁹ Report and Order and Further Notice of Proposed Rulemaking, *Connect America Fund*, 26 FCC Rcd. 17663, 77 FR 26987, FCC 11-161, ¶ 1 (released November 18, 2011) (noting the Commission's goal to establish a "framework to distribute universal service funding in the most efficient and technologically neutral manner possible."); Report and Order and Further Notice of Proposed Rulemaking, *Connect America Fund; ETC Annual Reports and Certifications*, 29 FCC Rcd. 8769, 79 FR 44352, FCC 14-98, ¶ 10 (released July 14, 2014) (discussing the use of "targeted funding to expand efficiently the availability of voice and broadband-capable infrastructure.").

⁶⁰ According to the TVA website, Newport Utilities is a TVA member. See, TVA website, *Local Power Companies* (available at: <https://www.tva.gov/Energy/EnergyRightSolutions/Local-Power-Companies#N>) (visited November 20, 2017).

⁶¹ See, Kampis, Johnny, Tennessee Watchdog.org, *Tennessee town's broadband plan may face difficult hurdles*, October 6, 2017 (available at: https://www.watchdog.org/tennessee/tennessee-town-s-broadband-plan-may-face-difficult-hurdles/article_83adeba8-aa97-11e7-8b27-ff728c594b3b.html) (visited November 20, 2017)

service territory of Newport Utilities is located in Cocke County Tennessee, which has already received \$535,396 in CAF support, directed towards approximately two thousand homes and businesses.⁶²

The 2017 USTelecom Survey results underscore USTelecom's recommendation for Commission coordination with appropriate federal agency stakeholders and legislative committees holding TVA oversight. While the TVA asserts that its sole obligation is to ensure that electric rates be kept "as low as feasible" for electric ratepayers,⁶³ such rates should not serve to undermine the broader federal policy goal of increased broadband deployment. The Commission should therefore work with other federal stakeholders to ensure that the shared federal goals of increased broadband deployment are not derailed by the narrower goals of a single federal entity.

IV. The 2017 USTelecom Survey Results Demonstrate That the Commission's Proposed Further Reforms to Pole Attachment Regulations are Necessary.

In remarks delivered earlier this year to the Hudson Institute, Commission Chairman Ajit Pai stated that using data collected by the Commission and from other sources, the Commission "can make well-informed, economically sound policy."⁶⁴ Chairman Pai further noted the importance of utilizing data to inform long-term thinking into Commission policies, including those relating to the agency's infrastructure rules.⁶⁵ The data presented in the 2017 USTelecom Survey clearly demonstrates that further reforms are needed to the Commission's rules governing its pole attachment rate formulas.

Despite the well-intentioned goals of the Commission's 2011 Pole Attachment Order, the 2017 USTelecom Survey demonstrates that pole attachment rates for ILEC attachers have increased, whereas the rates ILECs charge CLEC and cable competitors have significantly *decreased*. Moreover, the imbalance in pole ownership and the resulting lack of ILEC bargaining power that was integral to the Commission's decision to institute rate reforms in

(noting that broadband providers in the service area of Newport Utilities include AT&T, Charter, Comcast and Windstream and fixed wireless providers Planet Connect and Ultranet.).

⁶² See, Federal Communications Commission, CAFII - Final Adopted Model for Offer of Model - Based Support to Price, Cap Carriers, AT&T - Offer by State showing Location Obligation, p. 28, April 29, 2015 (available at: https://apps.fcc.gov/edocs_public/attachmatch/DOC-335269A9.pdf) (visited November 20, 2017).

⁶³ *TVA Board Resolution*, Attachment B, p. 1.

⁶⁴ See, Remarks Of FCC Chairman Ajit Pai at the Hudson Institute, *The Importance of Economic Analysis at the FCC*, Washington, D.C., April 5, 2017, p. 4 (available at: https://apps.fcc.gov/edocs_public/attachmatch/DOC-344248A1.pdf) (visited November 14, 2017).

⁶⁵ *Id.*, pp. 5 – 6.

2011 continues today. Based on these findings, the Commission should expeditiously move forward with its proposal to institute a presumptive just and reasonable rate formula for ILEC attachers. As USTelecom noted in its comments in this proceeding, such a just and reasonable rate “should mean the same thing for providers of fundamentally identical services making fundamentally similar attachments.”⁶⁶

Any just and reasonable rate charged to ILEC attachers should be based on a rate using the most recent telecommunications rate formula.⁶⁷ The Commission should also adopt its proposal that an ILEC would receive the telecommunications rate unless the utility pole owner can demonstrate with “clear and convincing evidence” that the benefits to the ILEC far outstrip the benefits accorded to other pole attachers.⁶⁸

A presumptive just and reasonable ILEC rate will introduce greater certainty into the marketplace for ILEC attachers, investor-owned utility pole owners and the Commission. The Commission’s current case-by-case approach creates an unforgiving marketplace for ILEC attachers by forcing them to choose between two unsatisfactory options: agree to the disparate (and exorbitant) pole attachment rates charged by IOUs, or partake in the Commission’s lengthy (and costly) complaint process. While the former choice leads to increased infrastructure costs for ILECs that are ultimately passed on to consumers, the latter often results in extensive delays to broadband infrastructure deployments. Neither of these choices is efficient, and in both instances consumers lose – whether through delayed broadband deployments, increased consumer costs, or potentially both.

V. Conclusion.

USTelecom greatly supports and appreciates the Commission’s continuing efforts to establish regulatory parity among broadband competitors, and we urge the Commission to expeditiously adopt its proposal for a presumptive just and reasonable rate formula for ILEC attachers.

⁶⁶ See, *2017 USTelecom Comments*, p. 8.

⁶⁷ *Notice*, ¶ 45.

⁶⁸ *Notice*, ¶ 45.

Appendix – USTelecom 2017 Pole Survey Methodology

USTelecom surveyed member companies to collect certain information regarding pole attachments. USTelecom distributed the survey instrument (Attachment A to this Appendix) in late June 2017 and received responses in August and September of 2017 from seven member companies: AT&T, CenturyLink, FairPoint, Frontier, GVTC Communications, Verizon, and Windstream. Participating companies provided data under a nondisclosure agreement that prohibits release of company-specific data. FairPoint did not provide data for Maine, New Hampshire, and Vermont. Consolidated Communications acquired FairPoint on July 3, 2017, but the survey reflects only selected service areas of the former FairPoint, not the acquiring company.

Each participating company submitted state-level data, plus a company-aggregate for all reported states and a company-wide aggregate for all reported states in which the Federal Communications Commission (“FCC”) regulates pole attachment rates (“FCC-regulated states”). Under federal telecommunications law, states can opt to regulate certain pole attachment rates, and the FCC regulates rates for states that have not opted to regulate pole attachment rates. In total, USTelecom members contributed data for 140 company-state operating areas in 46 states, plus seven company aggregates for all states and seven company aggregates for FCC-regulated states. A list of states by regulatory jurisdiction and inclusion in this survey is included in Attachment B to this Appendix.

For each state for which a company submitted data, the survey sought data regarding the number of poles and the attachers to poles owned by incumbent local exchange carriers (“ILECs”) and three types of electric utilities (“utilities”): investor-owned utilities (“IOUs”), municipal utilities (“munis”), and electric cooperatives (“co-ops”). Specifically, the survey requested (1) the number of poles fully owned by incumbent local exchanges carrier (“ILECs”); (2) the number of poles owned jointly by ILECs and utilities; (3) the number of fully-owned electric utility poles with ILEC attachments; and (4) the number of fully-owned ILEC poles with attachments by utilities, cable operators, competitive local exchange carriers (“CLECs”), and “others.”

The survey also sought data regarding certain pole attachment rates: (1) the rates ILECs pay to each of the three types of utilities for attachments to fully-owned utility poles; (2) the rates each type of utility pays to ILECs for fully-owned ILEC poles; and (3) the rates cable operators, CLECs, and others pay to ILECs for fully-owned ILEC poles. The survey requested data on annual – not monthly – rates. For each state for which a company submitted data and for the company-wide aggregates, for each category of attachment, the survey requested the low and high rates, the weighted average rate; and the median rate. The survey also asked for annual gross payments ILECs make to each of the three types of utilities; and it is possible to calculate such gross payments ILECs receive for attachments from utilities, cable operators, CLECS, and others.

The survey does not capture any information regarding the number of attachments to and rates paid for utility poles to which ILECs do not attach; it does not capture rates cable operators, CLECs, and others pay to utilities; and it does not capture any rate information for poles jointly owned by ILECs and utilities. For selected metrics, USTelecom either collected or was able to develop aggregated totals, for example ILEC attachments to and from all utilities and total attachers of any type to ILEC poles.

After a data validation process, USTelecom generated aggregates for all reporting companies in all reported states, in all FCC-regulated states, and selected individual states. USTelecom was independently able to validate the number of poles and attachers, the low and high rates, and the weighted average rates. USTelecom was not able to validate reported median rates.

Per the terms of our nondisclosure agreement, USTelecom does not report company-specific data. Accordingly, USTelecom reports only aggregated state-level data if at least three companies provided data for the state so that it is not possible to derive individual company information. Given our nondisclosure requirements, USTelecom was able to create aggregates for 28 out of 46 states. Even for states in which three or more companies submitted a response, USTelecom reports individual data points for a state only if at least three companies provided that specific data. In addition, USTelecom reports data for aggregated categories (e.g., all utilities or all attachments) only if it would not be possible to derive a subcategory for which data were otherwise withheld. USTelecom also created an aggregate group for the seven states in which the Tennessee Valley Authority operates (“TVA-states”) – Alabama, Georgia, Kentucky, Mississippi, North Carolina, Tennessee, and Virginia. Among these states, all are reportable as individual aggregates, except Kentucky.

Please see Attachment C to this Appendix for a summary of the results for all states and for FCC-regulated states.

Attachment A to Appendix – Survey Instrument for 2017 USTelecom Survey

General Information	
1. How many poles do you fully own 100%?	
2. How many poles do you <u>jointly own</u> with utilities?	
3. How many poles fully owned by others (e.g. IOUs, munis, coops) do you attach to?	
a) Of the poles fully owned by other entities, how many are owned by municipalities?	
b) Of the poles fully owned by other entities, how many are owned by cooperatives?	
c) Of the poles fully owned by other entities, how many are fully owned by IOUs?	
4. On the poles you fully own, how many have attachments by:	
a) all utility companies	
(i) municipalities	
(ii) cooperatives	
(iii) IOUs	
b) cable companies	
c) CLECs	
d) other	

Investor Owned Utility (IOU) Agreements	Low End	High End
1. What is the range of rates that your company pays to utility companies for ILEC attachments on 100% owned IOU poles (not including munis/coops)?		
2. What is the weighted average rate that your company pays to utility companies for ILEC attachments on 100% owned IOU poles (not including munis/coops)?		
3. What is the [range of] median rates that [compan[ies] pay[] to utility companies for ILEC attachments on 100% owned IOU poles (not including munis/coops)?		
4. What is the total gross payment your company makes for pole attachments to 100% owned IOUs. This calculation should not include payments to muni/coops, or payments made under Joint Ownership agreements.		

Attachment A to Appendix – Survey Instrument for 2017 USTelecom Survey (Continued)

Electric Cooperative Agreements		Low End	High End
1. What is the range of rates that your company pays to electric cooperatives for ILEC attachments?			
2. What is the weighted average rate that your company pays to electric cooperatives for ILEC attachments?			
3. What is the [range of] median rates that []compan[ies] pay[] to electric cooperatives for ILEC attachments?			
4. What is the total gross payment your company makes for pole attachments to electric cooperatives?			

Municipality Agreements		Low End	High End
1. What is the range of rates that your company pays to municipalities for ILEC attachments?			
2. What is the weighted average rate that your company pays to municipalities for ILEC attachments?			
3. What is the [range of] median rates that []compan[ies] pay[] to municipalities for ILEC attachments?			
4. What is the total gross payment your company makes for pole attachments to municipalities?			

Attachment A to Appendix – Survey Instrument for 2017 USTelecom Survey (Continued)

Pole Ownership Information	
1. What is the range of rates your company receives for attachments for 100% ILEC owned poles from:	
	Low End High End
a) utility companies	
(i) municipalities	
(ii) cooperatives	
(iii) IOUs	
	Low End High End
b) cable companies;	
	Low End High End
c) CLECs	
	Low End High End
d) Other	
2. What is the weighted average rate your company receives for attachments from:	
a) utility companies;	
(i) municipalities	
(ii) cooperatives	
(iii) IOUs	
b) cable companies;	
c) CLECs	
d) Other	
3. What is the [range of] median rate[s] your compan[ies] receive[] for attachments from:	
a) utility companies;	
(i) municipalities	
(ii) cooperatives	
(iii) IOUs	
b) cable companies;	
c) CLECs	
d) Other	

Attachment B to Appendix – Regulatory Authority by State* for Pole Attachments and Status of Inclusion in the 2017 USTelecom Survey

State	Pole Attachment Regulator	Data Submitted in USTelecom 2017 Pole Survey?
Alabama	FCC	Yes
Arizona	FCC	Yes
Colorado	FCC	Yes
Florida	FCC	Yes
Georgia	FCC	Yes
Indiana	FCC	Yes
Iowa	FCC	Yes
Kansas	FCC	Yes
Maryland	FCC	Yes
Minnesota	FCC	Yes
Mississippi	FCC	Yes
Missouri	FCC	Yes
Montana	FCC	Yes
Nebraska	FCC	Yes
Nevada	FCC	Yes
New Mexico	FCC	Yes
North Carolina	FCC	Yes
North Dakota	FCC	Yes
Oklahoma	FCC	Yes
Pennsylvania	FCC	Yes
Rhode Island	FCC	Yes
South Carolina	FCC	Yes
South Dakota	FCC	Yes
Tennessee	FCC	Yes
Texas	FCC	Yes
Virginia	FCC	Yes
West Virginia	FCC	Yes
Wisconsin	FCC	Yes
Wyoming	FCC	Yes
Arkansas	STATE	Yes
California	STATE	Yes
Connecticut	STATE	Yes
Delaware	STATE	Yes
District of Columbia	STATE	Yes
Idaho	STATE	Yes
Illinois	STATE	Yes
Kentucky	STATE	Yes
Louisiana	STATE	Yes
Massachusetts	STATE	Yes
Michigan	STATE	Yes
New Jersey	STATE	Yes
New York	STATE	Yes
Ohio	STATE	Yes
Oregon	STATE	Yes
Utah	STATE	Yes
Washington	STATE	Yes
Hawaii	FCC	No
Alaska	STATE	No
Maine	STATE	No
New Hampshire	STATE	No
Vermont	STATE	No

Total States	51
States Submitted	46
Submitted - FCC Regulated	29
Submitted - State Regulated	17
States Not Submitted	5
Not Submitted - State Regulated	4
Not Submitted - FCC Regulated	1

*"State" includes the District of Columbia

Attachment C to Appendix – Aggregated Results of 2017 USTelecom Survey

	All States	FCC-Regulated States
General Information		
1. How many poles do you fully own 100%?	14,755,164	9,279,969
2. How many poles do you jointly own with utilities?	8,876,986	1,051,899
3. How many poles fully owned by others (e.g. IOUs, munis, coops) do you attach to?	22,424,588	16,635,659
a) Of the poles fully owned by other entities, how many are owned by municipalities?	2,696,576	2,356,976
b) Of the poles fully owned by other entities, how many are owned by cooperatives?	5,861,837	4,612,994
c) Of the poles fully owned by other entities, how many are fully owned by IOUs?	13,866,175	9,665,689
4. On the poles you fully own, how many have attachments by:		
a) all utility companies	5,392,992	3,762,405
(i) municipalities	570,118	495,664
(ii) cooperatives	271,132	215,208
(iii) IOUs	4,551,742	3,051,533
b) cable companies	9,242,678	4,159,856
c) CLECs	1,321,545	433,532
d) other	126,161	41,854
Investor Owned Utility (IOU) Agreements		
1. What is the range of rates that your company pays to utility companies for ILEC attachments on 100% owned IOU poles (not including munis/coops)?	\$0.00 \$123.18	\$0.00 \$123.18
2. What is the weighted average rate that your company pays to utility companies for ILEC attachments on 100% owned IOU poles (not including munis/coops)?	\$25.23	\$26.12
3. What is the [range of] median rate[s] the companies pay to utility companies for ILEC attachments on 100% owned IOU poles (not including munis/coops)?	\$7.00 \$37.45	\$9.45 \$37.57
4. What is the total gross payment your company makes for pole attachments to 100% owned IOUs. This calculation should not include payments to muni/coops, or payments made under Joint Ownership agreements.	\$351,779,591	\$251,303,331
Electric Cooperative Agreements		
1. What is the range of rates that your company pays to electric cooperatives for ILEC attachments?	\$0.70 \$42.93	\$1.00 \$40.86
2. What is the weighted average rate that your company pays to electric cooperatives for ILEC attachments?	\$21.05	\$21.57
3. What is the [range of] median rate[s] that the companies pay to electric cooperatives for ILEC attachments?	\$10.94 \$29.05	\$10.94 \$29.05
4. What is the total gross payment your company makes for pole attachments to electric cooperatives?	\$124,231,337	\$100,569,692
Municipality Agreements		
1. What is the range of rates that your company pays to municipalities for ILEC attachments?	\$0.00 \$59.08	\$0.00 \$53.42
2. What is the weighted average rate that your company pays to municipalities for ILEC attachments?	\$19.96	\$20.98
3. What is the [range of] median rate[s] the companies pay to municipalities for ILEC attachments?	\$8.51 \$25.45	\$8.13 \$25.57
4. What is the total gross payment your company makes for pole attachments to municipalities?	\$54,757,746	\$50,302,619

Attachment C to Appendix – Aggregated Results of 2017 USTelecom Survey (Continued)

Pole Ownership Information				
1. What is the range of rates your company receives for attachments for 100% ILEC owned poles from:				
a) utility companies	\$0.00	\$96.20	\$0.00	\$96.20
(i) municipalities	\$0.00	\$60.57	\$0.00	\$60.57
(ii) cooperatives	\$1.00	\$79.81	\$1.00	\$46.75
(iii) IOUs	\$0.00	\$96.20	\$0.00	\$96.20
b) cable companies;	\$0.42	\$25.00	\$0.42	\$25.00
c) CLECs	\$0.42	\$25.00	\$0.42	\$25.00
d) Other	\$0.97	\$118.75	\$0.97	\$25.00
2. What is the weighted average rate your company receives for attachments from:				
a) utility companies;	\$26.59		\$26.08	
(i) municipalities	\$20.86		\$21.67	
(ii) cooperatives	\$21.05		\$20.65	
(iii) IOUs	\$27.64		\$27.18	
b) cable companies;	\$4.83		\$3.00	
c) CLECs	\$5.07		\$3.75	
d) Other	\$5.80		\$3.83	
3. What is the [range of] median rate[s] the companies receive for attachments from:				
a) utility companies;				
(i) municipalities	\$9.00	\$25.57	\$9.00	\$29.82
(ii) cooperatives	\$14.40	\$30.46	\$13.70	\$30.46
(iii) IOUs	\$11.32	\$28.03	\$9.59	\$28.03
b) cable companies;	\$3.29	\$5.30	\$2.77	\$5.64
c) CLECs	\$2.44	\$5.59	\$2.14	\$6.00
d) Other	\$3.40	\$62.38	\$3.20	\$6.00

CERTIFICATE OF FILING AND SERVICE

I, James M. Carr, hereby certify that on August 22, 2019, I filed the foregoing Respondents' Excerpts of Record with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit using the electronic CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and will be served electronically by the CM/ECF system.

/s/ James M. Carr

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 18-72689 (L), 19-70490

AMERICAN ELECTRIC POWER SERVICE CORPORATION, ET AL.,
PETITIONERS,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
RESPONDENTS.

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

**RESPONDENTS' EXCERPTS OF RECORD
VOLUME TWO
(PAGES 287 TO 396)**

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Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment**

Third Report and Order and Declaratory Ruling - WC Docket No. 17-84; WT Docket No. 17-79

Background: This *Third Report and Order* would adopt a new framework for the vast majority of pole attachments governed by federal law by instituting a “one-touch make-ready” (OTMR) regime, in which the new attacher may opt to perform all work to prepare a pole for a new attachment. OTMR should accelerate broadband deployment and reduce costs by allowing the party with the strongest incentive to prepare the pole to efficiently perform the work itself. This *Declaratory Ruling* would conclude that section 253(a) of the Communications Act prohibits state and local moratoria on telecommunications facilities deployment.

What the Report and Order Would Do:

- Permit new attachers to elect an OTMR process for simple make-ready for wireline attachments in the “communications space” on a pole.
 - Establish safeguards in the OTMR process to promote coordination among the parties and ensure that new attachers perform work safely and reliably.
 - Retain a multi-party process for other new attachments where safety and reliability risks are greater, while making some modifications to speed deployment.
- Codify the Commission’s existing precedent that permits attachers to “overlash” existing wires without first seeking the utility’s approval while allowing the utility to request reasonable advance notice of overlash.
- Eliminate outdated disparities between the pole attachment rates incumbent carriers must pay compared to other similarly-situated cable and telecommunications attachers.
- Make clear that the FCC will preempt, on an expedited case-by-case basis, state and local laws that inhibit the rebuilding or restoration of broadband infrastructure after a disaster.

What the Declaratory Ruling Would Do:

- Conclude that state and local moratoria on telecommunications services and facilities deployment are barred by section 253(a) of the Communications Act because they “prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”
 - Define “moratoria” barred by section 253(a) to include both express moratoria and *de facto* moratoria that effectively halt or suspend the acceptance, processing, or approval of applications or permits.
- Determine that moratoria are generally not protected by the exceptions to the section 253(a) prohibition.
- Direct the Wireline Competition Bureau and Wireless Telecommunications Bureau to act promptly on petitions challenging specific alleged moratoria.

* This document is being released as part of a “permit-but-disclose” proceeding. Any presentations or views on the subject expressed to the Commission or its staff, including by email, must be filed in WC Docket No. 17-84, which may be accessed via the Electronic Comment Filing System (<https://www.fcc.gov/ecfs/>). Before filing, participants should familiarize themselves with the Commission’s *ex parte* rules, including the general prohibition on presentations (written and oral) on matters listed on the Sunshine Agenda, which is typically released a week prior to the Commission’s meeting. See 47 CFR § 1.1200 *et seq.*

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

In the Matter of)
Accelerating Wireline Broadband Deployment by) WC Docket No. 17-84
Removing Barriers to Infrastructure Investment)
Accelerating Wireless Broadband Deployment by) WT Docket No. 17-79
Removing Barriers to Infrastructure Investment)

THIRD REPORT AND ORDER AND DECLARATORY RULING*

Adopted: []

Released: []

By the Commission:

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* This document has been circulated for tentative consideration by the Commission at its August 2018 open meeting. The issues referenced in this document and the Commission’s ultimate resolution of those issues remain under consideration and subject to change. This document does not constitute any official action by the Commission. However, the Chairman has determined that, in the interest of promoting the public’s ability to understand the nature and scope of issues under consideration, the public interest would be served by making this document publicly available. The FCC’s ex parte rules apply and presentations are subject to “permit-but-disclose” ex parte rules. See, e.g., 47 C.F.R. §§ 1.1206, 1.1200(a). Participants in this proceeding should familiarize themselves with the Commission’s ex parte rules, including the general prohibition on presentations (written and oral) on matters listed on the Sunshine Agenda, which is typically released a week prior to the Commission’s meeting. See 47 CFR §§ 1.1200(a), 1.1203.

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I. INTRODUCTION

1. Today, we continue our efforts to promote broadband deployment by speeding the process and reducing the costs of attaching new facilities to utility poles.¹ Now, more than ever, access to this vital infrastructure must be swift, predictable, safe, and affordable, so that broadband providers can continue to enter new markets and deploy facilities that support high-speed broadband. Pole access also is essential to the race for 5G because mobile and fixed wireless providers are increasingly deploying innovative small cells on poles and because these wireless services depend on wireline backhaul.² Indeed, an estimated 100,000 to 150,000 small cells will be constructed by the end of 2018, and these numbers are projected to reach 455,000 by 2020 and 800,000 by 2026.³

2. In today’s order, we take one large step and several smaller steps to improve and speed the process of preparing poles for new attachments, or “make ready.”⁴ Make-ready generally refers to the modification or replacement of a utility pole, or of the lines or equipment on the utility pole, to accommodate additional facilities on the pole. Consistent with the recommendations of the Broadband Deployment Advisory Committee (BDAC),⁵ we fundamentally shift the framework for the vast majority of attachments governed by federal law by adopting a new pole attachment process that includes “one-touch make-ready” (OTMR), in which the new attacher performs all make-ready work. OTMR speeds and reduces the cost of broadband deployment by allowing the party with the strongest incentive—the new attacher—to prepare the pole quickly to perform all of the work itself, rather than spreading the work across multiple parties. By some estimates, OTMR alone could result in approximately 8.3 million incremental premises passed with fiber and about \$12.6 billion in incremental fiber capital expenditures.⁶

¹ Consistent with section 224 of the Communications Act of 1934, as amended (the Act), we use the term “pole attachment” to encompass “any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility,” unless otherwise dictated by context. *See* 47 U.S.C. § 224(a)(4). In the specific context of pole attachment timelines, we use the term “pole attachment” to refer only to utility poles (and not to attachments to ducts, conduits, or rights of way). *See* 47 CFR § 1.1412(a).

² *See* Crown Castle Wireline NPRM Comments at 1-2; Mobilitie Wireline NPRM Comments at 7-8; Sprint Wireline NPRM Comments at 10, 39-40.

³ *Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling*, WT Docket No. 16-421, Public Notice, 31 FCC Rcd 13360, 13363-64 (WTB 2016).

⁴ *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket Nos. 96-98, 95-185, Order on Reconsideration, 14 FCC Rcd 18049, 18056 n.50 (1999).

⁵ *See* Letter from Paul D’Ari, Designated Federal Officer, Broadband Deployment Advisory Committee, FCC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84 (filed July 3, 2018), at Attach. Broadband Deployment Advisory Committee, FCC, Report of the Competitive Access to Broadband Infrastructure Working Group at 18-31 (2018), <https://ecfsapi.fcc.gov/file/107030255502405/Competitive%20Access%20to%20Broadband%20Infrastructure%20Report.pdf> (BDAC January 2018 Recommendations).

⁶ *See* Letter from Thomas J. Navin, Counsel to Corning, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-84, at Attach. A, Ed Naef and Alex King, CMA Strategy Consulting, *Assessing the Impact of Removing Regulatory Barriers on Next Generation Wireless and Wireline Broadband Infrastructure Investment: Annex 1, Model Sensitivities* at 5-6 (filed Feb. 26, 2018) (Corning Economic Study).

We exclude from OTMR new attachments that are more complicated or above the “communications space” of a pole, where safety and reliability risks are greater, but we make significant incremental improvements for such attachments to speed the existing process, promote accurate billing, and reduce the likelihood of coordination failures that cause unwarranted delay.

3. We also adopt other improvements to our pole attachment rules. To provide certainty to all parties and reduce the costs of deciphering our old decisions, we codify and refine our existing precedent that requires utilities to allow “overlapping,” which helps maximize the usable space on the pole. We clarify that new attachers are not responsible for the costs of repairing preexisting violations of safety or pole owner construction standards discovered during the pole attachment process. And we eliminate outdated disparities between the pole attachment rates incumbent local exchange carriers (LECs) must pay compared to other similarly-situated telecommunications attachers.

4. Finally, we address two forms of state and local regulatory barriers to the deployment of wireline and wireless facilities. In the Report and Order, we make clear that we will preempt, on a case-by-case basis, state and local laws that inhibit the rebuilding or restoration of broadband infrastructure after a disaster. In today’s Declaratory Ruling, we conclude that state and local moratoria on telecommunications services and facilities deployment are barred by section 253(a) of the Act because they “prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”⁷ Barring deployment deprives the public of better services and more broadband options, yet a small but growing number of localities have adopted moratoria in various forms. We put an end to such regulatory barriers.

II. BACKGROUND

5. Section 224 of the Act grants us broad authority to regulate attachments to utility-owned and -controlled poles, ducts, conduits, and rights-of-way.⁸ The Act authorizes us to prescribe rules to: ensure that the rates, terms, and conditions of pole attachments are just and reasonable;⁹ require utilities¹⁰ to provide nondiscriminatory access to their poles, ducts, conduits, and rights-of-way to telecommunications carriers and cable television systems (collectively, attachers);¹¹ provide procedures for resolving pole attachment complaints;¹² govern pole attachment rates for attachers;¹³ and allocate make-ready costs among attachers and utilities.¹⁴ The Act exempts from our jurisdiction those pole

⁷ 47 U.S.C. § 253(a).

⁸ See 47 U.S.C. § 224(b)(1). The placement and use of utility infrastructure also are governed by local, state, and federal safety rules, as well as by industry standards such as those set forth in the National Electric Safety Code (NESC). The NESC is a set of standards published by the Institute of Electrical and Electronics Engineers (IEEE) for the safe installation, operation, and maintenance of electric power and communications systems. *2017 National Electrical Safety Code (C2-2017)*, IEEE (2017).

⁹ 47 U.S.C. §§ 224(b)(1)-(2).

¹⁰ The Act defines a utility as a “local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications.” 47 U.S.C. § 224(a)(1). However, for purposes of pole attachments, a utility does not include any railroad, any cooperatively-organized entity, or any entity owned by a federal or state government. *Id.*

¹¹ 47 U.S.C. § 224(f). The Act allows utilities that provide electric service to deny access to their poles, ducts, conduits, or rights-of-way because of “insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.” *Id.* at § 224(f)(2).

¹² 47 U.S.C. § 224(b)(1).

¹³ 47 U.S.C. §§ 224(d)-(e).

¹⁴ 47 U.S.C. §§ 224(b), (h)-(i).

attachments in states that have elected to regulate pole attachments themselves.¹⁵ Pole attachments in thirty states are currently governed by our rules.

6. Our rules take into account the many purposes of utility poles and how an individual pole is divided into various “spaces” for specific uses.¹⁶ Utility poles often accommodate equipment used to provide a variety of services, including electric power, telephone, cable, wireline broadband, and wireless.¹⁷ Accommodating a variety of services on the same pole benefits the public by minimizing “unnecessary and costly duplication of plant for all pole users.”¹⁸ Different vertical portions of the pole serve different functions.¹⁹ The bottom of the pole generally is unusable for most types of attachments, although providers of wireless services and facilities sometimes attach equipment associated with distributed antenna systems (DAS) and other small wireless facilities to the portion of the pole near the ground.²⁰ Above that, the lower usable space on a pole—the “communications space”—houses low-voltage communications equipment, including fiber, coaxial cable, and copper wiring.²¹ The topmost portion of the pole, the “electric space,” houses high-voltage electrical equipment.²² Work in the electric space generally is considered more dangerous than work in the communications space.²³ Historically, communications equipment attachers used only the communications space; however, mobile wireless providers increasingly are seeking access to areas above the communications space, including the electric space, to attach pole-top small wireless facilities.²⁴

¹⁵ See 47 U.S.C. § 224(c). To date, twenty states and the District of Columbia have opted out of Commission regulation of pole attachments in their jurisdictions. *States That Have Certified That They Regulate Pole Attachments*, WC Docket No. 10-101, Public Notice, 25 FCC Rcd 5541, 5541-42 (WCB 2010).

¹⁶ 47 CFR §§ 1.1412(e), (i); 1.1413(a). The citations to the rules throughout this Order and Appendix A reflect the renumbering of Part 1, subpart J of Title 47 of the Code of Federal Regulations as adopted by the Commission in July 2018. See *Amendment of Procedural Rule Governing Formal Complaint Proceedings Delegated to the Enforcement Bureau*, EB Docket No. 17-245, Report and Order, FCC 18-XXX, Appx. A (adopted July 12, 2018).

¹⁷ See Letter from H. Russell Frisby Jr, Counsel to Edison Electric Institute (EEI), to Marlene Dortch, Secretary, FCC, WC Docket No. 17-84, at Attach. Duke Energy, *What’s on an electric utility pole?* (filed Oct. 3, 2017) (EEI Oct. 3, 2017 Wireline *Ex Parte* Letter).

¹⁸ S. REP. NO. 95-580, at 13 (1977), as reprinted in 1978 U.S.C.C.A.N. 109, 121.

¹⁹ See Florida Public Service Commission, *What’s on a Utility Pole?* <http://www.psc.state.fl.us/ConsumerAssistance/UtilityPole> (last visited June 27, 2018); see also EEI Oct. 3, 2017 Wireline *Ex Parte* Letter at Attach. *Pole Attachments: Safety and Reliability*, at 4.

²⁰ See EEI Oct. 3, 2017 Wireline *Ex Parte* Letter at Attach. *Pole Attachments: Safety and Reliability*; Crown Castle Wireline NPRM Comments at 5.

²¹ See Florida Public Service Commission, *What’s on a Utility Pole?* <http://www.psc.state.fl.us/ConsumerAssistance/UtilityPole> (last visited June 27, 2018); see also EEI Oct. 3, 2017 Wireline *Ex Parte* Letter at Attach. Duke Energy, *What’s on an electric utility pole?*

²² See Florida Public Service Commission, *What’s on a Utility Pole?* <http://www.psc.state.fl.us/ConsumerAssistance/UtilityPole> (last visited June 27, 2018); see also EEI Oct. 3, 2017 Wireline *Ex Parte* Letter at Attach. Duke Energy, *What’s on an electric utility pole?*

²³ See Coalition of Concerned Utilities (CCU) Wireline NPRM Comments at 28-29; Texas Office of Public Utility Counsel Wireline NPRM Comments at 4; EEI Wireline NPRM Reply at 23; Alliant Energy Corp. et al. (Midwest Electric Utilities) Wireline NPRM Reply at 25-28.

²⁴ See Crown Castle Wireline NPRM Comments at 18.

7. When a new attacher seeks access to a pole, it is necessary to evaluate whether adding the attachment will be safe and whether there is room for it.²⁵ In many cases, existing attachments must be moved to make room for the new attachment. In some cases, it is necessary to install a larger pole to accommodate a new attachment.²⁶ Our current rules, adopted in 2011, prescribe a multi-stage process for placing new attachments on utility poles:

- Application Review and Survey. The new attacher applies to the utility for pole access. Once the application is complete, the utility has 45 days in which to make a decision on the application and complete any surveys to determine whether and where attachment is feasible and what make-ready is required.²⁷ The utility may take an additional 15 days for large orders.²⁸ Our current rules allow new attachers in the communications space to perform surveys when the utility does not meet its deadline.²⁹
- Estimate. The utility must provide an estimate of all make-ready charges within 14 days of receiving the results of the survey.³⁰
- Attacher Acceptance. The new attacher has 14 days or until withdrawal of the estimate by the utility, whichever is later, to approve the estimate and provide payment.³¹
- Make-Ready. The existing attachers are required to prepare the pole within 60 days of receiving notice from the utility for attachments in the communications space (105 days in the case of larger orders) or 90 days for attachments above the communications space (135 days in the case of larger orders).³² A utility may take 15 additional days after the make-ready period ends to complete make-ready itself.³³ Our current rules allow new attachers in the communications space to perform make-ready work themselves using a utility-approved contractor when the utility or existing attachers do not meet their deadlines.³⁴

8. A number of commenters allege that pole attachment delays and the high costs of attaching to poles have deterred them from deploying broadband.³⁵ For example, Nittany Media's CTO

²⁵ See American Cable Association (ACA) Wireline NPRM Reply at 18; Ameren et al. (Electric Utilities) Wireline NPRM Reply at 17.

²⁶ See Google Fiber Wireline NPRM Comments at 7.

²⁷ 47 CFR § 1.1412(c).

²⁸ 47 CFR §§ 1.1412(c), (g).

²⁹ 47 CFR § 1.1412(i).

³⁰ 47 CFR § 1.1412(d).

³¹ 47 CFR §§ 1.1412(d)(1)-(2).

³² 47 CFR §§ 1.1412(e)(1)(ii), (e)(2)(ii). A "larger order" is "the lesser of 3000 poles or 5 percent of the utility's poles in a state." 47 CFR § 1.1412(g)(3).

³³ 47 CFR §§ 1.1412(e)(1)(iv), (e)(2)(iv).

³⁴ 47 CFR § 1.1412(e)(1)(v).

³⁵ See, e.g., Crown Castle Wireline NPRM Comments at 4-10; Google Fiber Wireline NPRM Comments at 2; Lightower Wireline NPRM Comments at I, 2; Mobilitie Wireline NPRM Comments at 8-11; see also INCOMPAS Wireline NPRM Comments at 6 ("The existing rules, while adopted with the right objectives, are insufficient for modern infrastructure."); Fiber Broadband Association (FBA) Wireline NPRM Comments at 4 ("Yet, six years after the 2011 Pole Attachment Order, the FBA's service provider members still find that substantial problems persist in seeking access to poles. In too many instances, pole owners simply ignore the Commission's mandated timelines.").

explains that “[o]ver the past 4 years I have seen a tremendous increase in the costs of fiber construction. Although material and labor costs have remained stable and even in some cases become more efficient, pole attachment costs have increased exponentially.”³⁶ Commenters in particular point to the make-ready stage of our current timeline as the largest source of high costs and delays in the pole attachment process.³⁷ In response to these types of concerns and to promote broadband deployment, two localities and one state—Louisville, Kentucky;³⁸ Nashville, Tennessee;³⁹ and the State of West Virginia⁴⁰—adopted their own versions of OTMR where the new attachers perform all the required make-ready work.

9. As part of its commitment to speeding broadband deployment, the Commission established the Broadband Deployment Advisory Committee (BDAC) in January 2017 to advise on how best to remove barriers to broadband deployment, such as delays in new pole attachments.⁴¹ Earlier this year, the BDAC recommended that the Commission take a series of actions to promote competitive access to broadband infrastructure, including adopting OTMR for simple attachments in the

³⁶ Letter from Michael H. Hain, CTO, Nittany Media, Inc., to Marlene Dortch, Secretary, FCC, WC Docket No. 17-84, at 1 (filed June 15, 2017). *See also* FBA Wireline NPRM Comments at 3 (stating that FBA “encourages the Commission to adopt reforms that will improve efficiency by addressing practices of many pole owners and existing attachers that delay and increase the cost of pole access”); Google Fiber Wireline NPRM Comments at 2 (“[S]taging make-ready in sequential 60-day notice periods . . . results in delay and increased costs . . . These problems, in turn, hinder—and may even foreclose entirely—the deployment of new networks and expansion of broadband service.”); Lightower Wireline NPRM Comments at i (“Lightower has experienced barriers [to deploying wired broadband infrastructure] due to a lack of cost transparency.”).

³⁷ *See* Letter from Katharine R. Saunders, Managing Associate General Counsel, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84 (filed Nov. 13, 2017) (Verizon Nov. 13, 2017 Wireline *Ex Parte* Letter), at Attach. Nicholas Vantzelfde, Managing Partner, Communications Media Advisors, LLC, *Perspectives on the Current State of Make Ready and the Potential Impact of a One-Touch Make-Ready Policy*, at 4 (2017) (CMA Report) (“Expediting the make-ready process can reduce payback periods and thus spur increased investment for next-generation networks. The current process is inefficient; impeding broadband deployment and creating additional burdens for pole owners.”); Letter from Karen Reidy, VP, Regulatory Aff., INCOMPAS, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2 (filed Dec. 20, 2017) (INCOMPAS Dec. 20, 2017 Wireline *Ex Parte* Letter) (“[T]he current [make-ready] approach—with its sequential make-ready performed by different parties—results in substantial delays, lack of predictability, higher costs, and reduced fiber network expansion.”); CCU Wireline NPRM Comments at 11; Google Fiber Wireline NPRM Comments at 9; BDAC January 2018 Recommendations at 19-20.

³⁸ *See* Louisville Ordinance No. O-427-15, § 116.72(D)(2). In March 2017, the United States District Court for the Western District of Kentucky allowed several challenges to the Louisville OTMR ordinance to proceed. *See Insight Kentucky Partners II v. Louisville/Jefferson County Metro Government*, 2017 WL 1193065 (W.D. Ky. Aug. 16, 2017).

³⁹ *See* Nashville Ordinance No. BL2016-343, § 13.18.020 (A). In November 2017, the United States District Court for the Middle District of Tennessee found that the Nashville OTMR ordinance was preempted by federal law and permanently enjoined the City of Nashville and Davidson County, TN from applying the ordinance to private parties. *See BellSouth Telecomm., LLC v. Metro. Gov’t of Nashville and Davidson Cnty., Tenn.*, 2017 WL 5641145 (M.D. Tenn. Nov. 21, 2017).

⁴⁰ *See* W. VA. Code § 31G (2017). In June 2018, after both West Virginia and Frontier, which challenged the West Virginia OTMR statute, agreed that the Commission’s pole attachment rules preempt West Virginia OTMR statute, the United States District Court for the Southern District of West Virginia granted Frontier’s motion for summary judgment and permanently enjoined the West Virginia OTMR statute. *See Frontier West Virginia Inc., et al. v. Gov. Jim Justice II, et al.; West Virginia Cable Telecommunications Ass’n Inc. v. James C. Justice Jr., et al.*, Civil Action Nos. 2:17-cw-03560, 2:17-cv-03609, Memorandum Opinion and Order (S.D. W.Va. June 14, 2018).

⁴¹ *See* FCC, Broadband Deployment Advisory Committee, Organization, Charter, <https://www.fcc.gov/sites/default/files/bdac-charter.pdf> (last visited June 28, 2018).

communications space and making incremental improvements to the Commission's pole attachment process for complex and non-communications space attachments.⁴²

10. We are also committed to using all the tools at our disposal to speed the restoration of infrastructure after disasters. Disasters such as the 2017 hurricanes can have debilitating effects on communications networks,⁴³ and one of our top priorities is assisting in the rebuilding of network infrastructure in the wake of such events.⁴⁴ We have also made clear our commitment to ensuring that our own federal regulations do not impede restoration efforts.⁴⁵

11. The Commission initiated this proceeding on April 20, 2017 by adopting a *Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment* seeking comment on a number of potential regulatory reforms to our rules and procedures to accelerate deployment of next-generation networks and services.⁴⁶ The Commission sought comment on, among other things, speeding the pole attachment timeline;⁴⁷ alternative pole attachment processes, including OTMR;⁴⁸ and creating a presumption that the incumbent LEC attachers pay the same pole attachment rate as other telecommunications attachers.⁴⁹ The Commission also sought comment on whether moratoria on the deployment of telecommunications facilities are inconsistent with section 253(a) of the Act.⁵⁰

12. On November 16, 2017, the Commission adopted a *Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking* enacting reforms to better enable providers to invest in next generation networks.⁵¹ Among other proposals, the *Further Notice of Proposed Rulemaking* sought comment on the treatment of overloading by utilities⁵² and what actions the Commission can take to facilitate the rebuilding and repairing of broadband infrastructure after natural disasters.⁵³

⁴² See BDAC January 2018 Recommendations at 19, 21.

⁴³ See Letter from Sandra E. Torres López, Chairwoman, Puerto Rico Telecommunications Regulatory Board, to Ajit Pai, Chairman, FCC, WC Docket No. 10-90, at 1 (filed Dec. 13, 2017) (estimating that Hurricanes Irma and Maria caused approximately \$1.5 billion of damage to Puerto Rico's communications network).

⁴⁴ See, e.g., *Uniendo a Puerto Rico Fund and the Connect USVI Fund*, WC Docket No. 18-143, et. al., Order and Notice of Proposed Rulemaking, FCC 18-57 (May 29, 2018) (establishing the Uniendo a Puerto Rico Fund and the Connect USVI Fund to rebuild, improve and expand voice and broadband networks in Puerto Rico and the U.S. Virgin Islands).

⁴⁵ See, e.g., *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking, 32 FCC Rcd 11128, 11157-59, paras. 71-78 (2017) (*Wireline Infrastructure Order*); *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Second Report and Order, FCC 18-74, paras. 58-59 (June 8, 2018) (*Second Wireline Infrastructure Order*) (streamlining network change procedures where *force majeure* event necessitates a network change).

⁴⁶ *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, 32 FCC Rcd 3266 (2017) (*Wireline Infrastructure Notice*).

⁴⁷ *Id.* at 3268-70, paras. 7-12.

⁴⁸ *Id.* at 3270-76, paras. 13-31.

⁴⁹ *Id.* at 3279-80, paras. 44-46.

⁵⁰ *Id.* at 3297, para. 102.

⁵¹ See generally *Wireline Infrastructure Order*.

⁵² See *id.* at 11188-89, paras. 160-62.

⁵³ See *id.* at 11194, paras. 178-79.

III. REPORT AND ORDER

13. Based on the record in this proceeding, we amend our pole attachment rules to facilitate faster, more efficient broadband deployment and to address state and local legal barriers to rebuilding networks after disasters. But, at the outset, we emphasize that parties are welcome to reach bargained solutions that differ from our rules.⁵⁴ Our rules provide processes that apply in the absence of a negotiated agreement, but we recognize that they cannot account for every distinct situation and encourage parties to seek superior solutions for themselves through voluntary privately-negotiated solutions. In addition, we recognize that some states will seek to build on the rules that we adopt herein in order to serve the particular needs of their communities. Provided such state requirements do not conflict with the rules we adopt today, states are free to experiment with other ways to encourage broadband deployment in their local jurisdictions.

A. Speeding Access to Poles

14. Most fundamentally, we amend our rules to allow new attachers⁵⁵ with simple wireline attachments in the communications space to elect an OTMR-based pole attachment process that places them in control of the work necessary to attach their equipment, and we improve our existing attachment process for other, more complex attachments. We summarize these changes, as well as our prior rules, in the table below:⁵⁶

⁵⁴ See CCU Wireline NPRM Comments at 18 (encouraging that “utilities and attachers be free to agree on their own one-touch make-ready process”).

⁵⁵ We define a new attacher as a cable television system or telecommunications carrier requesting to attach new or upgraded facilities (e.g., equipment or lines) to a pole owned or controlled by a utility. See *infra* Appx. A, 47 CFR § 1.1412(a)(2). Therefore, new attachers include existing attachers that need to upgrade their facilities with new attachments.

⁵⁶ This table is a summary for informational purposes only, and it sacrifices nuance for brevity. The text of this *Report and Order* (excluding the table) and the rules in Appendix A set forth our binding determinations.

Phase	Prior Rules	OTMR-Based Regime	Enhanced Non-OTMR Regime
<i>Review of Application for Completeness</i>	Vague definition of complete application can lead to delays. No timeline for utility to determine whether application is complete. <i>47 CFR § 1.1412(c)</i>	Revised definition of complete application makes it clear what must be included in application. A utility has 10 business days to determine whether an application is complete; the utility must specify any deficiencies and has limited time to review resubmitted applications. <i>Appx. A §§ 1.1412(c)(1), (j)(1)(ii)</i>	
<i>Review of Whether to Grant Complete Application; Survey</i>	The utility has 45 days to decide whether to grant a complete application and to complete any surveys. The utility has an additional 15 days for large orders. <i>47 CFR § 1.1412(c)</i>	The utility has 15 days to decide whether to grant a complete application. The new attacher conducts the survey and determines its timing. <i>Appx. A § 1.1412(j)(2), (j)(3)</i>	Same as prior rules, except that the utility must take certain steps to facilitate survey participation by new and existing attachers. <i>Appx. A § 1.1412(c)(3)</i>
<i>Estimate</i>	The utility must provide an estimate of the make-ready charges within 14 days of receiving the survey results. <i>47 CFR § 1.1412(d)</i>	N/A – no estimate stage	Same as prior rules, except the estimate must detail basis for charges. <i>Appx. A § 1.1412(d)</i>
<i>Attacher Acceptance</i>	The attacher has 14 days or until withdrawal of the estimate by the utility, whichever is later, to approve the estimate and provide payment. <i>47 CFR § 1.1412(d)(i)-(ii)</i>	N/A – no acceptance stage	Same as prior rules. <i>Appx. A § 1.1412(d)(2)</i>
<i>Make-Ready</i>	The existing attachers must prepare the pole within 60 days of receiving notice from the utility in the communications space (105 days for larger orders) or 90 days in the above the communications space (135 days for larger orders). A utility may take 15 additional days after the make-ready period to complete make-ready itself. <i>47 CFR § 1.1412(e)(1)(ii), (e)(1)(iv), (e)(2)(ii), (e)(2)(iv)</i>	The new attacher performs all work in as little as one trip. The new attacher must provide 15 days' notice to existing attachers before commencing work, and this notice period may run concurrently with the utility's review of whether to grant the application. The new attacher must notify existing attachers within 15 days after completion of work on a pole so that existing attachers can inspect the work. <i>Appx. A § 1.1412(j)(4)</i>	The existing attachers prepare the pole within 30 days in the communications space (75 days for larger orders) or 60 days above the communications space (105 days for larger orders). A utility may take 15 additional days after the make-ready period to complete make-ready itself for work outside the communications space. <i>Appx. A § 1.1412(e)(1)(ii), (e)(2)(ii), (e)(2)(iv)</i>
<i>Self-Help Remedy</i>	New attachers in the communications space may perform work themselves when the deadlines are not met. <i>47 CFR § 1.1412(i)</i>	N/A	New attachers in any part of the pole may perform work themselves when the deadlines are not met. We take steps to strengthen the self-help remedy. <i>Appx. A § 1.1412(i)(2)</i>

15. No matter the attachment process, we encourage all parties to work cooperatively to meet deadlines, perform work safely, and address any problems expeditiously. Utilities, new attachers, and existing attachers agree that cooperation among the parties works best to make the pole attachment process proceed smoothly and safely.⁵⁷

1. New OTMR-Based Pole Attachment Process

16. We adopt a new pole attachment process that new attachers can elect that places them in control of the surveys, notices, and make-ready work necessary to attach their equipment to utility poles. With OTMR as the centerpiece of this new pole attachment regime, new attachers will save considerable time in gaining access to poles (with accelerated deadlines for application review, surveys, and make-ready work) and will save substantial costs with one party (rather than multiple parties) doing the work to prepare poles for new attachments. A better aligning of incentives for quicker and less expensive attachments will serve the public interest through greater broadband deployment and competitive entry.

a. Applicability and Merits of OTMR Regime

17. We adopt the BDAC's recommendation and amend our rules to allow new attachers to elect OTMR for simple make-ready for wireline attachments in the communications space on a pole.⁵⁸ We define simple make-ready as the BDAC does, i.e., make-ready where "existing attachments in the communications space of a pole could be transferred without any reasonable expectation of a service outage or facility damage and does not require splicing of any existing communication attachment or relocation of an existing wireless attachment."⁵⁹ Commenters state that simple make-ready work does not raise the same level of safety concerns as complex make-ready or work above the communications space on a pole.⁶⁰ There is substantial support in the record, both from utilities and attachers, for allowing OTMR for simple make-ready;⁶¹ and because this option will apply to the substantial majority of pole

⁵⁷ See, e.g., CCU Wireline NPRM Comments at 3-4; Midwest Electric Utilities Wireline NPRM Comments at 18; CenterPoint Energy Houston Electric, LLC et al. (POWER Coalition) Wireline NPRM Comments at 9-10; AT&T Wireline NPRM Reply at 4 n.4.

⁵⁸ See BDAC January 2018 Recommendations at 21.

⁵⁹ *Id.* at 20.

⁶⁰ See, e.g., ExteNet Systems, Inc. (ExteNet) Wireline & Wireless NPRM Comments at 54-55; FBA Wireline NPRM Comments at 5 n.12, 8; AT&T Wireline NPRM Reply at 8-9; Letter from Kristine Laudadio Devine, Counsel to Google Fiber, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2 (filed June 4, 2018) (Google Fiber June 4, 2018 Wireline *Ex Parte* Letter); Letter from Charles A. Zdebski and Brett H. Freedson, Counsel to CenterPoint Energy Houston Electric, LLC and Florida Power & Light Co., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2 (filed Feb. 13, 2018) (CenterPoint Energy/FPL Feb. 13, 2018 Wireline *Ex Parte* Letter); Letter from Eben M. Wyman, Principal, Power & Communication Contractors Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at [2] (filed Nov. 30, 2017) (PCCA Nov. 30, 2017 Wireline *Ex Parte* Letter).

⁶¹ See CCU Wireline NPRM Comments at 17-18; Computing Technology Industry Association (COMPTIA) Wireline NPRM Comments at 2-3; EEI Wireline NPRM Comments at 32; Electric Utilities Wireline NPRM Comments at 7; FBA Wireline NPRM Comments at 5; Level 3 Wireline NPRM Comments at 2-3; POWER Coalition Wireline NPRM Comments at 10; Utilities Technology Council (UTC) Wireline NPRM Reply at 17-21; AT&T Wireline NPRM Reply at 7-8; CPS Energy Wireline NPRM Reply at 8-9; Google Fiber Wireline NPRM Reply at 1-2; Verizon Wireline NPRM Reply at 4-9; Letter from Angie Kronenberg, Chief Advocate & General Counsel, INCOMPAS, to Marlene Dortch, Secretary, FCC, WC Docket No. 17-84 et al., at Attach. 3 (filed Feb. 13, 2018) (INCOMPAS Feb. 13, 2018 Wireline *Ex Parte* Letter); Letter from Brett Heather Freedson, Counsel to CenterPoint Energy Houston Electric, LLC et al., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, Attach. 1 (filed May 25, 2018) (CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter); Letter from Debbie Goldman, Telecommunications Policy Director, Communications Workers of America, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2 (filed Feb. 6, 2018) (CWA Feb. 6, 2018 Wireline *Ex Parte*

attachment projects,⁶² it will speed broadband deployment. We also follow the BDAC's recommendation and do not provide an OTMR option for more complex projects in the communications space or for any projects above the communications space at this time.⁶³

18. Our new rules define “complex” make-ready, as the BDAC does, as “[t]ransfers and work within the communications space that would be reasonably likely to cause a service outage(s) or facility damage, including work such as splicing of any communication attachment or relocation of existing wireless attachments.”⁶⁴ We consider “[a]ny and all wireless activities, including those involving mobile, fixed, and point-to-point wireless communications and wireless internet service providers[] . . . to be . . . complex.”⁶⁵ While the BDAC recommendation did not explicitly address the treatment of pole replacements, we interpret the definition of complex make-ready to include all pole replacements as well. We agree with commenters that pole replacements are usually not simple or routine and are more likely to cause service outages or facilities damage,⁶⁶ and thus we conclude that they should fall into the complex category of work.

19. There is substantial support from commenters in the record for not using OTMR for complex make-ready work at this time.⁶⁷ We agree that we should exclude these more challenging attachments from OTMR at this time to minimize the likelihood and impact of service disruption. In particular, cutting or splicing of existing wires on a pole has the heightened potential to result in a network outage.⁶⁸ We also recognize that wireless attachments involve unique physical and safety

Letter); Letter from Lonnie R. Stephenson, International President, IBEW, to Marlene Dortch, Secretary, FCC, WC Docket No. 17-84, at 2 (filed Jan. 30, 2018) (IBEW Jan. 30, 2018 Wireline *Ex Parte* Letter).

⁶² According to AT&T, approximately 80 percent of current make-ready work is “simple.” See Letter from Ola Oyefusi, Director, Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at Attach. *Accelerating Wireline Broadband Deployment: Presentation – Pole Attachment Process with OTMR* at 2 (filed Jan. 22, 2018) (AT&T Jan. 22, 2018 Wireline *Ex Parte* Letter). See also Letter from Eric B. Langley, Counsel to Electric Utilities, to Marlene Dortch, Secretary, FCC, WC Docket No. 17-84, at 2 (filed Mar. 19, 2018) (Electric Utilities Mar. 19, 2018 Wireline *Ex Parte* Letter) (stating that “more than 80[] [percent] of make-ready poles require communications space make-ready only”). We recognize that in the future, it is likely that less than 80 percent of make-ready work will be eligible for OTMR as wireless carriers ramp up non-simple 5G deployments. See, e.g., AT&T Wireline NPRM Comments at 8 (stating that “[i]ndustry-wide 5G network deployment is expected to involve 10 to 100 times more antenna locations than 4G or 3G.”); EEI Wireline NPRM Comments at 29 (asserting that “[i]t can be expected that an increase in the volume of wireless attachment requests due to 5G deployments will exacerbate pole attachment delays due to the complex nature of the installations and the number of poles involved.”).

⁶³ See BDAC January 2018 Recommendations at 21-22, 27.

⁶⁴ *Id.* at 20.

⁶⁵ *Id.*

⁶⁶ See Letter from Kristine Laudadio Devine, Counsel to Google Fiber, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2 (filed Apr. 12, 2018) (Google Fiber Apr. 12, 2018 Wireline *Ex Parte* Letter); Midwest Electric Utilities Wireline NPRM Reply at 25-26; Puget Sound Energy Wireline NPRM Comments at 7-8.

⁶⁷ See, e.g., Charter Communications, Inc. (Charter) Wireline & Wireless NPRM Comments at 55; FBA Wireline NPRM Comments at 5 n.12; Google Fiber Wireline NPRM Comments at 5-6; Level 3 Wireline NPRM Comments at 3; POWER Coalition Wireline NPRM Comments at 11; Texas Office of Public Utility Counsel Wireline NPRM Comments at 4; Letter from Frank S. Simone, Vice President-Federal Regulatory, AT&T, and Debbie Goldman, Telecommunications Policy Director, Communications Workers of America, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, GN Docket No. 17-83, at 1 (filed Jan. 16, 2018) (AT&T-CWA Jan. 16, 2018 Wireline *Ex Parte* Letter); CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at 1.

⁶⁸ See Google Fiber Apr. 12, 2018 Wireline *Ex Parte* Letter at 2.

complications that existing attachers must consider (e.g., wireless configurations cover multiple areas on a pole, considerably more equipment is involved, RF impacts must be analyzed), thus increasing the challenges of using an accelerated, single-party process at this time.⁶⁹

20. The new OTMR process also will not be available for work above the communications space, including the electric space.⁷⁰ Many utility commenters argue that work above the communications space, which mainly involves wireless attachments, frequently impacts electrical facilities and that such work should fall to the utilities to manage and complete.⁷¹ We recognize that work above the communications space is more dangerous for workers and the public and that impacts of electric outages are especially severe.⁷² Therefore, we find at this time that the value of control by existing attachers and utilities over infrastructure above the communications space outweighs the benefits of allowing OTMR for these attachments. Based on the foregoing analysis, we decline Verizon's request to allow OTMR for complex make-ready and work above the communications space.⁷³ We recognize that by not providing an OTMR option above the communications space for the time being, we are not permitting OTMR as an option for small cell pole-top attachments necessary for 5G deployment. We take this approach because there is broad agreement that more complex projects and all projects above the communications space raise substantial safety and continuity of service concerns.⁷⁴ At the same time, we adopt rules aimed at mitigating the safety and reliability concerns about the OTMR process we adopt today, and we are optimistic that once parties have more experience with OTMR, either they will by contract or we will by rule expand the reach of OTMR. In the meantime, we find that the benefits of moving incrementally by providing a right to elect OTMR only in the communications space and only for simple wireline projects outweigh the costs.

21. We agree with commenters that argue that OTMR is substantially more efficient for new attachers, current attachers, utilities, and the public than the current sequential make-ready approach set forth in our rules.⁷⁵ We agree with Next Centuries Cities that "OTMR facilitates deployment and reduces

⁶⁹ See CCU Wireline NPRM Comments at 27-28; EEI Wireline NPRM Comments at 28-29; Midwest Electric Utilities Wireline NPRM Comments at 28-29; American Public Power Association (APPA) Wireline NPRM Reply at 28.

⁷⁰ This accords with the BDAC's recommendations. See BDAC January 2018 Recommendations at 21-22.

⁷¹ See CCU Wireline NPRM Comments at 28; EEI Wireline NPRM Comments at 28-29; Electric Utilities Wireline NPRM Comments at 6; Midwest Electric Utilities Wireline NPRM Comments at 30; POWER Coalition Wireline NPRM Comments at 11; Puget Sound Energy Wireline NPRM Comments at 5; Texas Office of Public Utility Counsel Wireline NPRM Comments at 4; UTC Wireline NPRM Comments at 13.

⁷² See, e.g., CCU Wireline NPRM Comments at 28-29; Electric Utilities Wireline NPRM Comments at 8-9; Puget Sound Energy Wireline NPRM Comments at 4; Texas Office of Public Utility Counsel Wireline NPRM Comments at 4; EEI Wireline NPRM Reply at 20; Midwest Electric Utilities Wireline NPRM Reply at 24-26.

⁷³ See Letter from Katharine R. Saunders, Managing Associate General Counsel, Verizon, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, WC Docket No. 17-84, at 4 (filed Mar. 8, 2018) (Verizon Mar. 8, 2018 Wireline *Ex Parte* Letter).

⁷⁴ See, e.g., CCU Wireline NPRM Comments at 28-29; EEI Wireline NPRM Comments at 28; Texas Office of Public Utility Counsel Wireline NPRM Comments at 4; Midwest Electric Utilities Wireline NPRM Reply at 25-26; APPA Wireline NPRM Reply at 28; AT&T-CWA Jan. 16, 2018 Wireline *Ex Parte* Letter at 2; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at 2.

⁷⁵ See Computer & Communications Industry Association (CCIA) Wireline & Wireless NPRM Comments at 17; Letter from Christopher Shipley, Attorney and Policy Advisor, INCOMPAS, to Marlene Dortch, Secretary, FCC, Docket Nos. 17-84 et al., at 2 (filed Apr. 20, 2018) (INCOMPAS April 20, 2018 Wireline *Ex Parte* Letter); Letter from Kristine Laudadio Devine, Counsel to Google Fiber Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 1-2 (filed Feb. 1, 2018) (Google Fiber Feb. 1, 2018 Wireline *Ex Parte* Letter); Electric Utilities Mar. 19, 2018 Wireline *Ex Parte* Letter at 2.

barriers to access, which leads to increased broadband deployment, decreased costs for consumers, and increased service speeds.”⁷⁶ Indeed, Corning estimates that OTMR for wireline deployments could result in over eight million additional premises passed with fiber and about \$12.6 billion in incremental fiber capital expenditures.⁷⁷ Although we do not at this time provide for an OTMR option for pole-top small cell deployment, OTMR will facilitate the rollout of 5G services because mobile services depend on wireline backhaul, and OTMR will expedite the buildout of wireline backhaul capacity.⁷⁸ Utilities such as Ameren and Oncor Electric agree that “[OTMR] in the communications space is the most effective vehicle for the Commission to make large strides in speeding the deployment of broadband.”⁷⁹

22. OTMR speeds broadband deployment by better aligning incentives than the current multi-party process.⁸⁰ It puts the parties most interested in efficient broadband deployment—new attachers—in a position to control the survey and make-ready processes.⁸¹ The misaligned incentives in the current process often result in delay by current incumbents and utilities and high costs for new attachers as a result of the coordination of sequential make-ready work performed by different parties.⁸² As Google Fiber points out, under the current process, if the lowest attacher on the pole (usually the

⁷⁶ Next Century Cities Wireline NPRM Comments at 7; *see also* Google Fiber Feb. 1, 2018 Wireline *Ex Parte* Letter at 1 (“OTMR will allow new attachers to pay for one trip to the pole instead of several, facilitate streamlined engagement of contractors, reduce duplication of effort, and eliminate the need to pay pass-through administrative costs of existing attachers—all factors that make deployment of new networks expensive and slow.”); BDAC January 2018 Recommendations at 19, 31 (“The rules should provide pole attachers with a single-contractor, single-trip solution for simple make-ready work [in the communications space] which expedites make-ready work”); Corning Economic Study at 28-29 (asserting that under sequential make-ready, a pole with four attachers means four different parties are completing make-ready at four different times, “a wasteful process as each touch can add up to \$450 in costs[]” for the new attacher); CCA Wireline & Wireless NPRM Comments at 17 (“OTMR reduces the cost and [increases the] speed of deployment of new networks by maximizing efficiency”); CPS Energy Wireline NPRM Reply at 14 (“CPS Energy has worked with industry stakeholders to develop an innovative OTMR process that effectively and efficiently facilitates access to poles in a manner that protects the legitimate interests of CPS Energy, new entrants, and existing attaching entities.”); INCOMPAS April 20, 2018 Wireline *Ex Parte* Letter at 2; Electric Utilities Mar. 19, 2018 Wireline *Ex Parte* Letter at 1 (OTMR “in the communications space is the most effective vehicle for the Commission to make large strides in speeding the deployment of broadband.”).

⁷⁷ *See* Corning Economic Study at 5.

⁷⁸ *See* Google Fiber Wireline NPRM Comments at 4; Verizon Wireline NPRM Comments at 2.

⁷⁹ Electric Utilities Mar. 19, 2018 Wireline *Ex Parte* Letter at 1.

⁸⁰ *See* CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at 2 (“From the perspective of the IOUs, this common sense approach also appropriately places the burden of coordinating make-ready work on the communications entity that ultimately will benefit from use of the pole.”); Letter from Katharine R. Saunders, Managing Associate General Counsel, Verizon, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, WC Docket No. 17-84, at 2-3 (filed June 21, 2018) (Verizon June 21, 2018 Wireline *Ex Parte* Letter) (describing the buildout in West Virginia of wireline backhaul for Verizon’s wireless network where it “faced multiple and extensive delays at every step of the make-ready process as existing attachers repeatedly missed deadlines. This meant that there were often teams of workers ready to complete the build who were sidelined as they waited for existing attachers to finish their respective moves. This not only delayed deployment significantly but also drove up our costs as we waited for the ability to build.”).

⁸¹ *See* CMA Report at 10, 12; COMPTIA Wireline NPRM Comments at 3; Electric Utilities Wireline NPRM Comments at 5; ExteNet Wireline & Wireless NPRM Comments at 54-55; Google Fiber Wireline NPRM Comments at 11; INCOMPAS Wireline NPRM Comments at 9-10; Next Century Cities Wireline NPRM Comments at 6.

⁸² *See* CMA Report at 1-2, 6-8, 12; INCOMPAS Feb. 13, 2018 Wireline *Ex Parte* Letter Attach. 2-3; Verizon June 21, 2018 Wireline *Ex Parte* Letter at 2; *see also* CCU Wireline NPRM Comments at 11-12; Google Fiber Wireline NPRM Comments at 11-12; BDAC January 2018 Recommendations at 19-20.

incumbent LEC) moves its wires and equipment to accommodate a new attachment at the end of the existing 60-day make-ready period, then the entire pole attachment process is derailed because multiple existing attachers still have to perform make-ready on their equipment, despite the fact that the make-ready deadline contemplated in our rules has lapsed.⁸³ Because existing attachers lack an incentive to accommodate new attachers quickly, these delays in sequential attachment are all too common.⁸⁴ OTMR eliminates this problem.

23. We also agree with commenters that OTMR will benefit municipalities and their residents by reducing closures and disruptions of streets and sidewalks.⁸⁵ Unlike sequential make-ready work, which results in a series of trips to the affected poles by each of the attachers and repeated disruptions to vehicular traffic, OTMR's single trip to each affected pole will reduce the number of such disruptions.⁸⁶

24. We also agree with those commenters that argue that an OTMR-based regime will benefit utilities.⁸⁷ The record indicates that many utilities that own poles are not comfortable with their current responsibilities for facilitating attachments in the communications space.⁸⁸ By shifting responsibilities from the utility to the new attacher to survey the affected poles, determine the make-ready work to be done, notify affected parties of the required make-ready work, and perform the make-ready work, our new OTMR regime will alleviate utilities of the burden of overseeing the process for most new attachments and of some of the costs of pole ownership.⁸⁹

25. While giving the new attacher control drives the substantial benefits of an OTMR regime, it also raises concerns among some utilities and existing attachers. But we are not convinced by the arguments made by some commenters that OTMR will allow make-ready work to be performed by new

⁸³ See Google Fiber Feb. 1, 2018 Wireline *Ex Parte* Letter at 3; see also Letter from Katharine R. Saunders, Managing Associate General Counsel, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, WT Docket No. 17-79, at 3 (filed July 2, 2018) (Verizon July 2, 2018 Wireline *Ex Parte* Letter) (stating that "if make-ready is necessary to accommodate a new attachment that will be placed at the top of the communications space, then existing attachers will move their facilities downward proceeding sequentially from the lowest attacher in the communications space to the highest attacher in the communications space.").

⁸⁴ See CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at 2 ("a formidable disincentive exists for an incumbent communications attacher to cooperate in a process that ultimately will bring direct competition within its service footprint"); CCU Wireline NPRM Comments at 11; CMA Report at 1-2; INCOMPAS Feb. 13, 2018 Wireline *Ex Parte* Letter at Attach. at 2-3; Verizon June 21, 2018 Wireline *Ex Parte* Letter at 2; BDAC January 2018 Recommendations at 19-20.

⁸⁵ See Electric Utilities Wireline NPRM Comments at 8; ExteNet Wireline & Wireless NPRM Comments at 54-55; FBA Wireline NPRM Comments at 6-8; INCOMPAS Wireline NPRM Comments at 9; Next Century Cities Wireline NPRM Comments at 6; Verizon Nov. 13, 2017 Wireline *Ex Parte* Letter at 2; PCCA Nov. 30, 2017 Wireline *Ex Parte* Letter at 2; Google Fiber Feb. 1, 2018 Wireline *Ex Parte* Letter at 1-2.

⁸⁶ See, e.g., ExteNet Wireline & Wireless NPRM Comments at 54-55; INCOMPAS Wireline NPRM Comments at 9; Verizon July 2, 2018 Wireline *Ex Parte* Letter at 3.

⁸⁷ See, e.g., EEI Wireline NPRM Comments at 32; FBA Wireline NPRM Comments at 7; CPS Energy Wireline NPRM Reply at 6-7; Verizon Nov. 13, 2017 Wireline *Ex Parte* Letter at 2; INCOMPAS April 20, 2018 Wireline *Ex Parte* Letter at 2.

⁸⁸ See, e.g., EEI Wireline NPRM Comments at 21-22; Electric Utilities Wireline NPRM Comments at 5-6; POWER Coalition Wireline NPRM Comments at 11-12; UTC Wireline NPRM Reply at 18; Verizon July 2, 2018 Wireline *Ex Parte* Letter at 3.

⁸⁹ See FBA Wireline NPRM Comments at 8; CPS Energy Wireline NPRM Reply at 6-7; UTC Wireline NPRM Reply at 18; Verizon Nov. 13, 2017 Wireline *Ex Parte* Letter at 2; INCOMPAS April 20, 2018 Wireline *Ex Parte* Letter at 2.

attachers that lack adequate incentives to perform quality work, and therefore will increase the likelihood of harm to equipment integrity and public safety.⁹⁰ As other commenters explain, the new attacher and its chosen contractor have an incentive to perform quality work in order to limit risk, keep workers safe, and avoid tort liability for damages caused by substandard work.⁹¹ We also adopt several safeguards herein that incentivize the new attacher and its contractor to perform work correctly.⁹²

26. In addition, some commenters raise concerns that OTMR may not protect public safety “given the real prospects for serious injuries to [lineworkers] and the public[;]”⁹³ ensure “the reliability and security of the electric grid[;]”⁹⁴ and maintain the safety and reliability of existing attachers’ facilities in order to prevent service outages.⁹⁵ We are not persuaded, however, by the anecdotal evidence offered in support of these commenters’ concerns.⁹⁶ For example, Charter cites problems with third-party contractor work on its equipment in San Antonio and in Kansas City.⁹⁷ CPS Energy contends, however that rather than being an indictment of OTMR, Charter’s anecdotes instead show that an OTMR process can work as intended to speed broadband deployment without sacrificing safety or network integrity.⁹⁸

⁹⁰ See AT&T Wireline NPRM Comments at 16; Charter Wireline & Wireless NPRM Comments at 39; Comcast Wireline & Wireless NPRM Comments at 20; EEI Wireline NPRM Comments at 31 ; Frontier Wireline NPRM Comments at 18; NCTA Wireline & Wireless NPRM Comments at 16; POWER Coalition Wireline NPRM Comments at 12; CCU Wireline NPRM Reply at 2-6; CenturyLink Wireline NPRM Reply at 15-16; Communications Workers of America (CWA) Wireline NPRM Reply at 1; AT&T-CWA Jan. 16, 2018 Wireline *Ex Parte* Letter at 2; Letter from Elizabeth Andrion, Charter Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, GN Docket No. 17-83, at 1 (filed Feb. 5, 2018) (Charter Feb. 5, 2018 Wireline *Ex Parte* Letter).

⁹¹ See CMA Report at 10-13; CPS Energy Wireline NPRM Reply at 10-11, 20, 23; Google Fiber Wireline NPRM Reply at 8; PCCA Nov. 30, 2017 Wireline *Ex Parte* Letter at 2.

⁹² See *infra* sections III.A.1.b., III.A.1.c.

⁹³ EEI Wireline NPRM Comments at 12; see also, e.g., BDAC January 2018 Recommendations at 19 (“The rules also should balance every community’s interest in safety and continuous service.”); AT&T Wireline NPRM Comments at 15 (stating that OTMR should preserve the safety of the public and workers).

⁹⁴ EEI Wireline NPRM Comments at 12; see also, e.g., POWER Coalition Wireline NPRM Comments at 11 (OTMR “must be limited to ensure that workers on the pole are not exposed to, and do not create unsafe conditions, or act in a manner that threatens the reliability of electric infrastructure.”); CCU Wireline NPRM Reply at 2-3 (“Contractors in the electric space working under the direction of communications companies could injure themselves, create hazards to subsequent pole workers or the public at large, cause electrical outages or reliability concerns, or damage electric service facilities on the poles.”).

⁹⁵ See CenturyLink Wireline NPRM Comments at 15; Charter Wireline & Wireless NPRM Comments at 39; Comcast Wireline & Wireless NPRM Comments at 20; Frontier Wireline NPRM Comments at 18; NCTA Wireline & Wireless NPRM Comments at 15-16.

⁹⁶ See e.g., AT&T Wireline NPRM Comments at 16 (“unapproved contractors have caused outages to AT&T wireline facilities in Tennessee, Kentucky, Florida, Georgia, and North Carolina. In 2016, AT&T suffered four outages in the Nashville area that were caused by an attacher’s unapproved contractors’ underground boring operations, one of which resulted in a major 911 outage.”); Comcast Wireline & Wireless NPRM Comments at 21-22 (“Comcast has experienced this dynamic firsthand in Nashville, where, at last count, roughly 40 percent of the instances of make-ready work performed by Google Fiber contractors on Comcast’s equipment violated requirements set forth in the National Electrical Safety Code[.]”) (emphasis removed).

⁹⁷ See Charter Wireline & Wireless NPRM Comments at 39-44 (noting NESC violations discovered after OTMR performed on its equipment and after make-ready).

⁹⁸ See CPS Energy Wireline NPRM Reply at 23; see also Google Fiber June 4, 2018 Wireline *Ex Parte* Letter at 1 (“The mere fact that, at some point, errors were made by someone in performing make-ready work does not implicate the safety and efficiency of a well-structured OTMR regime.”).

We agree. As CPS Energy points out, its OTMR process ensured that Charter received notice of the completion of make-ready and received adequate opportunity to perform a post-make-ready inspection.⁹⁹ It was during the inspection that Charter discovered problems with the make-ready work performed by the new attacher, at which point it had the opportunity to report any make-ready problems discovered during the inspection to the new attacher for remediation.¹⁰⁰ As CPS Energy notes, its OTMR process “worked as designed: Charter experienced no outages.”¹⁰¹ The process we adopt today assures these same safeguards.¹⁰²

27. We are committed to ensuring that our approach to pole attachments preserves the safety of workers and the public and protects the integrity of existing electric and communications infrastructure. As an initial matter, we follow the BDAC’s recommendation that all complex work and work above the communications space, where reliability and safety risks are greater, will not be eligible for the new OTMR process.¹⁰³ In addition, we take several steps to promote coordination among the parties and ensure that new attachers perform work safely and reliably, thereby significantly mitigating the potential drawbacks of OTMR. First, we require new attachers to use a utility-approved contractor to perform OTMR work, except when the utility does not provide a list of approved contractors, in which case new attachers must use qualified contractors.¹⁰⁴ This requirement addresses existing attachers’ apprehension about unfamiliar contractors working on their facilities¹⁰⁵ and also guards against delays that result when utilities fail to maintain approved contractor lists.¹⁰⁶ Second, we require new attachers to provide advance notice and allow representatives of existing attachers and the utility a reasonable opportunity to be present when surveys and OTMR work are performed in order to encourage new attachers to perform quality work and to provide the utility and existing attachers an opportunity for oversight to protect safety and prevent equipment damage.¹⁰⁷ Third, we require new attachers to allow existing attachers and the utility the ability to inspect and request any corrective measures soon after the new attacher performs the OTMR work to address existing attachers’ and utilities’ concerns that the new

⁹⁹ CPS Energy Wireline NPRM Reply at 23.

¹⁰⁰ *See id.*; *see also* Google Fiber Wireline NPRM Reply at 12 n.24 (noting that in Nashville, “Comcast inspected the work before it was completed, and upon receiving notice of the violations, Google Fiber made corrections as required.”); PCCA Nov. 30, 2017 Wireline *Ex Parte* Letter at 2 (“[W]e believe OTMR can be, and already is[,] performed in the field safely and efficiently.”).

¹⁰¹ CPS Energy Wireline NPRM Reply at 23.

¹⁰² *See infra* section III.A.1.c.

¹⁰³ *See* BDAC January 2018 Recommendations at 21-22, 27.

¹⁰⁴ *See infra* section III.A.1.b. (describing the required contractor qualifications).

¹⁰⁵ *See, e.g.*, AT&T Wireline NPRM Comments at 16; Charter Wireline & Wireless NPRM Comments at 39; Comcast Wireline & Wireless NPRM Comments at 21.

¹⁰⁶ *See* ACA Wireline NPRM Reply at 24-25.

¹⁰⁷ *See* ACA Wireline NPRM Comments at 16-17; *see, e.g.*, Charter Wireline & Wireless NPRM Comments at 39-44 (“Charter’s experience has been that the work done under [a] one-touch policy is only as effective as the contractor performing the work and the quality and timeliness of the initial notice that Charter receives.”); Comcast Wireline & Wireless NPRM Comments at 20-22; NCTA Wireline NPRM Comments at 15-16 (“[T]hese ordinances generally provide little or no advance notice to an existing provider that its facilities will be moved, little or no opportunity to perform the work even when notice is provided, no ability to select the contractor that performs the work on behalf of the new entrant, and limited ability to inspect and remediate (and no indemnification requirement) if the work is done poorly. The effect of these provisions is to jeopardize the safety and quality of service of existing providers.”); AT&T Wireline NPRM Reply at 9 (“Under AT&T’s OTMR proposal, existing attachers are provided 30 days after notice to make these determinations and to invoke their right to the existing 60-day make-ready period if complex make-ready is required.”).

attacher's contractor may damage equipment or cause an outage without their knowledge and with no opportunity for prompt recourse.¹⁰⁸

28. We recognize that we cannot fully align the incentives of new attachers with those of existing attachers and utilities, but we find that the significant benefits of faster, cheaper, more efficient broadband deployment from this new OTMR process outweigh any costs that remain for most pole attachments. We expect the OTMR regime we adopt today to speed broadband deployment without substantial service interruptions or danger to the public or workers. To the extent that it exceeds our expectations, we may consider expanding the availability of our OTMR process where it is safe to do so.¹⁰⁹ Conversely, if new attachers fail to prevent physical harm or outages, we will not hesitate to revisit whether to maintain an OTMR option.

29. We note that even where an attachment qualifies for our new OTMR process, there may be instances where a new attacher prefers to use our existing pole attachment timeline because, for instance, the new attacher prefers a process where existing attachers are responsible for moving their own equipment rather than the new attacher.¹¹⁰ Therefore, we permit new attachers to elect our existing pole attachment regime (as modified herein) rather than the new OTMR process.

30. *Rejecting Non-OTMR Solutions.* We reject proposals advanced in the record to reform the pole attachment timeline—specifically, “right-touch, make-ready”¹¹¹ and NCTA’s “Accelerated and Safe Access to Poles” (“ASAP”) proposal—which merely modify the current framework rather than using OTMR.¹¹² We find that compared to our OTMR approach, these approaches have much more limited benefits because they rely on diffuse responsibility among parties that lack the new attacher’s incentive to ensure that the work is done quickly, cost-effectively, and properly.¹¹³ Moreover, they would “do nothing to solve the numerous separate climbs and construction stoppages in the public-rights-of-way” resulting from sequential make-ready.¹¹⁴ We also agree with AT&T that adopting a penalties-based approach is more likely to promote conflict than speedier deployment.¹¹⁵

¹⁰⁸ See, e.g., Charter Wireline & Wireless NPRM Comments at 56-57; Comcast Wireline & Wireless NPRM Comments at 21-23; NCTA Wireline & Wireless NPRM Reply at 16-17.

¹⁰⁹ Corning estimates that applying OTMR to 5G attachments would result in an additional 5.9 million incremental premises passed and about \$8.8 billion in associated capital expenditures. Corning Economic Study at 5-6.

¹¹⁰ See Verizon Nov. 13, 2017 Wireline *Ex Parte* Letter at 2 (“Attachers who do not elect to use OTMR would be able to continue to use the existing pole attachment timeframes and processes.”).

¹¹¹ See Comcast Wireline & Wireless NPRM Reply at 10-11 (proposing right-touch, make-ready, which allows existing attachers to perform make-ready sequentially within a designated time period and relies on fines and other penalties to encourage existing attachers to meet their deadlines).

¹¹² See Letter from Steven F. Morris, Vice President & Associate General Counsel, NCTA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84 (filed Mar. 5, 2018) (NCTA Mar. 5, 2018 Wireline *Ex Parte* Letter) (setting forth “ASAP” proposal, which shortens existing pole attachment timeline, particularly for utilities).

¹¹³ See CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at 3; Letter from Kristine Laudadio Devine, Counsel to Google Fiber, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 4 (filed Mar. 14, 2018) (Google Fiber Mar. 14, 2018 Wireline *Ex Parte* Letter) (“By reducing inefficiency and waste in make-ready, adoption of OTMR will shift the core economic assumptions that inform deployment planning.”).

¹¹⁴ INCOMPAS Wireline NPRM Comments at 10; see CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at 2-3 (“[T]he ASAP Proposal would maintain the current sequence of duplicative visits to the pole[.]”).

¹¹⁵ See AT&T Wireline NPRM Comments at 28 (“Adopting a penalties-based approach would only foment conflict, in litigation or otherwise, between new and existing attachers about who is to blame for the make-ready delay.”); see also Crown Castle Wireline NPRM Comments at 25 (stating that “the administration, tracking, and enforcement of such fines would simply complicate matters”); Frontier Wireline NPRM Comments at 19 (stating that any

31. We also agree with commenters that the ASAP proposal would put unrealistic time pressure on existing attachers and utilities.¹¹⁶ For example, NCTA recommends: (1) an expedited 15-day period for utilities to both complete their review of pole attachment applications and conduct the appropriate pole surveys; and (2) a seven-day period for presenting the new attacher with an estimate of make-ready charges.¹¹⁷ As the Electric Utilities explain, “NCTA’s recent ‘ASAP’ proposal seeks to cut critical engineering review and addresses steps in the access process that are not part of the problem.”¹¹⁸ While a more compressed pole attachment timeline is appropriate for our OTMR regime because a single party controls the work, such timelines are not appropriate for a utility that has to coordinate work separately for both the new attacher and multiple existing attachers.¹¹⁹

32. *Legal Considerations.* We reject the contentions of certain cable commenters that OTMR “deprives an existing attacher of its statutory right to notice and an opportunity to add to or modify its own existing attachment before a pole is modified or altered and thus violates Section 224(h).”¹²⁰ Section 224(h) of the Act provides, in relevant part, that “[w]henver the owner of a pole . . . intends to modify or alter such pole . . . the owner shall provide written notification of such action to any entity that has obtained an attachment . . . so that such entity may have a reasonable opportunity to add to or modify its existing attachment.”¹²¹ We agree with Verizon that there is no statutory right under section 224(h) for an existing attacher to add to or modify its existing attachment when a new attacher is performing the make-ready. On its face section 224(h) only applies to situations where the pole owner modifies or alters the pole, and thus is not implicated under the OTMR approach we adopt today: under our approach new attachers, not pole owners, perform OTMR work.¹²²

33. We also find that OTMR does not constitute a government taking of existing attachers’ property that requires just compensation under the Fifth Amendment, and we reject arguments to the contrary.¹²³ As an initial matter, OTMR is not a “permanent physical occupation” of an existing attacher’s property;¹²⁴ at most it gives contractors of the new attacher a temporary right to move and

significant penalties for failing to act in a certain timeframe would unfairly shift significant costs and risks to existing attachers and utilities); Verizon Wireline NPRM Reply at 9.

¹¹⁶ See Verizon Mar. 8, 2018 Wireline *Ex Parte* Letter at 3-4 (stating that “rather than enabling new attachers to help drive the application review, survey, and make-ready estimate process, the NCTA proposal would place increased burdens on pole owners and existing attachers to process applications and complete make-ready”); Google Fiber Mar. 14, 2018 Wireline *Ex Parte* Letter at 4-5; Electric Utilities Mar. 19, 2018 Wireline *Ex Parte* Letter at 2; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at 2.

¹¹⁷ NCTA Mar. 5, 2018 Wireline *Ex Parte* Letter Attach. 1-2.

¹¹⁸ Electric Utilities Mar. 19, 2018 Wireline *Ex Parte* Letter at 2.

¹¹⁹ See Verizon Wireline NPRM Comments at 9 (“With the one-touch make-ready alternative available to those who want to move more quickly, the Commission should leave intact the current process and timelines for those attachers who do not wish to take on the responsibility for conducting an engineering survey, estimating the necessary make-ready work, and doing one-touch make-ready through an approved contractor.”)

¹²⁰ NCTA Wireline NPRM Reply at 20; *see also* Charter Wireline NPRM Comments at 45-46; Comcast Wireline NPRM Comments at 19; NCTA Comments at 19.

¹²¹ 47 U.S.C. §224(h).

¹²² Verizon Wireline NPRM Reply at 10.

¹²³ See Charter Wireline & Wireless NPRM Comments at 49-50; Comcast Wireline & Wireless NPRM Comments at 22.

¹²⁴ See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1073 (1992). With respect to utilities’ property interests, we recognize that our new OTMR regime grants access to utilities’ poles, as our current regime does, via section 224(f)(1), which requires utilities to provide cable systems and telecommunications carriers with nondiscriminatory

rearrange attachments.¹²⁵ In such situations, where a regulation falls short of eliminating all economically beneficial use of the property at issue, courts apply the balancing test of *Penn Central Transportation Co.*¹²⁶ and evaluate the economic impact of the regulation on the property owner, the extent to which the regulation has interfered with “distinct investment-backed expectations,” and “the character of the government action.”¹²⁷ Applying that test here makes clear that OTMR effects no taking. We are limiting the application of OTMR to simple work (i.e., where outages are not expected to occur) on wireline attachments in the communications space performed by qualified contractors, and we have taken steps to ensure that the OTMR process limits adverse effects on existing attachers’ networks,¹²⁸ which means any economic impact on existing attachers and any interference with investment expectations will be limited. Furthermore, OTMR represents at most an incidental movement of existing attachers’ property.¹²⁹ To the extent that movement affects existing attachers’ or utilities’ property, such impact is incidental and not our purpose, which is to promote broadband deployment and further the public interest.¹³⁰

b. Contractor Selection Under the OTMR Process

34. We adopt rules requiring attachers using the OTMR process to use a utility-approved contractor if the utility makes available a list of qualified contractors authorized to perform surveys and simple make-ready work in the communications space. If there is no utility-approved list of contractors, we adopt rules that require OTMR attachers to use a contractor that meets key safety and reliability criteria, as recommended by the BDAC.¹³¹ The record suggests that inconsistent updating of approved contractor lists by utilities, as well as a lack of uniform contractor qualification and selection standards, leads to delays when new attachers seek to exercise their self-help remedy and perform make-ready work on a pole.¹³² At the same time, existing attachers are understandably apprehensive about having

access to utilities’ poles, ducts, and rights-of-way, and that Congress’ grant of such mandatory access likely constitutes a government taking. See *Gulf Power Co. v. United States*, 187 F.3d 1324, 1328-29 (11th Cir. 1999). However, we agree with the Eleventh Circuit that by mandating that utilities receive just and reasonable rates for such access, the Act “is not facially unconstitutional under the Fifth Amendment, because, at least in most cases, it provides a constitutionally adequate process which ensures a utility does not suffer that taking without obtaining just compensation,” *Id.* at 1338. Our OTMR regime changes the manner by which new attachers may invoke their mandatory access right under section 224(f)(1), but does not change the process by which new attachers must compensate utilities for such access.

¹²⁵ See Google Fiber Wireline NPRM Comments at 13-14.

¹²⁶ *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978); *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001).

¹²⁷ *Penn Central Transp. Co.*, 438 U.S. at 124.

¹²⁸ See *infra* section III.A.1.c.(i), (v) (specifying that new attachers must provide advance notice and allow representatives of existing attachers and the utility a reasonable opportunity to be present when surveys and OTMR work are performed); section III.A.1.c.(vi) (mandating that new attachers allow existing attachers and the utility the ability to inspect and request any corrective measures soon after the new attacher performs the OTMR work).

¹²⁹ *Penn Central Transp. Co.*, 438 U.S. at 124 (noting that a taking “may more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.”) (citation omitted).

¹³⁰ See *id.*

¹³¹ See BDAC January 2018 Recommendations at 26.

¹³² See ACA Wireline NPRM Reply at 24-25; see also BDAC January 2018 Recommendations at 20.

unfamiliar contractors work on and potentially damage their facilities.¹³³ The process we adopt addresses both of these problems by preventing delays in the engagement of contractors and by establishing clear minimum qualifications.¹³⁴

35. *Utility-Approved Contractors.* We strongly encourage, but do not require, utilities to publicly maintain a list of approved contractors qualified to perform surveys and simple make-ready work as part of the OTMR process.¹³⁵ However we do not *require* utilities to do so. Utilities have a strong interest in protecting their equipment and many have indicated their interest in deciding which contractors can perform work on their poles.¹³⁶ At the same time, many utilities have indicated that they do not have the expertise to select contractors qualified to work in the communications space and would prefer to defer to the new attachers' choice of contractors.¹³⁷ Therefore, we give the utilities the option of maintaining a list of approved contractors for OTMR work but do not impose a mandate.

36. If the utility maintains a list, new and existing attachers may request that contractors meeting the qualifications set forth below be added to the utility's list and utilities may not unreasonably withhold consent to add a new contractor to the list. We adopt this requirement so that a utility that maintains a list does not have the ability to prevent deployment progress, which would be contrary to our goal in adopting OTMR. To be reasonable, a utility's decision to withhold consent must be prompt, set forth in writing that describes the basis for rejection, nondiscriminatory, and based on fair application of commercially reasonable requirements for contractors relating to issues of safety or reliability.¹³⁸

37. To help ensure public and worker safety and the integrity of all parties' equipment, we conclude that any contractors that perform OTMR must meet certain minimum safety and reliability standards. We require utilities to ensure that contractors on the approved list meet the following minimum requirements, enumerated by the BDAC, for performing OTMR work: (1) follow published safety and operational guidelines of the utility, if available, but if unavailable, follow the National Electrical Safety Code (NESC) guidelines; (2) read and follow licensed-engineered pole designs for make-ready work, if required by the utility; (3) follow all local, state, and federal laws and regulations including, but not limited to, the rules regarding Qualified and Competent Persons under the requirements

¹³³ See AT&T Wireline NPRM Comments at 16; Charter Wireline NPRM Comments at 39; Comcast Wireline NPRM Comments at 21; see also BDAC January 2018 Recommendations at 27.

¹³⁴ See BDAC January 2018 Recommendations at 29-30.

¹³⁵ See *id.* at 28; CCU Wireline NPRM Comments at 17; CPS Energy Wireline NPRM Reply at 11; Verizon Wireline NPRM Reply at 7; Letter from Heather Burnett Gold, President & CEO, Fiber Broadband Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 4 (filed Apr. 10, 2018) (FBA Apr. 10, 2018 Wireline *Ex Parte* Letter).

¹³⁶ See, e.g., CCU Wireline NPRM Comments at 17; AT&T Wireline NPRM Reply at 10; Google Fiber Wireline NPRM Reply at 9; Verizon Wireline NPRM Reply at 7.

¹³⁷ See BDAC January 2018 Recommendations at 20, 26, 28; Midwest Electric Utilities Wireline NPRM Comments at 27; POWER Coalition Wireline NPRM Comments at 13; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at 2.

¹³⁸ Cf. BDAC January 2018 Recommendations at 30 ("Either a pole owner or an existing attacher could reject a contractor proposed by an attacher before the twenty-five calendar day notice period expires, but only on established, declared transparent grounds uniformly applied on the basis of safety or reliability qualification failure."); CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at 2 ("An IOU pole owner . . . may object to any proposed Communications Contractor . . . (i) if it is determined that such contractor does not satisfy the minimum qualification requirements proposed by the BDAC; or (ii) if it is determined that such contractor does not meet any minimum qualification requirement of the IOU pole owner related to safety or reliability, that is disclosed to the public, and that is evenhandedly applied; or (iii) if it determined, based on past record, that such contractor is not qualified to perform the work for which it seeks to be pre-approved.").

of the Occupational Safety and Health Administration (OSHA) rules; (4) meet or exceed any uniformly applied and reasonable safety and reliability thresholds set and made available by the utility, e.g., the contractor cannot have a record of significant safety violations or worksite accidents; and (5) be adequately insured or be able to establish an adequate performance bond for the make-ready work it will perform.¹³⁹ These requirements collectively will materially reduce safety and reliability risks, as well as delays in the completion of pole attachments, by allowing one qualified contractor to perform all necessary make-ready work instead of having multiple contractors make multiple trips to the pole to perform this work.¹⁴⁰

38. *New Attacher Selection of Contractors.* Where there is no utility-approved list of qualified contractors or no approved contractors available within a reasonable time period, then, consistent with the BDAC recommendation, new attachers proceeding with OTMR may use qualified contractors of their choosing.¹⁴¹ The new attacher must certify to the utility¹⁴² (either in the three-business-day advance notice for surveys or in the 15-day make-ready notice)¹⁴³ that the named contractor meets the same five minimum requirements for safety and reliability discussed above.¹⁴⁴

39. The utility may mandate additional commercially reasonable requirements for contractors relating to issues of safety and reliability, but such requirements must clearly communicate the safety or reliability issue, be non-discriminatory, in writing, and publicly available (e.g., on the utility's website).¹⁴⁵ This condition will guard against pole damage and resulting outages and safety hazards due to particular local conditions,¹⁴⁶ while ensuring that utilities do not use these additional requirements as a roadblock to deployment.¹⁴⁷ We also grant utilities the flexibility to mandate such additional commercially reasonable requirements for contractors because utilities are best positioned to ensure that any additional state or local legal requirements are complied with and any additional environmental or pole-specific factors are accounted for.¹⁴⁸

¹³⁹ See BDAC January 2018 Recommendations at 29; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter Attach. at 2.

¹⁴⁰ See BDAC January 2018 Recommendations at 19; Lumos Wireline NPRM Reply at 4-5.

¹⁴¹ Cf. BDAC January 2018 Recommendations at 28 (“In addition to those contractors placed on an approved list by the pole owner, attachers may propose contractors to the pole owner for approval for any category of make-ready work.”). To maximize options for new attachers, we allow a new attacher entitled to select a contractor that does not appear on a utility's list to use its own employees to perform pole attachment work, so long as that employee meets all qualifications for contractors set forth herein. Thus, we use the term “contractor” as a term of art that encompasses the new attacher's employees.

¹⁴² The new attacher may choose to require the contractor to certify to the new attacher that the contractor meets the five BDAC-enumerated minimum safety and reliability requirements and provide a copy of this contractor certification to the utility.

¹⁴³ See *infra* section III.A.1.c.(i), (v).

¹⁴⁴ See BDAC January 2018 Recommendations at 29; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter Attach. at 2.

¹⁴⁵ See BDAC January 2018 Recommendations at 29; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter Attach. at 2. Ideally, such requirements for contractors would also be found in the pole attachment agreement between the utility and the new attacher.

¹⁴⁶ See Frontier Wireline NPRM Comments at 16; Charter Wireline NPRM Comments at 38.

¹⁴⁷ See Verizon Wireline NPRM Reply at 8 n.29.

¹⁴⁸ Cf. CCU Wireline NPRM Comments at 10, 24 (stating that the Coalition currently “complies with federal, state, and, when applicable, local code and operating requirements for safe work and construction practices[.]” and that “[i]t takes careful effort to maintain and operate critical electric infrastructure[.]” to ensure attachments are not

40. Where there is no utility-approved list of contractors, we adopt rules, consistent with the BDAC's recommendation, allowing the utility to veto any contractor chosen by the new attacher.¹⁴⁹ Utilities must base any veto on safety and reliability concerns related to the contractor's ability to meet one or more of the minimum qualifications described earlier in this subsection or on the utility's previously posted safety standards.¹⁵⁰ When vetoing an attacher's chosen contractor, the utility must identify at least one qualified contractor available to do the work. The utility also must make its veto within either the three-business-day notice period for surveys or the 15-day notice period for make-ready.¹⁵¹ In reaching this determination, we agree with the Coalition of Concerned Utilities that the safety and reliability of the pole is extremely important and, as a result, utilities should be able to disqualify contractors that raise concrete workmanship dangers.¹⁵² To avoid an ongoing dispute between the utility and the new attacher that results in the substantial delay of the pole attachment, any veto by the utility that conforms with the requirements we set forth is determinative and final.¹⁵³

41. *Existing Attachers.* We decline to grant existing attachers the right to veto or object to the inclusion of a contractor on the utility-approved list or a new attacher's contractor selection.¹⁵⁴ Several commenters explain that existing attachers lack the incentive to act quickly to accommodate a new attacher on a pole given that a new attacher may be a competitor to an existing attacher.¹⁵⁵ By contrast, the utility in most cases is not a competitor to the new attacher.¹⁵⁶ Further, while there will only be one utility with an objection right for any given pole, there could be several existing attachers for that same pole, thereby materially increasing the chances that an objection may be lodged for the purposes of competitive gamesmanship were we to allow existing attachers to challenge a new attacher's contractor

installed out of compliance with applicable codes or in a manner that cannot withstand weather emergencies); Midwest Electric Utilities Wireline NPRM Comments at 38 (describing a utility response to an inclement weather emergency or power outage); POWER Coalition Wireline Comments at 6 (describing its members' experience complying with local requirements).

¹⁴⁹ See BDAC January 2018 Recommendations at 30; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter Attach. at 2.

¹⁵⁰ See BDAC January 2018 Recommendations at 30 (stating that a utility cannot be unreasonably restrictive if a contractor meets the minimum qualification requirements; a rejection of a contractor must be on "established, declared transparent grounds uniformly applied on the basis of safety or reliability qualification failure"); CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter Attach. at 2.

¹⁵¹ If a contractor conducts a survey and the utility vetoes that contractor during the 15-day notice period for make-ready, then the survey is not invalidated because the utility already had the opportunity to: (1) be present for the survey; and (2) object to the contractor during the three-business-day notice period for surveys.

¹⁵² See CCU Wireline NPRM Reply at 2-3; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter Attach. at 2.

¹⁵³ See AT&T Wireline NPRM Reply at 10.

¹⁵⁴ The BDAC recommended giving existing attachers the right to object to a new attacher's proposed contractor. See BDAC January 2018 Recommendations at 30. Several commenters support granting existing attachers a right to object to either or both of (1) contractors on the utility list and (2) the new attacher's contractor selection. See AT&T Wireline NPRM Comments at 16; CenturyLink Wireline NPRM Comments at 15; Charter Wireline NPRM Comments at 50, 56; NCTA Wireline NPRM Comments at 16.

¹⁵⁵ See, e.g., CMA Report at 6; CCU Wireline NPRM Comments at 11; Verizon June 21, 2018 Wireline *Ex Parte* Letter at 2; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at 2; FBA Apr. 10, 2018 Wireline *Ex Parte* Letter at 2; Letter from Karen Reidy, VP of Regulatory Affairs, INCOMPAS, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2 (filed Apr. 4, 2018) (INCOMPAS Apr. 4, 2018 Wireline *Ex Parte* Letter); Google Fiber Feb. 1, 2018 Wireline *Ex Parte* Letter at 1-2.

¹⁵⁶ See *infra* section III.C (describing declining incumbent LEC pole ownership rates).

selection. Therefore, we are not convinced that an objection process for existing attachers could be designed in a manner sufficient to prevent significant delays in deployment. Imposition of a time limit for objections could force existing attachers to make objections more promptly, but would not prevent gamesmanship, and imposition of a good faith objection requirement would not prevent deployment delays as new attachers would need to resort to the Commission's complaint process to enforce such a requirement.

42. The rules we adopt should alleviate some commenters' concern that depriving existing attachers of a right to input in the contractor selection process could result in serious harm to existing facilities on the pole.¹⁵⁷ First, only simple make-ready work is subject to the OTMR process; existing attachers can perform their own make-ready work in more challenging and dangerous situations. Further, the authority we grant utilities to develop a mandatory list and veto a new attacher's contractor selection for OTMR work should help mitigate the risk to the safety and reliability of the attachments subject to make-ready work by the new attacher's contractor.¹⁵⁸ As several commenters point out, in many markets, contractors approved by the utilities may already be the same as those approved by existing attachers.¹⁵⁹ Additionally, regardless of whether the utility intervenes, contractors must meet the five criteria recommended by the BDAC, which help to ensure safe, reliable, and quality work. Finally, we conclude that we have put in place adequate protections elsewhere in the new OTMR process, in addition to the protections we identify here, to protect the network reliability and safety concerns of existing attachers.¹⁶⁰

43. *Use of Union Workers to Perform Make-Ready Work.* We decline to adopt a requirement that OTMR must be performed by union contractors where an existing attacher has entered into a collective bargaining agreement (CBA) that requires the existing attacher to use union workers for pole attachment work.¹⁶¹ The BDAC's OTMR recommendation did not create a different OTMR regime for existing attachers subject to CBAs,¹⁶² and we find no reason to do so here. New attachers that are not parties to a CBA have no obligations under such a CBA. It is the new attacher's contractor that will be performing the make-ready work, so the CBA is not implicated.

44. Further, the record indicates that requiring a new attacher to hire a union contractor only because one of the existing attachers' CBA mandates the use of union workers to perform its pole attachment work would frustrate the efficiency and utility of OTMR. The record suggests that in some areas, it may not be possible for a new attacher to find union contractors covered by an existing attacher's CBA.¹⁶³ In addition, tailoring our OTMR rules to an existing attacher's CBA "would result in a

¹⁵⁷ See AT&T Wireline NPRM Comments at 16; Charter Wireline NPRM Comments at 52, 56; Comcast Wireline NPRM Comments at 21 n.51; NCTA Wireline NPRM Comments at 16.

¹⁵⁸ See CCU Wireline NPRM Comments at 26; Google Fiber Wireline NPRM Reply at 9.

¹⁵⁹ See Google Fiber Wireline NPRM Reply at 9 n.17; Verizon Wireline NPRM Reply at 6.

¹⁶⁰ See *infra* section III.A.1.c.(i), (v) (specifying that new attachers must provide advance notice and allow representatives of existing attachers and the utility a reasonable opportunity to be present when surveys and OTMR work are performed); section III.A.1.c.(vi) (mandating that new attachers allow existing attachers and the utility the ability to inspect and request any corrective measures soon after the new attacher performs the OTMR work).

¹⁶¹ Several commenters advocate such a requirement. See Frontier Wireline NPRM Comments at 17-18; AT&T Wireline NPRM Reply at 9-10; CenturyLink Wireline NPRM Reply at 14; CWA Feb. 6, 2018 Wireline *Ex Parte* Letter at 2; IBEW Jan. 30, 2018 Wireline *Ex Parte* Letter at 2.

¹⁶² See BDAC January 2018 Recommendations at 19-25.

¹⁶³ See Google Fiber Feb. 1, 2018 Wireline *Ex Parte* Letter at 4 (stating that, in many areas, the only union members covered by AT&T's collective bargaining agreements are AT&T employees).

patchwork of rules that might be subject to change every few years and would be administratively unmanageable for new attachers.”¹⁶⁴

45. The Communications Workers of America (CWA) has expressed concern that an OTMR regime that fails to honor CBAs has the potential to cause facility damage, service interruption, and danger to the public and workers.¹⁶⁵ Specifically, CWA argues that its CBAs ensure that make-ready work is performed by “well-trained employees who are directly accountable for their work,” and as a result, “perform the job properly and safely.”¹⁶⁶ We find that CWA’s concerns are already addressed in the proposed OTMR regime through the opportunity for existing attachers to be present for surveys and make-ready work¹⁶⁷ and to conduct post-make-ready inspections on the work performed.¹⁶⁸ Both opportunities provide existing attachers with a safeguard against facility damage and harms that could result from contractor mistakes¹⁶⁹—and nothing in our adoption of an OTMR regime should be construed as preventing an existing attacher from using union contractors pursuant to an applicable CBA on pole-related work not subject to OTMR that the existing attacher is entitled to perform.

46. Finally, allowing private contracts to dictate our policy choice would “subvert[] the supremacy of federal law over contracts.”¹⁷⁰ As the Supreme Court has made clear, “[i]f the regulatory statute is otherwise within the powers of Congress . . . its application may not be defeated by private contractual provisions.”¹⁷¹

c. OTMR Pole Attachment Timeline

47. One substantial benefit of the OTMR process is that it allows for a substantially shortened timeline for application review and make-ready work. We estimate that new attachers using the new OTMR process will save more than three months from application to completion as compared to the process provided for under our existing rules.¹⁷²

(i) Conducting a Survey

48. Our OTMR regime saves significant time by placing the responsibility on the new attacher (rather than the utility) to conduct a survey of the affected poles to determine the make-ready work to be performed.¹⁷³ Under an OTMR regime, the survey will come near the beginning of the process (after the new attacher negotiates with the utility for pole access and chooses a contractor to

¹⁶⁴ Verizon Wireline NPRM Reply at 8.

¹⁶⁵ Letter from Debbie Goldman, Telecommunications Policy Director, CWA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 1-3 (filed May 23, 2018) (CWA May 23, 2018 Wireline *Ex Parte* Letter).

¹⁶⁶ *Id.* at 3.

¹⁶⁷ See ACA Wireline NPRM Comments at 16-17.

¹⁶⁸ See AT&T Wireline NPRM Comments at 3, 18; Charter Wireline NPRM Comments at 56; COMPTIA Wireline NPRM Comments at 2; Electric Utilities Wireline NPRM Comments at 6; Google Fiber Wireline NPRM Comments at 6; Portland General Electric Company et al. (Oregon Electric Utilities) Wireline NPRM Comments at 8; CPS Energy Wireline NPRM Reply at 11.

¹⁶⁹ See ACA Wireline NPRM Comments at 16-17; Electric Utilities Wireline NPRM Comments at 6; CPS Energy Wireline NPRM Reply at 11.

¹⁷⁰ Google Fiber Wireline NPRM Reply at 7.

¹⁷¹ *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224 (1986).

¹⁷² This calculation includes a 30-day reduction in the application review/survey stage, the elimination of the 28-day estimate and acceptance stages, and up to 45 days saved to complete make-ready.

¹⁷³ See Verizon Wireline NPRM Reply at 5; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at 4.

perform the work required for attachment) to enable the new attacher to determine whether any make-ready is required and, if so, what type of make-ready (simple or complex) is involved. The results of the survey typically will be included in the new attacher's pole attachment application.¹⁷⁴

49. To help ensure that the new attacher handles third-party equipment with sufficient care and makes an accurate determination of the work to be done to prepare the poles for its new attachments, our new rules require new attachers to permit representatives of the utility and any existing attachers potentially affected by the proposed work to be present for the survey, using commercially reasonable efforts to provide at least three business days of advance notice of the date, time, and location of the survey and the name of the contractor performing the survey.¹⁷⁵ We find that advance notice of three business days strikes the right balance between providing sufficient time to accommodate coordination with the utility and existing attachers and the need to keep the pole attachment process moving forward in a timely manner.¹⁷⁶ Also, as the BDAC found in the context of utility surveys, joint surveys help address the potential safety and equipment damage risks raised by existing attachers.¹⁷⁷ To prevent coordination problems that may invite delay, we do not require a new attacher to set a date for the survey that is convenient for the utility and existing attachers.¹⁷⁸ In the case of reasonable scheduling conflicts, however, we encourage the parties to work together to find a mutually-agreeable time for the survey. We also encourage all attachers to provide a point of contact publicly (e.g., on their websites) so that new attachers know whom to contact when providing notices required under the OTMR regime.

(ii) Notifying the Utility of the Intent to Use OTMR

50. Consistent with the BDAC's recommendation, we require the new attacher to ensure that its contractor determines whether make-ready work identified in the survey is "simple or complex, subject to an electric utility's right to reasonably object to the determination."¹⁷⁹ For purposes of clarity and certainty, we require a new attacher—if it wants to use the OTMR process and is eligible to do so based on the survey—to elect OTMR in its pole attachment application and to identify in its application the simple make-ready work to be performed.¹⁸⁰ Some commenters oppose letting the new attacher's contractor make the simple versus complex determination.¹⁸¹ AT&T, for example, advocates for allowing the existing attacher to make the determination.¹⁸² However, we agree with those commenters that argue

¹⁷⁴ CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at 4.

¹⁷⁵ See, e.g., BDAC January 2018 Recommendations at 37; ACA Wireline NPRM Reply Comments at 16-17; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at 4.

¹⁷⁶ See, e.g., BDAC January 2018 Recommendations at 37, 39 ("Members of the Committee agreed that a joint survey would be a useful option for the attacher and could benefit the utility as well. They also agreed that the pole owner should be able to establish the timing of the joint survey and then give the attacher reasonable notice (of not less than three days) to participate."); ACA Wireline NPRM Comments at 16-17; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at 4.

¹⁷⁷ See BDAC January 2018 Recommendations at 37.

¹⁷⁸ See *id.* at 40.

¹⁷⁹ See *id.* at 24; see also CPS Energy Wireline NPRM Reply at 7; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at Attach. at 1 Verizon Mar. 8, 2018 Wireline *Ex Parte* Letter at 5; INCOMPAS Apr. 4, 2018 Wireline *Ex Parte* Letter at 2. At this time, we find it unnecessary to establish specific procedures around determining whether work will be in the communications space (and thus eligible for OTMR) because we expect that determination to be self-evident.

¹⁸⁰ CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter Attach. at 2.

¹⁸¹ See AT&T Wireline NPRM Reply at 9; NCTA Wireline NPRM Reply at 17; CWA Feb. 6, 2018 Wireline *Ex Parte* Letter at 3.

¹⁸² See AT&T Wireline NPRM Reply at 9; Charter Wireline & Wireless NPRM Comments at 55.

that the new attacher's contractor has the incentive to make the correct determination in order to (1) avoid liability for damages caused by an incorrect choice; (2) limit risk; and (3) in the case of third-party contractors, preserve relationships with all attachers, as well as with the utility, to obtain future work.¹⁸³ As a result, we find it is "more likely that approved contractors will be conservative in their determination of whether work is simple or complex."¹⁸⁴ In addition, we agree with Google Fiber that having a contractor chosen from a neutral utility-approved list, where such a list is available, "determine whether make-ready is simple or complex means neither the incumbent nor the new attacher has an opportunity to inject anti-competitive bias into the process."¹⁸⁵

51. We require an electric utility that wishes to object to a simple make-ready determination to raise such an objection during the 15-day application review period (or within 30 days in the case of larger orders).¹⁸⁶ While the BDAC did not address the timing of an objection to the simple/complex determination in its OTMR recommendation, we find that setting a time limit for the objection will reduce confusion and foster quicker deployment. We find 15 days to be sufficient because the electric utility will have the right to accompany the new attacher's contractor on the survey when the contractor makes the simple/complex determination,¹⁸⁷ so the electric utility will have ample opportunity to have the information it needs to determine whether to object before the deadline.

52. If the electric utility objects to the new contractor's determination that work is simple, then the work is deemed complex—the utility's objection is final and determinative so long as it is specific and in writing, includes all relevant evidence and information supporting its decision, and provides a good faith explanation of how such evidence and information relate to a determination that the make-ready is not simple. This approach is consistent with other decisions left to an electric utility during our pole attachment process.¹⁸⁸ We find that making the electric utility's determination final is appropriate because it avoids protracted disputes that could slow deployment. However, we caution utilities that if they make such a decision in a manner inconsistent with the requirements we set forth, for instance without adequate support or in bad faith, then new attachers can avail themselves of our complaint process to address such behavior.

53. If the new attacher determines that the make-ready involves a mix of simple and complex work, then we allow the new attacher discretion to determine whether to bifurcate the work. If the new attacher prefers to complete the simple make-ready work under the OTMR process while it waits for the complex work to run its course through the longer existing process, then it may do so. A new attacher electing to bifurcate the work must submit separate applications for the simple and complex work. If the new attacher prefers that its entire project (both simple and complex work) follow the existing process, or

¹⁸³ See Google Fiber Wireline NPRM Reply at 6; Verizon Mar. 8, 2018 Wireline *Ex Parte* Letter at 5; see also INCOMPAS Apr. 4, 2018 Wireline *Ex Parte* Letter at 2 (explaining that letting existing attachers, which are often competitors of new attachers, select the contractor for OTMR could lead to anti-competitive behavior). In cases where the new attachers uses its own employees, we find that it will be sufficiently incentivized to make the correct choice in order to limit liability for damages and risk.

¹⁸⁴ Google Fiber Feb. 1, 2018 Wireline *Ex Parte* Letter at 3.

¹⁸⁵ *Id.*; see also Verizon Mar. 8, 2018 Wireline *Ex Parte* Letter at 5.

¹⁸⁶ We specifically reserve this objection right to an electric utility only and not to other utilities (such as incumbent LECs) defined in 47 U.S.C. § 224(a)(1). See, e.g., *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5250, 5265, paras. 19, 49 (2011) (*2011 Pole Attachment Order*) ("Consulting electric utilities are entitled to make final determinations in case of disputes over capacity, safety, reliability, and generally applicable engineering purposes.").

¹⁸⁷ See *infra* section III.A.1.c.(i).

¹⁸⁸ See 47 U.S.C. § 224(f)(2); see *infra* Appx. A, 47 CFR § 1.1413(d).

if the new attacher does not view bifurcation as feasible, then it may employ the existing process for the entire project.

(iii) Review of Application for Completeness

54. In the interest of speeding application review, we adopt a rule to specify that under the OTMR regime, a pole attachment application is complete if it provides the utility with the information necessary under the utility's procedures, as specified in a master service agreement or in publicly-available requirements at the time of submission of the application, to make an informed decision on the application.¹⁸⁹ We also establish a timeline for the utility's review of the application for completeness. We adopt these requirements to address attachers' complaints—made in response to the Commission's request in the *Wireline Infrastructure Notice* for comments on ways to streamline and accelerate the pole attachment timeline¹⁹⁰—that “pole owners are not transparent about telling applicants all information that is required to be included on applications at the time of their submission,” often resulting in delays to the pole attachment process while the pole owner requests additional information over a series of weeks or months.¹⁹¹

55. While the current definition of a complete application only requires “information necessary under [the utility's] procedures,”¹⁹² our revised definition provides more transparency about what an attacher must include in its application, because the master service agreement or publicly-available requirements must be available to new attachers as they prepare their application.¹⁹³ We reject NCTA's proposal that we define an application as complete if it provides “only the information reasonably necessary to commence the application process and does not impose unreasonable or unnecessary additional requirements”¹⁹⁴ because that definition fails to provide new attachers sufficient prior notice of the application requirements and invites disputes between the new attacher and utility over what information is “reasonably necessary to commence the application process” or what constitutes “unreasonable or unnecessary additional requirements.”¹⁹⁵

56. To prevent unnecessary delays in starting the pole attachment process, we adopt rules consistent with the BDAC-recommended timeline for a utility to determine whether a pole attachment application is complete.¹⁹⁶

- A utility has 10 business days after receipt of a pole attachment application in which to determine whether the application is complete and notify the attacher of that decision.
- If the utility notifies the attacher that the attacher's application is not complete within the 10

¹⁸⁹ See Letter from Thomas Cohen, Counsel to ACA, to Marlene Dortch, Secretary, FCC, WC Docket No. 17-84, at 5 (filed Sep. 14, 2017) (ACA Sep. 14, 2017 Wireline *Ex Parte* Letter). The BDAC recommended a definition of a complete pole attachment application that we adopt for our existing pole attachment timeline. See BDAC January 2018 Recommendations at 32; see also *infra* section III.A.1.c.(iii). We slightly revise that definition for purposes of our OTMR timeline to account for the new attacher, rather than the utility, conducting the pole surveys.

¹⁹⁰ See *Wireline Infrastructure Notice*, 32 FCC Rcd at 3268-69, 3273, paras. 7-8, 21.

¹⁹¹ See Lighttower Wireline NPRM Comments at 4-5; ACA Sep. 14, 2017 Wireline *Ex Parte* Letter at 4; FBA Apr. 10, 2018 Wireline *Ex Parte* Letter at 3.

¹⁹² 47 CFR § 1.1412(c).

¹⁹³ See *infra* Appx. A, 47 CFR § 1.1412(c)(1).

¹⁹⁴ NCTA Mar. 5, 2018 Wireline *Ex Parte* Letter at Attach. at 1.

¹⁹⁵ *Id.*

¹⁹⁶ BDAC January 2018 Recommendations at 32; see also ACA Sep. 14, 2017 Wireline *Ex Parte* Letter at 5. See *infra* Appx. A, 47 CFR § 1.1412(j)(1)(ii).

business-day review period, then the utility must specify where and how the application is deficient.

- If there is no response by the utility within 10 business days, or if the utility rejects the application as incomplete but fails to specify any deficiencies in the application, then the application is deemed complete.
- If the utility timely notifies the new attacher that the application is incomplete and specifies deficiencies, a resubmitted application need only supplement the previous application by addressing the issues identified by the utility, and the application shall be deemed complete within five business days after its resubmission, unless the utility specifies which deficiencies were not addressed and how the resubmitted application did not sufficiently address the utility's reasons.
- The new attacher may follow this resubmission procedure as many times as it chooses, so long as in each case it makes a bona fide attempt to correct the issues identified by the utility, and in each case the deadlines set forth herein apply to the utility's review.

57. We find that incorporating a specific timeline into our rules provides all parties with some predictability about the start of the OTMR process and avoids unnecessary delays that arise when utilities do not formally accept an application in a timely manner.¹⁹⁷ We also find that the timeline we adopt balances the interests of new attachers in the speedy processing of applications and of utilities in needing sufficient time to review the applications. We require utilities to specify the deficiencies in pole attachment applications within 10 business days of receipt so that the new attachers have the information necessary to address those deficiencies in a timely fashion. We also believe this gives incentives for utilities generally to communicate to prospective applicants concerning what is needed for an application because doing so will aid in the utility's formal review process. We adopt a "deemed grant" remedy to prevent delays, and we adopt a shorter timeline for second and further reviews because we expect utilities' review to be cabined to a more limited number of issues that it previously identified. We also encourage utilities that receive complete applications to respond promptly and affirmatively confirm that applications are complete, rather than wait for the 10 business-day review period to lapse.

(iv) Application Review

58. For OTMR attachments, we shorten the time period within which a utility must decide whether to grant a complete application from 45 days to 15 days for standard requests and from 60 days to 30 days for larger requests.¹⁹⁸ While the BDAC did not address this issue, we find that because the new attacher (rather than the utility) will be doing most of the pre-make-ready work under OTMR (e.g., surveys, notices), it is appropriate to adopt a shorter timeline for the utility to review the application.¹⁹⁹ Furthermore, because the utility has the right to specify the information it requires the new attacher to put in the application and has the ability to reject the application (multiple times if necessary) before accepting it for review, we find 15 days should be sufficient for the utility to conduct its review.²⁰⁰

¹⁹⁷ See ACA Sep. 14, 2017 Wireline *Ex Parte* Letter at 4-5 (explaining the delays and lack of transparency in the application process).

¹⁹⁸ See *infra* Appx. A, 47 CFR § 1.1412(j)(2) (the deadline is extended to 60 days for larger pole attachment requests as described in 47 CFR § 1.1412(g)). Larger requests are when an order is greater than 3000 poles or 5 percent of the utility's poles in a state. See *infra* Appx. A, 47 CFR § 1.1412(g).

¹⁹⁹ See CPS Energy Wireline NPRM Reply at 7 (explaining that transferring the make-ready design and planning to the new attachers allows CPS Energy to slash its pole attachment application review time by over fifty percent).

²⁰⁰ We retain in the OTMR context our preexisting requirement that if a utility denies an application, the utility's denial must be specific and include all relevant evidence and information supporting its denial and must explain how

(v) **Make-Ready**

59. The new attacher may proceed with OTMR by giving 15 days' prior written notice to the utility and all affected existing attachers.²⁰¹ To avoid unnecessary delays, we conclude that the new attacher may provide the required 15-day notice any time after the utility deems its pole attachment application complete. Thus, the 15-day notice period may run concurrently with the utility's evaluation of whether to grant the application. If, however, the new attacher cannot start make-ready work on the date specified in its 15-day notice (e.g., because its application has been denied or it is otherwise not ready to commence make-ready), then the new attacher must provide 15 days' advance notice of its revised make-ready date.

60. Although the BDAC recommendation provides for 25 days prior written notice for OTMR,²⁰² we find that 15 days strikes a reasonable balance between promoting fast access to utility poles (one of the core goals of OTMR) and providing sufficient time for existing attachers and the utility to work with the new attacher to arrange to be present when OTMR is being performed on their equipment.²⁰³ Furthermore, the 25-day notice period recommended by the BDAC for OTMR is only five days shorter than the 30-day period recommended by the BDAC for existing attachers to complete complex make-ready work,²⁰⁴ which is not much time savings for an OTMR process that we adopt for simple work that is unlikely to cause safety issues.²⁰⁵

61. To keep all affected parties informed about the new attacher's progress, and consistent with the BDAC's recommendation, we require the new attacher to provide representatives of the utility and existing attachers with the following information in the 15-day advance notice: (1) the date and time of the make-ready work; (2) a description of the make-ready work involved; (3) a reasonable opportunity to be present when the make-ready work is being performed; and (4) the name of the contractor chosen by the new attacher to perform the make-ready work.²⁰⁶ Allowing existing attachers and the utility a reasonable opportunity to be present when OTMR work is being done addresses the concerns of existing attachers that third-party contractors may not take proper care when performing simple make-ready work

such evidence and information relate to a denial of access for reasons of safety, reliability, lack of capacity, or engineering standards. *See* 47 CFR § 1.1403(b).

²⁰¹ *See* COMPTIA Wireline NPRM Comments at 2; Google Fiber Wireline NPRM Reply at 9; *cf.* BDAC January 2018 Recommendations at 23.

²⁰² *See* BDAC January 2018 Recommendations at 23; *see also* AT&T Wireline NPRM Comments at 17 (requesting that new attachers notify existing attachers at least 30 days prior to the OTMR make-ready); CPS Energy Wireline NPRM Reply at 9, 16-17 (requesting 21 days' advance notice to existing attachers of impending OTMR work); Charter Feb. 5, 2018 Wireline *Ex Parte* Letter at 1 (requesting 30 days' advance notice to give existing attachers a chance to move their equipment).

²⁰³ *See* Level 3 Wireline NPRM Comments at 3; Verizon Wireline NPRM Comments at 7 (recommending only five days' notice before OTMR work begin); Google Fiber Wireline NPRM Reply at 9.

²⁰⁴ *See* BDAC January 2018 Recommendations at 21, 23.

²⁰⁵ *See* Google Fiber Wireline NPRM Reply at 9 (stating that "the Commission should not unreasonably enlarge the notice period given to existing attachers before make-ready commences[]" and noting that "a 15-day notice period should be sufficient for utility-approved contractors to ensure that these services will be adequately protected during make-ready").

²⁰⁶ *See* BDAC January 2018 Recommendations at 23; *infra* Appx. A, 47 CFR § 1.1412(j)(4)(i); Charter Wireline & Wireless NPRM Comments at 56; NCTA Mar. 5, 2018 Wireline *Ex Parte* Letter at Attach. at 5. If a new attacher requests contact information for existing attachers from the utility for use in this notification process, the utility must provide any such contact information it possesses. We adopt this requirement so that a new attacher can fulfill its notification obligation when it does not have a direct relationship with existing attachers.

on their equipment.²⁰⁷ We also adopt the advance notice requirements to allow the utility and existing attachers, if they so choose, to alert their customers that work on their equipment is forthcoming; as Liberty Cablevision of Puerto Rico explains, “[t]his is a reasonable way to address concerns that service-affecting problems arising from the make-ready work would be improperly attributed to an existing attacher.”²⁰⁸ In addition, providing the name of the new attacher’s OTMR contractor allows existing attachers to notify the utility and the utility to object if the contractor is not properly qualified.²⁰⁹

62. We emphasize that the 15 days is only a notice period before the new attacher begins make-ready work; it is not an opportunity for existing attachers or the utility to complete make-ready work on their equipment and then bill the new attacher for that work.²¹⁰ Providing an existing attacher an affirmative right to move its own equipment during the notice period would undermine two of the main benefits of OTMR: eliminating multiple trips to the pole and decreasing make-ready costs for new attachers.²¹¹

63. We also adopt the BDAC recommendation that we require the new attacher to notify an affected entity immediately if the new attacher’s contractor damages another company’s equipment or causes an outage that is reasonably likely to interrupt the provision of service.²¹² We extend this requirement to damage to the utility’s equipment as well. Upon receiving notice of damaged equipment or a service outage, the utility or existing attacher can either complete any necessary remedial work and bill the new attacher for the reasonable costs related to fix the damage or require the new attacher to fix the damage at its expense within 14 days following notice from the utility or existing attacher.²¹³ Fourteen days provides sufficient time for the new attacher to fix any problems caused by its work, yet is a short enough period such that damaged equipment does not create a lingering safety or outage issue. This requirement addresses the concern of existing attachers and utilities that the new attacher’s contractor may damage equipment or cause an outage that would harm consumers or threaten safety without the existing attacher’s or utility’s knowledge or an opportunity for prompt recourse.²¹⁴

²⁰⁷ See BDAC January 2018 Recommendations at 27 (“Existing attachers worry that one-touch make-ready endangers their attachments and provision of service because they are in control of neither the contractor nor the quality of work performed.”); Comcast Wireline & Wireless NPRM Comments at 21; NCTA Mar. 5, 2018 Wireline *Ex Parte* Letter at 2 (stating that cable operators have experienced problems with OTMR “where there is a complete lack of privity between the existing attacher and the contractor.”).

²⁰⁸ Liberty Cablevision of Puerto Rico Wireline NPRM Comments at 8 n.7.

²⁰⁹ See BDAC January 2018 Recommendations at 27 (“Opponents of one-touch make-ready often cite unknown contractor qualifications as a principal reason why one-touch make-ready should not be adopted.”); see also Charter Wireline & Wireless NPRM Comments at 42 (stating that OTMR is only as effective as the contractor performing the work).

²¹⁰ *Accord* Verizon July 2, 2018 Wireline *Ex Parte* Letter at 3 (“If a new attacher elects OTMR, existing attachers would not have the right to perform their own make-ready.”).

²¹¹ See Google Fiber Mar. 14, 2018 Wireline *Ex Parte* Letter at 1; Verizon Mar. 8, 2018 Wireline *Ex Parte* Letter at 3-4.

²¹² BDAC January 2018 Recommendations at 22; Charter Wireline & Wireless NPRM Comments at 57; NCTA Mar. 5, 2018 Wireline *Ex Parte* Letter at Attach. at 5.

²¹³ See, e.g., CenturyLink Wireline NPRM Comments at 12-13; Charter Wireline & Wireless NPRM Comments at 56-57; CPS Energy Wireline NPRM Reply at 11-12; Electric Utilities Wireline NPRM Comments at 6; Frontier Wireline NPRM Comments at 19; Level 3 Wireline NPRM Comments at 3; Midwest Electric Utilities Wireline NPRM Comments at 8; POWER Coalition Wireline NPRM Comments at 12; UTC Wireline NPRM Comments at 14; AT&T-CWA Jan. 16, 2018 Wireline *Ex Parte* Letter at 1.

²¹⁴ See BDAC January 2018 Recommendations at 27; Charter Wireline & Wireless NPRM Comments at 39-43; Comcast Wireline NPRM Comments at 21-22; NCTA Wireline NPRM Reply at 16-17.

(vi) **Post Make-Ready**

64. We agree with commenters that suggest that the OTMR process should include time for post-make-ready inspections and the quick repair of any defective make-ready work.²¹⁵ To give existing attachers and the utility an opportunity to correct any errors and to further encourage quality work by the new attacher, we adopt the BDAC's recommendation that the new attacher must provide notice to the utility and affected existing attachers within 15 days after the new attacher has completed OTMR work on a particular pole.²¹⁶ In its post-make ready notice, the new attacher must provide the utility and existing attachers at least a 30-day period for the inspection of make-ready work performed by the new attacher's contractors.²¹⁷ This post-make-ready inspection and remedy requirement gives the utility and existing attachers their own opportunity to ensure that work has been done correctly.

65. To allow new attachers to timely address allegations of needed repair work, we adopt rules requiring that within 14 days after any post-make ready inspection, the utility and the existing attachers notify the new attacher of any damage caused to their equipment by the new attacher's make-ready work. The utility or existing attacher can either complete any necessary remedial work and bill the new attacher for the reasonable costs related to fix the damage, or require the new attacher to fix the damage at its expense within 14 days following notice from the utility or existing attacher.²¹⁸ We provide the utility or existing attacher options regarding repair to maximize their flexibility in addressing issues for which they are not at fault. The safeguards we establish in the OTMR process collectively give the new attacher the incentive to ensure its contractor performs work correctly; we therefore expect the invocation of this remediation procedure to be infrequent.

66. We disagree with Verizon's argument that we should refrain from establishing a timeframe for the utility and existing attachers to inspect completed make-ready work because deadlines for raising claims about property damage are "typically governed by state contract or property law."²¹⁹ We find it appropriate to establish a post-inspection timeline at the federal level so that parties can identify any defective make-ready work that has the potential to cause harm or injury to persons or equipment and remedy it as soon as possible. We also find that the deadlines we establish for the post-make-ready timeline give the existing attachers and the utility time that is sufficient but not unnecessarily long to inspect the work and give the new attacher reasonable time to fix any equipment damage and to rectify any potentially unsafe conditions.

²¹⁵ See AT&T Wireline NPRM Comments at 18; CenturyLink Wireline NPRM Comments at 15; Charter Wireline & Wireless NPRM Comments at 56-57; COMPTIA Wireline NPRM Comments at 2; Electric Utilities Wireline NPRM Comments at 6; Google Fiber Wireline NPRM Comments at 6; Oregon Electric Utilities Wireline NPRM Comments at 8; CPS Energy Wireline NPRM Reply at 11; UTC Wireline NPRM Reply at 19; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at 4.

²¹⁶ BDAC January 2018 Recommendations at 22; see also Electric Utilities Wireline NPRM Comments at 6; CPS Energy Wireline NPRM Reply at 11. To minimize paperwork burdens, the new attacher may batch in one post-make-ready notice all poles completed in a particular 15-day span. For example, if a pole attachment project took 30 days to complete, the new attacher could provide one notice to the existing attacher with the first 15 days' worth of work and a second notice on day 30 with the remainder of the work.

²¹⁷ See, e.g., CPS Energy Wireline NPRM Reply at 11; Electric Utilities Wireline NPRM Comments at 6; Google Fiber Wireline NPRM Comments at 6 (recommending 60-day period for post-OTMR inspections).

²¹⁸ See, e.g., Charter Wireline & Wireless NPRM Comments at 56-57; CPS Energy Wireline NPRM Reply at 11; Electric Utilities Wireline NPRM Comments at 6; Frontier Wireline NPRM Comments at 19-20; Midwest Electric Utilities Wireline NPRM Comments at 8; POWER Coalition Wireline NPRM Comments at 12; UTC Wireline NPRM Comments at 14; AT&T-CWA Jan. 16, 2018 Wireline *Ex Parte* Letter at 1; see also Level 3 Wireline NPRM Comments at 3 (submitting that remediation should take place within 30 days).

²¹⁹ Verizon Wireline NPRM Reply at 9.

d. Indemnification

67. We conclude that new attachers should be responsible for any damage resulting from work completed by the new attacher during OTMR. The OTMR rules we adopt provide a process for existing attachers to timely identify damage to their equipment that occurs during the OTMR process and to arrange for its repair.²²⁰ To the extent that process proves insufficient, injured parties may seek judicial relief based on state law claims.

68. We find, consistent with the BDAC's recommendation,²²¹ that federally-imposed indemnification is not necessary.²²² The record indicates that the existing legal regime, including contract²²³ and tort law,²²⁴ provides sufficient protection for existing attachers without broad federal regulatory intrusion. The repair process we adopt in our OTMR rules adds an additional layer of protection. With these other remedies already available, we disagree with NCTA that a Commission-mandated indemnification requirement is the "only practical mechanism by which an existing attacher can hold a new attacher or its contractor accountable for the consequences of performing shoddy work" in situations where there is no privity of contract between the parties or a statutory requirement to hold harmless existing attachers.²²⁵ Rather, we find that adding a federal layer of indemnification would not be efficient or assist in speeding broadband deployment. Further, we agree with Google Fiber that

²²⁰ See *supra* section III.A.1.c.(vi). OTMR contractors will be required to carry adequate insurance or establish a performance bond, which should ensure there is compensation available should the contractor's work be faulty. See *supra* section III.A.1.b. To reduce disputes over the cause of damages, NCTA proposes that we require new attachers' contractors to "document, via photograph or video, the condition of the existing attachers' facilities both before performing any make-ready work and after make-ready work is complete." NCTA Mar. 5, 2018 Wireline *Ex Parte* Letter Attach. 6. While we agree with NCTA that such documentation could potentially help to resolve disputes surrounding the cause of damage, there is no record evidence as to how effective or burdensome such a requirement would be, and NCTA does not indicate how widespread this practice currently is. Therefore, we decline to mandate it at this time.

²²¹ See January 2018 BDAC Recommendations at 47.

²²² Several commenters propose such a requirement. See AT&T Wireline NPRM Comments at 18; Electric Utilities Wireline NPRM Comments at 6; Frontier Wireline NPRM Comments at 18; UTC Wireline NPRM Comments at 14; Comcast Wireline NPRM Reply at 11; NCTA Wireline NPRM Reply at 20.

²²³ See Google Fiber Apr. 12, 2018 Wireline *Ex Parte* Letter at 3 (contending that contractual negotiations are sufficient to address new attacher liability to existing attachers beyond liability for damage the new attacher or the new attacher's contractor causes to the existing attacher's facilities); Verizon Mar. 8, 2018 Wireline *Ex Parte* Letter at 6 (arguing that "[a]ny third party or indirect damages should be addressed in the attachment agreement(s) between the parties already in place"). Google Fiber observes that it is common practice today for liability concerns to be addressed in pole attachment agreements, "under which attachers routinely agree to indemnify pole owners for property damage, bodily injury, and death arising from their work on, and attachments to utility poles." Letter from Kristine Laudadio Devine, Counsel to Google Fiber, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 3 n. 8 (filed Nov. 30, 2017) (Google Fiber Nov. 30, 2017 Wireline *Ex Parte* Letter).

²²⁴ See Charter Wireline & Wireless NPRM Comments at 51 (contending that without contractual privity between the existing and new attachers, the only method of resolving disputes over deficient make-ready work is through tort litigation); CenturyLink Wireline NPRM Reply at 14 (stating that the likely only remedy for an attaching entity, like Century Link, with no contract with another communications company "would be litigation against the IOU for breach or the attacher or its contractor in tort"). Google and CPS Energy also argue that indemnification is not appropriate in situations where there is not privity of contract between new and existing attachers. See CPS Energy Wireline NPRM Reply at 19-21; Google Fiber Nov. 30, 2017 Wireline *Ex Parte* Letter at 2-3. State tort law remains available regardless of whether there is contractual privity.

²²⁵ NCTA Apr. 4, 2018 Wireline *Ex Parte* Letter at 6.

indemnification obligations are typically not one-size-fits-all provisions,²²⁶ such that it would be difficult to craft a regulatory solution that is workable in all situations.

69. We disagree with NCTA's assertion that section 224(i) of the Act requires federally mandated "[b]road indemnification of existing attachers," including indemnification for consequential damages.²²⁷ Section 224(i) provides that existing attachers "shall not be required to bear any of the costs of rearranging or replacing its attachment, if such rearrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment sought by any other entity (including the owner of such pole, duct, conduit, or right-of-way)."²²⁸ NCTA claims that this language requires new attachers to pay for "any damages – such as damages caused by service downtime – resulting from such work."²²⁹

70. We find NCTA's reading of section 224(i) to be overly broad. In our view, the statute is best read to allow the existing attacher to recover only those costs directly connected to "rearranging or replacing the attachment," i.e., the direct costs of moving or replacing the attachment.²³⁰ These costs do not include consequential damages. While NCTA relies on the modifier "any of" for its broad reading, contending that the phrase "any of" means the statute requires compensation for consequential damages,²³¹ the more natural reading of "any of" is that the statute prohibits holding existing attachers responsible for any *portion* of "the costs of rearranging or replacing its attachment." NCTA cites no precedent that supports its broad reading, and the Commission's bonding and insurance requirements that NCTA does cite²³² are far more narrow than the broad indemnification it argues for in this instance.²³³ In fact, we have previously declined to adopt rules requiring broad indemnification for consequential damages, instead finding that indemnification obligations should be left for commercial negotiations.²³⁴

²²⁶ Google Fiber Nov. 30, 2017 Wireline *Ex Parte* Letter at 2-3.

²²⁷ See Letter from Steven F. Morris, Vice President & Associate General Counsel, NCTA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 5 (filed Apr. 4, 2018) (NCTA Apr. 4, 2018 Wireline *Ex Parte* Letter).

²²⁸ 47 U.S.C. § 224(i).

²²⁹ NCTA Apr. 4, 2018 Wireline *Ex Parte* Letter at 5 n.19.

²³⁰ 47 U.S.C. § 224(i).

²³¹ See NCTA Apr. 4, 2018 Wireline *Ex Parte* Letter at 5 n.19.

²³² *Id.* at 5; *2011 Pole Attachment Order*, 26 FCC Rcd. at 5266-69, para. 56 ("If a requirement is customary and prudent whenever a [utility-approved] contractor [for self-help] is hired, such as requiring a service bond . . . it is likely reasonable."); *In the Matter of Leased Commercial Access*, 23 FCC Rcd. 2909, 2922-23, para. 27-28 (2008) (finding it reasonable for a cable system operator to require a leased access programmer "to obtain reasonable liability insurance coverage[,] but confirming that the Commission would "continue to address complaints about specific contract terms and conditions on a case-by-case basis"). The *2008 Leased Access Order's* rules never went into effect due to a stay by the Sixth Circuit. See *Order, United Church of Christ Office of Communications, Inc. et al. v. FCC*, No. 08-3245 (and consolidated cases) (6th Cir., May 22, 2008). In June of this year, the Commission tentatively concluded that it should vacate the *2008 Leased Access Order. Leased Commercial Access Modernization of Media Regulation Initiative*, MB Docket Nos. 07-42, 17-105, Further Notice of Proposed Rulemaking, FCC 18-80, para. 2 (June 8, 2018). Consistent with the Commission's approach in the *2011 Pole Attachment Order*, our order today requires analogous bonding or insurance requirements for new attachers' third-party OTMR contractors. See *supra* section III.A.1.b.

²³³ Cf. Verizon July 2, 2018 Wireline *Ex Parte* Letter at 5 (submitting that "[t]he fact that the Commission has stated that, as a general matter, a utility can impose reasonable service bond requirements on contractors and that a cable system operator can impose reasonable insurance requirements in leased access contracts does not answer whether broad indemnification is reasonable for OTMR.").

²³⁴ See *2011 Pole Attachment Order*, 26 FCC Rcd. at 5261, para. 39 (concluding in response to commenters seeking broad indemnification for self-help make-ready work that "we presume that utilities could structure attachment

2. Targeted Changes to the Commission's Existing Pole Attachment Process

71. To speed broadband deployment for new attachments that are not eligible for our OTMR process and for new attachers that prefer not to use the OTMR process, we make targeted changes to the rules governing the existing pole attachment timeline. Our targeted changes include:

- Revising the definition of a complete pole attachment application and establishing a timeline for a utility's determination whether an application is complete;
- Requiring utilities to provide at least three business days' advance notice of any surveys to the new attacher and each existing attacher;
- Shortening the existing make-ready deadline by 30 days for attachments above the communications space;
- Establishing a 30-day deadline for completion of all make-ready work in the communications space;
- Eliminating the 15-day utility make-ready period for communications space attachments;
- Streamlining the utility's notice requirements;
- Enhancing the new attacher's self-help remedy by making the remedy available for surveys and make-ready work for all attachments anywhere on the pole in the event that the utility or the existing attachers fail to meet the required deadlines;
- Revising the contractor selection process for a new attacher's self-help work; and
- Requiring utilities to provide detailed estimates and final invoices to new attachers regarding make-ready costs.

72. We agree with numerous commenters that with respect to the Commission's current pole attachment timeline, we should refrain from adopting wholesale changes at this time.²³⁵ We agree with Verizon that "any timeline change should be very cautious and include only targeted, incremental reforms" and with AT&T that "[e]xisting timelines are already challenging for some utilities to meet, and shortening those deadlines even further could compromise safety by encouraging workforces to rush or to take shortcuts to meet deadlines."²³⁶ As a result, while we make changes aimed at speeding broadband deployment where the record indicates such changes would be workable and beneficial, we leave unchanged the pole attachment deadlines for the existing application review/survey, estimate, and acceptance stages.

agreements to . . . address liability or other concerns they might have in cases where they elect to perform make-ready themselves.").

²³⁵ See CCU Wireline NPRM Comments at 24-25; CenturyLink Wireline NPRM Comments at 3; Comcast Wireline NPRM Comments at 18; Charter Wireline NPRM Comments at 37-38; EEI Wireline NPRM Comments at 3, 22; Electric Utilities Wireline NPRM Comments at 11-13; Frontier Wireline NPRM Comments at 15; POWER Coalition Wireline NPRM Comments at 5; Puget Sound Energy Wireline NPRM Comments at 3-5; Texas Office of Public Utility Counsel Wireline NPRM Comments at 2; APPA Wireline & Wireless NPRM Reply at 30; AT&T Wireline NPRM Reply at 1, 4-5; CWA Wireline NPRM Reply at 1; Midwest Electric Utilities Wireline NPRM Reply at 4-5; Verizon Wireline NPRM Reply at 10.

²³⁶ See AT&T Wireline NPRM Reply at 4-5; Verizon Wireline NPRM Reply at 10.

a. Creating a More Efficient Pole Attachment Timeline

(i) Review of application for completeness

73. For the reasons discussed above, we adopt rules reflecting the same improvements to our definition of a complete pole attachment application and the same completeness review process as we do for the OTMR timeline, subject to one change to adjust for the fact that the utility conducts the survey under the non-OTMR process.²³⁷ We adopt the BDAC’s recommendation and revise our existing pole attachment rules to define an application as complete if it provides the utility with the information necessary under its procedures, as specified in a master service agreement or in publicly-available requirements at the time of submission of the application, to begin to survey the affected poles.²³⁸ While the current definition of a complete application only requires “information necessary under [the utility’s] procedures,”²³⁹ this revised definition requires more transparency on behalf of the utility as the master service agreement and public requirements will be available to new attachers as they prepare their applications. In addition, to prevent unnecessary delays in starting the pole attachment process, we adopt the same BDAC-recommended timeline as in our OTMR process for a utility to determine whether a pole attachment application is complete.²⁴⁰ We agree with ACA that providing a specific timeline for determining completeness offers all parties predictability about the start of the OTMR process and avoids unnecessary delays.²⁴¹

74. We decline to make further changes at this time to our rules governing the process prior to the utility’s substantive review of a pole attachment application. Some new attachers ask that we curtail or eliminate what they describe as “burdensome” pre-application requirements imposed by some utilities,²⁴² such as “unnecessary” pole design and engineering analyses, the submission of a “pre-application” to allow utilities to determine make-ready costs, and the pre-payment of pole surveys and other fees.²⁴³ Because it is unclear from the record whether any pre-application requirements have the systematic effect of delaying broadband deployment, we find it premature to adopt rules governing these requirements and instead will address any onerous pre-application requirements on a case-by-case basis via our complaint procedures. We recognize that utility-imposed pre-application procedures can have value²⁴⁴ and can help to avoid incomplete or erroneous pole attachment applications, thus saving time in the process.²⁴⁵ Certain pre-application requests for information (e.g., the submission of pole loading

²³⁷ See *supra* section III.A.1.c.(iii). Except for the distinction we identify, nothing about the complete application definition and completeness review process we adopt is dependent on or justified by which party performs the make-ready work.

²³⁸ BDAC January 2018 Recommendations at 32; ACA Sep. 14, 2017 Wireline *Ex Parte* Letter at 5; CenterPoint Energy et al. May 25, 2018 *Ex Parte* Letter at 3 n.19.

²³⁹ 47 CFR § 1.1412(c).

²⁴⁰ See *supra* section III.A.1.c.(iii); BDAC January 2018 Recommendations at 32; see also ACA Sep. 14, 2017 Wireline *Ex Parte* Letter at 5.

²⁴¹ ACA Sep. 14, 2017 Wireline *Ex Parte* Letter at 4-5.

²⁴² See, e.g., Charter Wireline NPRM Comments at 36-37; ExteNet Wireline & Wireless NPRM Comments at 51; Lighttower Wireline NPRM Comments at 4-5; NCTA Wireline NPRM Comments at 6-7; ACA Wireline NPRM Reply at 19; Comcast Wireline & Wireless NPRM Reply at 10; Crown Castle Reply, WC Docket No. 17-84, at 3-4 (July 17, 2017) (Wireline NPRM Reply).

²⁴³ See Charter Wireline NPRM Comments at 36-37; Lighttower Wireline NPRM Comments at 4-5; ACA Wireline NPRM Reply at 19; Crown Castle Wireline NPRM Reply at 3-5.

²⁴⁴ See CCU Wireline NPRM Reply at 18 (“Each pole must be analyzed to ensure that it has sufficient strength and space to accommodate the new pole attachment, and that applicable safety codes and standards can be achieved.”).

²⁴⁵ See Midwest Electric Utilities Wireline NPRM Comments at 17-18; CCU Wireline NPRM Reply at 12-13.

analyses) can be important tools to address safety, reliability, and engineering concerns.²⁴⁶ We caution utilities, however, that any such requirements must be reasonable, nondiscriminatory, and applied fairly and efficiently.²⁴⁷

(ii) Review of whether to grant complete application and survey

75. We decline to shorten the 45-day period in our existing rules during which the utility must review a complete pole attachment application and survey the affected poles for non-OTMR projects. In so doing, we reject proposals by some attachers that we shorten the application review and survey stage²⁴⁸ because we agree with utility commenters that the existing 45-day timeframe accounts for demands on existing workforce, safety concerns, volume of pole attachment applications, and timing constraints.²⁴⁹

76. To make the survey and application review process more efficient and transparent, however, we adopt a change recommended by the BDAC and several commenters to require utilities to facilitate survey participation by new and existing attachers.²⁵⁰ Specifically, in performing a field inspection as part of any pre-construction survey, we modify our rules to require a utility to permit the new attacher and any existing attachers potentially affected by the new attachment to be present for any pole surveys.²⁵¹ We require the utility to use commercially reasonable efforts to provide at least three business days' advance notice of any surveys to the new attacher and each existing attacher, such notice to include the date, time, and location of the survey, and the name of the contractor performing the survey.²⁵² We find that advance notice of three business days strikes the right balance between providing sufficient time to accommodate coordination with the attachers and the need to keep the pole attachment process moving forward in a timely manner.²⁵³ We agree with ACA that by encouraging collaboration between all interested parties at an early stage in the pole attachment process, this requirement will facilitate “the expeditious development of solutions in advance of attachments, as well as reduce the

²⁴⁶ CCU Wireline NPRM Reply at 12-13, 16; Electric Utilities Wireline NPRM Reply at 17-19; CenterPoint Energy et al. Reply, WC Docket No. 17-84, at 11 (July 17, 2017) (POWER Coalition Wireline NPRM Reply).

²⁴⁷ See *2011 Pole Attachment Order*, 26 FCC Rcd at 5274, para. 73; see also POWER Coalition Wireline NPRM Reply at 11 (explaining that pre-application requirements “are designed precisely to facilitate the pole owner’s determination of whether any requested attachment would raise concerns of safety, reliability, and engineering”).

²⁴⁸ See, e.g., NCTA Mar. 5, 2018 Wireline *Ex Parte* Letter at Attach. at 1 (proposing 15-day application review and survey period); Charter Feb. 5, 2018 Wireline *Ex Parte* Letter at Attach. at 1 (proposing 30-day application review and survey period); ExteNet Wireline & Wireless NPRM Comments at 51-52 (same proposal as Charter); Lightower Wireline NPRM Comments at 4.

²⁴⁹ See, e.g., AT&T Wireline NPRM Comments at 7-8; CCU Wireline NPRM Comments at 23; CenturyLink Wireline NPRM Comments at 8; Communications Workers of America Comments, WC Docket No. 17-84 (June 15, 2017), at 7-8; EEI Wireline NPRM Comments at 20-21; Electric Utilities Wireline NPRM Comments at 11; Frontier Wireline NPRM Comments at 16; POWER Coalition Wireline NPRM Comments at i; Puget Sound Energy Wireline NPRM Comments at 3; Verizon Wireline NPRM Comments at 9; APPA Wireline NPRM Reply at 3, 30; Midwest Electric Utilities Wireline NPRM Reply at 5-6, 16; UTC Wireline NPRM Reply at 1.

²⁵⁰ See BDAC January 2018 Recommendations at 37; ACA Wireline NPRM Reply at 18-19; FBA Apr. 10, 2018 Wireline *Ex Parte* Letter at 4.

²⁵¹ See, e.g., BDAC January 2018 Recommendations at 37 (stating that a joint survey requirement “would speed up the application process and lower the cost of attachments”); ACA Wireline NPRM Comments at 16-17.

²⁵² See BDAC January 2018 Recommendations at 37. To prevent coordination problems that may invite delay, we do not require a utility to set a date for the survey that is convenient for the affected attachers. *Id.* at 40. However, in the case of reasonable scheduling conflicts, we encourage the parties to work together to find a mutually-agreeable time for the survey.

²⁵³ See *supra* section III.A.1.c.(i).

potential for future disputes” and that it “reduce[s] the possibility of improper attachments, a concern raised by virtually all utility commenters.”²⁵⁴

77. In addition, to prevent unnecessary and wasteful duplication of surveys, we adopt a change to our rules that allows utilities to meet the survey requirement of our existing timeline by electing to use surveys previously prepared on the poles in question by new attachers. In the OTMR context, new attachers will perform the necessary surveys to determine whether make-ready work is simple or complex prior to the submission of an application.²⁵⁵ To the extent such work is complex, it will be governed by our existing pole attachment timeline where the utility performs the survey and must give advance notice of the survey to affected attachers.²⁵⁶ However, we will allow the utility to elect to use the new attacher’s previously performed survey (performed as part of the OTMR pole attachment process) to fulfill its survey requirements, rather than require the utility to perform a potentially duplicative survey. The utility still must notify affected attachers of its intent to use the new attacher’s survey and provide a copy of the new attacher’s survey in its notice.

(iii) Make-ready stage

78. To speed both wireline and wireless broadband deployment, we amend our rules to reduce by 30 days the make-ready deadlines for all attachments, subject to limited exceptions to allow utilities and existing attachers more time where needed. Specifically, for new attachments in the communications space, we reduce the deadlines for both simple and complex make-ready from 60 to 30 days (and from 105 to 75 days for large requests in the communications space), while for new attachments above the communications space, we reduce the make-ready deadline from 90 to 60 days (and from 135 to 105 days for large requests above the communications space). We also adopt modified notice requirements to apportion more of the responsibility for promoting make-ready timeline compliance from utilities to new attachers, because new attachers have the greater incentive to drive adherence to the make-ready deadline.

79. *Make-ready deadlines.* Based on the current record and the BDAC’s recommendation, we adopt a change to our rules that shortens the make-ready deadline for new pole attachments in the communications space to promote broadband deployment without imposing undue risk to safety or reliability.²⁵⁷ We agree with Crown Castle that adoption of a shorter make-ready period in the communications space will promote the efficient completion of make-ready by encouraging utilities and existing attachers to prioritize attachment work.²⁵⁸ We also agree with Google Fiber that a 30-day period for communications space make-ready (and 75 days for larger requests) “will ensure that existing attachers have the opportunity to control make-ready that is expected to affect their services, while reducing delays and increasing efficiency for new attachers.”²⁵⁹ The make-ready timelines we adopt for work in the communication space should be sufficient for both simple and complex work.

²⁵⁴ ACA Wireline NPRM Reply at 18-19 (footnotes omitted); *see also* ACA Wireline NPRM Comments at 39 (noting that Central Hudson Gas & Electric Corp. gives attachers five days’ notice of the survey and permits attachers to be present).

²⁵⁵ *See supra* section III.A.1.c.(i).

²⁵⁶ *See infra* Appx. A 47 CFR § 1.1412(c)(3).

²⁵⁷ *See* BDAC January 2018 Recommendations at 21, 24; ExteNet Wireline NPRM Comments at 52; Lightower Wireline NPRM Comments at 7; Crown Castle Wireline NPRM Reply at 11-12; Google Fiber Wireline NPRM Reply at 6.

²⁵⁸ Crown Castle Wireline NPRM Comments at 17.

²⁵⁹ Google Fiber Wireline NPRM Reply at 6.

80. While the BDAC recommended that we impose a 30-day deadline for complex make-ready work in the communications space,²⁶⁰ it did not make a recommendation on the deadline for simple make-ready work that is not subject to OTMR. We find that there is value to maintaining consistency of deadlines in the communications space; thus, we adopt the 30-day deadline for all communications space make-ready work.

81. To facilitate faster and more efficient wireless deployment (particularly the small cell deployments necessary for advanced 5G networks), without sacrificing safety or electric grid reliability, we also adopt a rule that reduces by 30 days, from 90 days to 60 days (and from 135 to 105 days for large requests), the make-ready deadline for pole attachments above the communications space.²⁶¹ In establishing the existing deadlines for make-ready above the communications space, which are 30 days longer than the existing deadlines for make-ready work in the communications space, the Commission pointed to the safety risks associated with working on attachments in, near, or above the electric space and the recognized lack of real-world experience at the time with pole-top attachments.²⁶² While some electric utility commenters argue that the current make-ready timeline for work above the communications space should be kept the same or even lengthened because of the complexity of the installations and the safety concerns of working above the communications space,²⁶³ we agree with AT&T and Verizon that utilities and attachers today “have much more experience with pole-top attachments than they had in 2011.”²⁶⁴ As Crown Castle asserts, it and other companies “have safely installed thousands of pole top wireless attachments,”²⁶⁵ such that installations above the communications space “are no longer the unusual event that utilities were claiming before 2011.”²⁶⁶ AT&T also points out that in some instances, make-ready above the communications space can be less complex than make-ready work in the communications space.²⁶⁷ Nevertheless, we continue to allow for more time to complete make-ready above the communications space, as opposed to make-ready work in the communications space, because such attachments involve work near electrical wires that require more careful work and more experienced contractors.

82. For all attachments, we retain as a safeguard our existing rule allowing utilities to deviate from the make-ready timelines for good and sufficient cause when it is infeasible for the utility to complete make-ready work within the prescribed time frame.²⁶⁸ This safeguard will mitigate the effects

²⁶⁰ BDAC January 2018 Recommendations at 21, 24; *see also* Google Fiber Wireline NPRM Comments at 7-8.

²⁶¹ *See* ExteNet Wireline NPRM Comments at 52; AT&T Wireline NPRM Reply at 6-7; Crown Castle Wireline NPRM Reply at 12-13; Verizon Wireline NPRM Reply at 11.

²⁶² *See 2011 Pole Attachment Order*, 26 FCC Rcd at 5258-59, para. 33.

²⁶³ *See* CCU Wireline NPRM Comments at 26-28; EEI Wireline NPRM Comments at 28-29; Midwest Electric Utilities Wireline NPRM Comments at 28-29; APPA Wireline NPRM Reply at 30.

²⁶⁴ Verizon Wireline NPRM Reply at 11; *see also* AT&T Wireline NPRM Reply at 6 (commenting that since 2011, “pole owners, wireless providers, and contractors have become more, not less, knowledgeable about and proficient at safely deploying antennas and other equipment on utility poles”).

²⁶⁵ Crown Castle Wireline NPRM Comments at 18.

²⁶⁶ *Id.*

²⁶⁷ AT&T Wireline NPRM Comments at 14; *see also* Crown Castle Wireline NPRM Comments at 18 (stating that even the NESC has been modified to eliminate some of the unique requirements for installing wireless antennas).

²⁶⁸ *2011 Pole Attachment Order*, 26 FCC Rcd at 5272-73, para. 68. Pursuant to 47 CFR § 1.1412(h)(2), a utility that needs to deviate from the make-ready timeline must immediately notify in writing the affected new and existing attachers and must include the detailed reasons for, and the date and duration of, the deviation from the timeline. The utility can deviate from the make-ready timeline “for a period no longer than necessary,” and the time for the deviation has the effect of tolling the make-ready timeline until the utility returns to routine operations and can resume make-ready performance. 47 CFR § 1.1412(h)(2). A new attacher may challenge the utility’s determination

of our decrease in the make-ready time periods by carving out edge cases where timely completion is truly infeasible and the utility wishes to retain control of the make-ready process. It aids us in balancing the interests of utilities to control make-ready in non-OTMR circumstances and the needs of new attachers to obtain timely completion of OTMR or the ability to employ self-help.

83. Recognizing that our new timeline will put pressure on existing attachers, particularly with respect to poles that have multiple attachers that must conduct complex make-ready work within a shorter timeframe, we adopt a new safeguard for existing attachers. Specifically, we adopt the BDAC recommendation that an existing attacher may deviate from the 30-day deadline for complex make-ready in the communications space (or the 75-day deadline in the case of larger orders) for reasons of safety or service interruption that renders it infeasible for the existing attacher to complete complex make-ready by the deadline.²⁶⁹ An existing attacher that so deviates must immediately notify, in writing, the new attacher and other affected existing attachers and include a detailed explanation of the reason for the deviation and a new completion date, which cannot extend beyond 60 days from the date of the utility make-ready notice to existing attachers (or 105 days in the case of larger orders). The existing attacher shall deviate from the complex make-ready time limits for a period no longer than necessary to complete make-ready. If the complex make-ready work is not complete within 60 days from the date that the existing attacher sends the notice to the new attacher, then the new attacher can complete the work using a utility-approved contractor.²⁷⁰ We require existing attachers to act in good faith in obtaining an extension, and we caution that obtaining an extension as a routine matter or for the purpose of delaying the new attachment is inconsistent with acting in good faith. If a new attacher believes the existing attacher is not using the extension period in good faith, it may file a complaint with the Commission.

84. We reject AT&T's request for a uniform 60-day time period for complex make-ready.²⁷¹ Although AT&T's proposal might provide more predictability, we find that the BDAC recommendation better speeds deployment by setting a shorter 30-day period for complex make-ready in the communications space and allowing for additional time in that context only on a case-by-case basis.

85. We further accelerate communications space attachments by eliminating the optional 15-day extension period for the utility to complete the make-ready work.²⁷² Many commenters and the BDAC support elimination of the extra 15 days at the end of the make-ready stage because few, if any, utilities actually invoke the extension.²⁷³ However, with respect to work above the communications

for deviating from the make-ready timeline if the utility's rationale is not justified by good and sufficient cause. *2011 Pole Attachment Order*, 26 FCC Rcd at 5273, para. 68.

²⁶⁹ BDAC January 2018 Recommendations at 21; *see also* Level 3 Wireline NPRM Comments at 3 ("New attachers must provide 30 days' written notice for complex make ready to allow a field meeting to be scheduled within that 30 days . . . The existing attacher will have 60 days from the date of notice to perform Complex Make Ready if the technicians mutually agree to such extension in the field meeting."); Oregon Electric Utilities Wireline NPRM Comments at 5 (when make-ready requires more than 45 days to complete, the parties must negotiate "a mutually satisfactory longer period to complete the make ready work.").

²⁷⁰ BDAC January 2018 Recommendations at 21; *see also* AT&T-CWA Jan. 16, 2018 Wireline *Ex Parte* Letter at 3. If no utility-approved contractor is available, then the new attacher must follow the procedures outlined *infra* in section III.A.2.c. for choosing an appropriate contractor.

²⁷¹ Letter from Ola Oyefusi, Director, Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2 (filed Mar. 23, 2018).

²⁷² *See* 47 CFR § 1.1412(e)(1)(iv).

²⁷³ *See* BDAC January 2018 Recommendations at 46 ("[B]ased on information that utilities rarely, if ever, assert their right to complete make-ready work that is uncompleted by existing attachers within 15 days, Committee members agreed to remove this obligation on utilities, which would facilitate a requesting attacher completing make-ready work as quickly as possible."); AT&T Wireline NPRM Comments at 13; Frontier Wireline NPRM Comments at 15; USTelecom Comments, WC Docket No. 17-84 (June 15, 2017), at 17 (USTelecom Wireline

space, we retain the optional 15-day extension period for utility make-ready.²⁷⁴ Because we are extending a new attacher's self-help remedy to attachments above the communications space, and because we are reducing the amount of time for make-ready by 30 days, more utilities may need to use the additional 15 days to perform such make-ready work themselves.²⁷⁵ Further, retaining this extra period promotes safety and reliability of the electric grid by granting the utility extra time to undertake the work itself. To the extent utilities do not intend to avail themselves of the additional 15 days before a new attacher resorts to self-help above the communications space, we strongly encourage utilities to communicate that intent as soon as possible to new attachers so that the new attacher can promptly begin make-ready work.

86. We decline to reduce the timeline for large attachments beyond the across-the-board 30-day decrease set forth above. While Crown Castle advocates for eliminating the additional time afforded to large pole attachment requests because of the resulting extra delay to the pole attachment process,²⁷⁶ we agree with commenters that argue that the additional time is often needed for utilities to carefully process larger requests.²⁷⁷ As AT&T explains "more attachments on more poles require more surveys, more coordination with attachers, and more make-ready work. That additional work, much of which involves site visits, requires additional time."²⁷⁸

87. We also decline the request of some commenters to adopt a shorter timeline for routine pole attachment requests involving a small number of poles.²⁷⁹ We agree with the Coalition of Concerned Utilities that mandating shorter deadlines for smaller requests could cause the utilities to give undue priority to those requests merely because they are smaller in order to meet the compressed deadlines.²⁸⁰ In addition, the Coalition of Concerned Utilities claims that new attachers have been shown to abuse the process in states where utilities are required to process smaller applications more quickly by submitting a series of smaller applications (as opposed to one large application) to ensure that utilities focus on their applications first.²⁸¹ We do not want to incentivize possible gamesmanship by instituting a federal requirement of shorter deadlines for smaller requests.

88. *Notice and New Attacher Role.* We adopt the BDAC recommendation that when a utility provides the required make-ready notice to existing attachers, then it must provide the new attacher with a copy of the notice, plus the contact information of existing attachers to which the notices were sent, and thereafter the new attacher (rather than the utility) must take responsibility for encouraging and

NPRM Comments); Lumos Wireline NPRM Reply at 6-7.

²⁷⁴ See 47 CFR § 1.1412(e)(2)(iv).

²⁷⁵ Cf. CenturyLink Wireline NPRM Comments at 10.

²⁷⁶ See Crown Castle Wireline NPRM Comments at 17-18.

²⁷⁷ See e.g., AT&T Wireline NPRM Comments at 10; CenturyLink Wireline NPRM Comments at 10; EEI Wireline NPRM Comments at 22; Midwest Electric Utilities Wireline NPRM Comments at 20; UTC Wireline NPRM Reply at 10-11.

²⁷⁸ AT&T Wireline NPRM Comments at 10.

²⁷⁹ See NTCA Wireline NPRM Comments at 6-7 (would apply to requests by smaller providers for routine attachments involving 100 or fewer poles in a six-month period); WTA Wireline NPRM Comments at 18 (would apply to pole attachment requests involving 50 or fewer poles); ACA Wireline NPRM Reply at 20-22 (would apply to routine pole attachment requests involving 20 or fewer poles); Charter Feb. 5, 2018 Wireline *Ex Parte* Letter at 3 (would apply to applications of 30 or fewer poles).

²⁸⁰ See CCU Wireline NPRM Reply at 23.

²⁸¹ CCU Wireline NPRM Reply at 23 (noting that "[i]n order to treat attaching entities in a nondiscriminatory manner, utilities typically process applications in the order they are received, no matter the size if [*sic*] the application").

coordinating with existing attachers to ensure completion of make-ready work on a timely basis.²⁸² We adopt this additional notice requirement to empower the new attacher to promote the timely completion of make-ready. As explained by the POWER Coalition, “the new attacher is in the better position to manage the work of existing attachers, to impose reasonable deadlines, and to negotiate compensation for the work performed.”²⁸³

89. *Delivery of Power.* We decline to amend our rules to require that the make-ready process include the delivery of electric power to a new attachment.²⁸⁴ As pointed out by utility commenters, the provision of electric service is outside of our jurisdiction, as it is governed by the Federal Energy Regulatory Commission and state law.²⁸⁵ We recognize, however, that electricity is critical to powering wireline and wireless equipment and that any delay in supplying power to a new attachment is an impediment to broadband deployment.²⁸⁶ We therefore strongly encourage utilities and new attachers to work together to avoid delays in delivering power to new attachments.

b. Enhancing the Self-Help Remedy

90. In the interest of speeding broadband deployment, we modify our rules to provide a self-help remedy to new attachers for work above the communications space, including the installation of wireless 5G small cells, when the utility or existing attachers have failed to complete make-ready work within the required time frames. We recognize that despite widespread agreement that make-ready work often extends past Commission-prescribed timelines,²⁸⁷ and new attachers’ frustration with delays caused by missed deadlines for make-ready work,²⁸⁸ the record shows that, at present, new attachers rarely invoke the existing self-help remedy in the communications space.²⁸⁹ In the interest of ensuring that new attachers are able to exercise the self-help remedy, we take this opportunity to reiterate its availability and

²⁸² See BDAC January 2018 Recommendations at 46; Electric Utilities Wireline NPRM Comments at 20; POWER Coalition Wireline NPRM Comments at 11-12; Letter from Thomas Cohen and J. Bradford Currier, Counsel to ACA, to Marlene Dortch, Secretary, FCC, WC Docket No. 17-84, at 6 (filed Mar. 26, 2018) (ACA Mar. 26, 2018 Wireline *Ex Parte* Letter); FBA Apr. 10, 2018 Wireline *Ex Parte* Letter at 4; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at Attach. at 3.

²⁸³ POWER Coalition Wireline NPRM Comments at 11-12; *see also* Electric Utilities Wireline NPRM Comments at 20 (requesting we make clear that “beyond an initial notification regarding the need for and nature of make-ready, the pole owner has no further notification or coordination obligations.”); ACA Mar. 26, 2018 Wireline *Ex Parte* Letter at 6 (asking that we require “the utility to notify existing attachers about the need for and nature of make-ready work and to provide that information to the new attacher, who then will be responsible for following-up with existing attachers on that work.”); Letter from Ola Oyefusi, Director, Federal Regulatory, AT&T to Marlene H. Dortch, Secretary, FCC, WC Docket 17-84, at 1-2 (filed April 19, 2018) (advocating for the new attacher to serve as “project manager” for the make-ready process).

²⁸⁴ See Crown Castle Wireline NPRM Comments at 21-22; Lighttower Wireline NPRM Comments at 7-8.

²⁸⁵ See CCU Wireline NPRM Reply at 24-25; EEI Wireline NPRM Reply at 9; Electric Utilities Wireline NPRM Reply at 9-12; Midwest Electric Utilities Wireline NPRM Reply at 28; POWER Coalition Wireline NPRM Reply at 10.

²⁸⁶ See Crown Castle Wireline NPRM Comments at 21-22; Lighttower Wireline NPRM Comments at 7-8.

²⁸⁷ See CCU Wireline NPRM Comments at 11-12; FBA Wireline NPRM Comments at 4; Google Fiber Wireline NPRM Comments at 11-12; CMA Report at 1-2, 6; INCOMPAS Feb. 13, 2018 Wireline *Ex Parte* Letter at Attach. at 2-3; NCTA Apr. 4, 2018 Wireline *Ex Parte* Letter at 2; *see also* BDAC January 2018 Recommendations at 19-20.

²⁸⁸ See ACA Wireline NPRM Comments at 20; CCU Wireline NPRM Comments at 11; FBA Wireline NPRM Comments at 4; Google Fiber Wireline NPRM Comments at 11-12; CMA Report at 1-2, 6-7; INCOMPAS Feb. 13, 2018 Wireline *Ex Parte* Letter at Attach. at 2-3; NCTA Apr. 4, 2018 Wireline *Ex Parte* Letter at 2.

²⁸⁹ See BDAC January 2018 Recommendations at 43-46; ACA Wireline NPRM Comments at 44; FBA Apr. 10, 2018 Wireline *Ex Parte* Letter at 4; Verizon July 2, 2018 Wireline *Ex Parte* Letter at 3.

modify our rules to provide a process for new attachers to communicate their intent to engage in self-help to the utility and existing attachers. These steps, together with the changes we make to the process for new attachers to hire contractors to conduct self-help work, should encourage the use of self-help where necessary and strengthen the incentive for utilities and existing attachers to complete work on time.

91. *Self-Help Above the Communications Space.* In light of the national importance of a speedy rollout of 5G services, we amend our rules to allow new attachers to invoke the self-help remedy for work above the communications space, including the installation of wireless 5G small cells, when utilities and existing attachers have not met make-ready work deadlines. Accenture estimates that wireless providers will invest \$275 billion dollars over the next decade to deploy 5G, which is expected to create three million new jobs across the country and boost the U.S. gross domestic product by half a trillion dollars.²⁹⁰ As CTIA explains, the network infrastructure needed to support 5G cannot wait, and it is incumbent on the Commission to quickly eliminate barriers to, and encourage investment in, 5G deployment.²⁹¹ Although we do not allow wireless attachers to perform their own work in the first instance for safety and equipment integrity reasons, we nonetheless give them the ability to use self-help to complete make-ready when utilities miss their deadline.

92. Until now, the only remedy for missed deadlines for work above the communications space has been filing a complaint with the Commission's Enforcement Bureau.²⁹² We agree with commenters that argue that complaints are an important but insufficient tool for encouraging compliance with our deadlines and speeding broadband deployment.²⁹³ We expect the availability of self-help above the communications space will strongly encourage utilities and existing attachers to meet their make-ready deadlines and give new attachers the tools to deploy quickly when they do not.²⁹⁴ As described by Crown Castle, the extension of the self-help remedy to attachments above the communications space closes "a significant gap in the Commission's rules that leaves Crown Castle without a meaningful remedy when the electric utility fails to perform make-ready work in a timely fashion."²⁹⁵

93. We recognize the valid concerns of utilities regarding the importance of safety and equipment integrity, particularly in the electric space,²⁹⁶ and we take several steps to address these important issues. In the event that new attachers must resort to self-help above the communications space, the new attacher must use a qualified contractor to do the work.²⁹⁷ In addition, we reiterate that utilities will have the opportunity to identify and address any safety and equipment concerns when they

²⁹⁰ See CTIA Wireline NPRM Comments at 4 (quoting Accenture Strategy, Smart Cities – How 5G Can Help Municipalities Become Vibrant Smart Cities at 1 (Jan. 12, 2017), https://newsroom.accenture.com/content/1101/files/Accenture_5G-Municipalities-Become-Smart-Cities.pdf).

²⁹¹ See CTIA Wireline NPRM Comments at 5.

²⁹² See *2011 Pole Attachment Order*, 26 FCC Rcd at 5262, paras. 42-43. We are not aware of any such complaints being filed since 2011.

²⁹³ See ACA Wireline NPRM Comments at 32; see also Crown Castle Wireline NPRM Comments at 19.

²⁹⁴ See ACA Wireline NPRM Comments at 46 ("The [self-help] process also would provide an incentive for utilities and existing attachers to conduct necessary make-ready works in a timely fashion to prevent other companies from moving their equipment.").

²⁹⁵ Crown Castle Wireline NPRM Comments at 19.

²⁹⁶ See CCU Wireline NPRM Comments at 28-29; Electric Utilities Wireline NPRM Comments at 8-11; POWER Coalition Wireline NPRM Comments at 11; Puget Sound Energy Wireline NPRM Comments at 5; Texas Office of Public Utility Counsel Wireline NPRM Comments at 3-4; EEI Wireline NPRM Reply at 20-21; Midwest Electric Utilities Wireline NPRM Reply at 24.

²⁹⁷ See ACA Wireline NPRM Comments at 45; Crown Castle Wireline NPRM Comments at 19; Lighttower Wireline NPRM Comments at 13-14.

receive advance self-help notice and post-completion notice from the new attacher.²⁹⁸ Our rules also contain additional pre-existing protections for utilities that empower them to promote safety and reliability.²⁹⁹ Finally, utilities may prevent self-help from being invoked by completing make-ready on time.

94. *Self-Help Notices.* Similar to the pre- and post-work notice requirements we adopt in the new OTMR process, and consistent with the BDAC's recommendation, we require new attachers to give affected utilities and existing attachers (1) no less than three business days advance notice for self-help surveys and five days' advance notice of when self-help make-ready work will be performed and a reasonable opportunity to be present,³⁰⁰ and (2) notice no later than 15 days after make-ready is complete on a particular pole so that they have an opportunity to inspect the make-ready work.³⁰¹ Just as in the OTMR context, the advance notice must include the date and time of the work, the nature of the work, and the name of the contractor being used by the new attacher.³⁰² We find that these notices will promote safe, reliable work and provide the opportunity for corrections where needed, as well as allow utilities and existing attachers to alert their customers of the work.³⁰³ In this context, we also find that the notices will help to address complaints that utilities are not receiving consistent notices from attachers regarding critical steps in the pole attachment process.³⁰⁴

²⁹⁸ See CenturyLink Wireline NPRM Comments at 11; Liberty Cablevision of Puerto Rico Wireline NPRM Comments at 8-9; Midwest Electric Utilities Wireline NPRM Comments at 27; POWER Coalition Wireline NPRM Comments at 12; ACA Wireline NPRM Reply at 27-28; NCTA Mar. 5, 2018 Wireline *Ex Parte* Letter at Attach. at 6; BDAC January 2018 Recommendations at 42.

²⁹⁹ See *infra* Appx. A, 47 CFR § 1.1413(d) (stating that when self-help surveys and make-ready work result in disputes between attachers and an electric utility, the consulting electric utilities are entitled to make final determinations "on a nondiscriminatory basis, where there is insufficient capacity and for reasons of safety, reliability, and generally applicable engineering purposes"); 47 CFR § 1.1412(e)(2)(iv) (providing the utility 15 days to complete work beyond other attachers).

³⁰⁰ In our new OTMR-based pole attachment process, we require that new attachers provide no less than three business days' advance notice for surveys and 15 days advance notice for make-ready. See *supra* sections III.A.1.c.(i), (v). The notice period to commence self-help make-ready is 10 days shorter than in the OTMR process because the utility and existing attachers have at least 30 days to perform make-ready prior to the new attacher electing self-help. See ACA Wireline NPRM Comments at 46 (proposing 7-day self-help notice period).

³⁰¹ Just as in the OTMR context, the new attacher's post-make-ready notice must provide the affected utility and existing attachers 30 days from receipt in which to inspect the make-ready work done on a particular pole. The affected utility and existing attachers have 14 days after completion of their inspection to notify the new attacher of any damage to their equipment caused by make-ready conducted by the new attacher. If the utility or existing attachers discover damage caused by make-ready conducted by the new attacher on equipment belonging to the utility or an existing attacher, then the utility or existing attacher may either (A) complete any necessary remedial work and bill the new attacher for the reasonable costs related to fix the damage, or (B) require the new attacher to fix the damage at its expense within 14 days following notice from the utility or existing attacher. See *supra* section III.A.1.c.(vi); CenturyLink Wireline NPRM Comments at 11; Liberty Cablevision of Puerto Rico Wireline NPRM Comments at 9; Midwest Electric Utilities Wireline NPRM Comments at 27; POWER Coalition Wireline NPRM Comments at 11-12; ACA Wireline NPRM Reply at 28; Charter Feb. 5, 2018 Wireline *Ex Parte* Letter at 1; NCTA Mar. 5, 2018 Wireline *Ex Parte* Letter at Attach. at 6; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at Attach. at 4.

³⁰² See *supra* sections III.A.1.c.(i), (v).

³⁰³ See *supra* sections III.A.1.c.(i), (v)-(vi).

³⁰⁴ See Midwest Electric Utilities Wireline NPRM Comments at 27.

95. At the request of numerous commenters,³⁰⁵ we also take this opportunity to reiterate that under our existing rules, the make-ready clock runs simultaneously and not sequentially for all existing attachers, and the utility must immediately notify at the same time all entities with existing attachments that are affected by the proposed make-ready work.³⁰⁶ We recognize that coordinating work among existing attachers may be difficult, particularly for poles with many attachments, and existing attachers that are not the first to move may in some circumstances receive limited or even no time for work during the make-ready stage.³⁰⁷ Despite these challenges, we expect utilities, new attachers, and existing attachers to work cooperatively to ensure that pole attachment deadlines are met. If others do not meet their deadlines, new attachers then may invoke the self-help remedy.³⁰⁸

c. Contractor Selection for Self-Help

96. We adopt different approaches to new attacher contractor selection for simple and non-simple self-help make-ready. Given that simple self-help and OTMR are substantially similar, we adopt the same approach to contractor selection for simple self-help in the communications space as for OTMR, and we do so for the same reasons set forth above.³⁰⁹ Thus, consistent with the OTMR regime:

- A new attacher electing self-help for simple work in the communications space must select a contractor from a utility-maintained list of qualified contractors, where such a list is available. The contractor must meet the same safety and reliability criteria as contractors authorized to perform OTMR work. New and existing attachers may request that qualified contractors be added to the utility's list and the utility may not unreasonably withhold its consent for such additions.
- Where no utility-maintained list is available, or no utility-approved contractor is available within a reasonable time period, the new attacher must select a contractor that meets the same safety and reliability criteria as contractors authorized to perform OTMR work and any additional non-discriminatory, written, and publicly-available criteria relating to safety and reliability that the utility specifies. The utility may veto the new attacher's contractor selection so long as it offers another available, qualified contractor.

97. For complex work and work above the communications space, we take a different approach and require new attachers to select a contractor from the utility's list. We also require utilities to make available and keep an up-to-date a reasonably sufficient list of contractors it authorizes to perform complex and non-communications space self-help surveys and make-ready work. We thus maintain our existing contractor selection requirements as to complex self-help in the communications space and extend those requirements to self-help above the communications space.³¹⁰

³⁰⁵ See Google Fiber Wireline NPRM Comments at 11-12; AT&T Wireline NPRM Reply at 11 (asserting that concerns with sequential make-ready can be resolved by clarifying that there is only one make-ready period applicable to all existing attachers); Lumos Wireline NPRM Reply at 5; CMA Report at 1-2, 6; see also ACA Wireline NPRM Comments at 20; CCU Wireline NPRM Comments at 11; Charter Wireline NPRM Comments at 34-35; BDAC January 2018 Recommendations at 19.

³⁰⁶ See 47 CFR § 1.1412(e); see also AT&T-CWA Jan. 16, 2018 Wireline *Ex Parte* Letter at 3 (“Sequential timelines are not and have never been contemplated or required by existing Commission rules.”).

³⁰⁷ See Google Fiber Feb. 1, 2018 Wireline *Ex Parte* Letter at 3; see also *supra* section III.A.1.a. We encourage coordination to ensure that each existing attacher receives the time it needs to complete make-ready.

³⁰⁸ See 47 CFR § 1.1412(e)(1)(v); 2011 *Pole Attachment Order*, 26 FCC Rcd at 5265, para. 49.

³⁰⁹ See *supra* section III.A.1.b.

³¹⁰ 47 CFR §§ 1.1413(a)-(b).

98. We treat the utility list as mandatory for complex and above the communications space work for several reasons. These types of make-ready involve greater risks than simple make-ready, and we agree with numerous commenters that utility selection of eligible contractors promotes safe and reliable work in more challenging circumstances.³¹¹ Although the current selection process sometimes entails delays where utilities fail to provide a list of approved contractors,³¹² we find that as to complex work and work above the communications space—which poses heightened safety and reliability risks—the benefits of the current approach outweigh its costs.³¹³ We recognize that self-help above the communications space is novel and poses particularly heightened safety and reliability risks.³¹⁴ We therefore find it especially important to give the utility control over who performs such work.³¹⁵ In reaching this conclusion, we decline to adopt the BDAC’s recommendation that utilities need no longer provide, and requesting attachers need not use, utility-approved contractors to complete complex make-ready work in the communications space under the self-help remedy.³¹⁶

99. Although we treat the utility list as mandatory for complex and above the communications space make-ready, we adopt a protective measure to prevent the utility list from being a choke-point that prevents deployment. The record indicates that some new attachers have been unable to exercise their self-help remedy because a list of utility-approved contractors was not available.³¹⁷ To alleviate this problem for complex and above the communications space work, we set forth in our rules—as we do in the context of OTMR and simple-self-help—that new and existing attachers may request that qualified contractors be added to the utility’s list and that the utility may not unreasonably withhold its consent for such additions. As in the context of OTMR and simple self-help, to be reasonable, a utility’s decision to withhold consent must be prompt, set forth in writing that describes the basis for rejection, nondiscriminatory, and based on fair application of commercially reasonable requirements for contractors relating to issues of safety or reliability.³¹⁸

100. Because we adopt this safeguard for non-simple make-ready, we decline to adopt the BDAC’s recommended multi-step objection and appeal process for adding and removing contractors from the utility-approved contractor list.³¹⁹ Among other things, the BDAC proposes giving existing attachers the right to request the removal of a contractor from the list,³²⁰ and it proposes allowing appeals to the

³¹¹ See CCU Wireline NPRM Comments at 28; Verizon Wireline NPRM Reply at 7; Google Fiber Feb. 1, 2018 Wireline *Ex Parte* Letter at 4.

³¹² See ACA Wireline NPRM Comments at 44-45.

³¹³ AT&T Wireline NPRM Reply at 7-8; see also *2011 Pole Attachment Order*, 26 FCC Rcd at 5267, para. 55 (concluding that the use of a utility-approved contractor by the new attacher “ensures that only qualified contractors work on utility poles”).

³¹⁴ See CCU Wireline NPRM Comments at 28-29; Midwest Electric Wireline NPRM Utilities Comments at 28; EEI Wireline NPRM Comments at 19 n.18; UTC Wireline NPRM Reply at 16.

³¹⁵ See Midwest Electric Utilities Wireline NPRM Comments at 28-29; CCU Wireline Comments at 28-29; UTC Wireline NPRM Reply at 16; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter Attach. at 1.

³¹⁶ BDAC January 2018 Recommendations at 46. The BDAC’s recommendation also extends to simple work in the communications space, see *id.*, and we adopt that aspect of the recommendation as set forth above.

³¹⁷ See ACA Wireline NPRM Reply at 24.

³¹⁸ See *supra* section III.A.1.b.

³¹⁹ See FCC, Broadband Deployment Advisory Committee, Approved Recommendations, Addendum to the Report of the Competitive Access to Broadband Infrastructure Working Group at 2-4 (Apr. 25, 2018) <https://www.fcc.gov/sites/default/files/bdac-cabi-report-04252018.pdf> (BDAC April 2018 Recommendations).

³²⁰ See *id.* at 2-3.

Commission for an expedited letter ruling by the Commission staff.³²¹ We find the BDAC's process unduly complex and cumbersome, and we believe it provides counterproductive opportunities for delay to competitors to new attachers.³²² We agree with Verizon that while utilities should consider feedback on contractors from existing attachers, if existing attachers had rights to object to utility-approved contractors, "the list of approved contractors could vary from pole to pole based on the particular attachers on the poles," creating an administrative burden for new attachers and thereby slowing deployment.³²³ Further, given that we do not directly regulate and generally have little information about communications pole attachment contractors operating throughout the country, we are not well-positioned at this juncture to adjudicate disputes over specific contractors' qualifications, especially on an expedited basis.

d. Detailed Make-Ready Costs

101. To facilitate the planning of more aggressive deployments, we adopt additional requirements to improve the transparency and usefulness of the make-ready cost estimates currently required under our rules.³²⁴ We require estimates of all make-ready charges to be detailed and include documentation that is sufficient to determine the basis for all charges,³²⁵ as well as similarly detailed post-make-ready invoices.

102. The record reflects frustration over the lack of transparency of current estimates of make-ready work charges.³²⁶ ACA, Lumos, Crown Castle, and other commenters express support for a requirement that utilities provide detailed, itemized estimates and final invoices of all necessary make-ready costs.³²⁷ They, along with other commenters, argue that, in many cases, utilities currently do not provide detailed estimates or detailed final invoices.³²⁸ They claim that where utilities do not detail the basis of potential or actual charges, new attachers may reasonably fear that utilities can "potentially include costs that are unnecessary, inappropriately inflated, or that attaching entities could easily

³²¹ *See id.* at 4.

³²² *See supra* section III.A.1.b (finding giving existing attachers an objection right to contractors likely to slow broadband deployment).

³²³ Verizon Wireline NPRM Reply at 7.

³²⁴ Under our current rules, a utility must present a new attacher with "an estimate of charges to perform all necessary make-ready work" within 14 days of conducting the survey of the pole or receiving from the new attacher its own conducted survey. 47 CFR § 1.1412(d); *see also 2011 Pole Attachment Order*, 26 FCC Rcd at 5255-56, paras. 26-28.

³²⁵ *See Lumos Wireline NPRM Reply* at 13.

³²⁶ *See ACA Wireline & Wireless NPRM Comments* at 24-26, 48; *Crown Castle Wireline NPRM Comments* at 15; *Google Fiber Wireline NPRM Comments* at 11; *NCTA Wireline & Wireless NPRM Comments* at 11-12; *Lumos Wireline NPRM Reply* at 13.

³²⁷ *See ACA Wireline & Wireless NPRM Comments* at 24-26; *Lightower Wireline NPRM Comments* at 6; *Crown Castle Wireline NPRM Reply* at 7-8; *Lumos Wireline NPRM Reply* at 13.

³²⁸ *See, e.g., ACA Wireline & Wireless NPRM Comments* at 25, 49; *Crown Castle Wireline NPRM Comments* at 14; *Lightower Wireline NPRM Comments* at 6; *Lumos Wireline NPRM Comments* at 12-13; *ACA Wireline & Wireless NPRM Reply* at ii; *Charter Feb. 5, 2018 Wireline Ex Parte Letter Attach.* at 3; *ACA Sep. 14, 2017 Wireline Ex Parte Letter* at 7. Oregon and New York currently require detailed make-ready estimates. *See Or. Admin. R. 860-028-0100*; *N.Y. Pub. Serv. Comm'n, Proceeding on Motion of the Commission Concerning Certain Pole Attachment Issues*, Order Adopting Policy Statement on Pole Attachments, Case 03-M0432, Appendix A (Aug. 6, 2004), available at <http://www.utilityregulation.com/content/orders/04NY0432E.pdf>; *see also ACA Wireline & Wireless NPRM Comments* at 49.

avoid.”³²⁹ Numerous commenters describe experiencing “‘bill shock,’ where a utility’s make-ready invoices far exceed[] the utility’s initial estimates[,]”³³⁰ and add that the lack of transparency of make-ready costs inhibits their ability to plan network expansions.³³¹ Given the frustration reflected in the record, we find that requiring detailed make-ready cost estimates and post-make-ready invoices will improve transparency in the make-ready process and better enable providers to plan broadband buildouts.³³²

103. We further clarify that our current rules require the utility to provide estimates for all make-ready work to be completed, regardless of what party completes the work.³³³ Although some utilities claim they are poorly positioned to provide estimates for make-ready work other than their own,³³⁴ we continue to find that utilities are best positioned to compile and submit these make-ready estimates and final invoices to new attachers due to their pre-existing and ongoing relationships with the existing attachers on their poles.³³⁵

104. We require the utility to detail all make-ready cost estimates and final invoices on a per-pole basis.³³⁶ While we recognize that requiring utilities to provide costs on a per-pole basis may be more burdensome than providing a less granular estimate,³³⁷ we find that a pole-by-pole estimate is necessary to enable new attachers to understand the costs of deployment and to make informed decisions about altering their deployment plans if make-ready costs on specific poles could prove to be cost-

³²⁹ Crown Castle Wireline NPRM Comments at 15; *see also* ACA Wireline & Wireless NPRM Comments at 48 (“Utilities . . . have exploited these gaps by providing attachers with vague and un-itemized pre-job estimates and post-job bills for make-ready work and attempting to charge attachers for fixing existing safety code violations and subsidizing the utilities’ own deferred maintenance.”).

³³⁰ ACA Mar. 26, 2018 Wireline *Ex Parte* Letter at 3.

³³¹ *See* Google Fiber Wireline NPRM Comments at 11 (noting that improved cost certainty across markets can allow attachers to plan network expansions with greater confidence); Lumos Wireline NPRM Comments at 14 (noting that requiring utilities to make their charges more transparent “would expedite the performance of necessary make-ready while maintaining cost certainty and ensuring non-discriminatory treatment of attachers”); ACA Wireline & Wireless NPRM Comments at 25-26 (stating that “post-make-ready financial surprises can damage the viability of projects” and providing examples of significant back-billing); NCTA Wireline & Wireless NPRM Comments at 11-12 (recognizing that cost transparency allows attachers to plan upgrades and extensions more effectively).

³³² *See* Lumos Wireline NPRM Reply at 13.

³³³ Our current rule requires that “a utility shall present to a cable operator or telecommunications carrier an estimate of charges to perform all necessary make-ready work” 47 CFR § 1.1412(d).

³³⁴ *See* Electric Utilities Wireline NPRM Comments at 15 (contending that utilities are ill-equipped both to estimate the make-ready costs of a third-party attacher on the utilities’ poles and to enforce any requirement that these third parties provide make-ready cost estimates to new attachers); Midwest Electric Utilities Wireline NPRM Reply at 17 (arguing that a utility should be required to provide “an estimate of the costs to perform make-ready work only on the utilities own facilities” and “not . . . an estimate of the costs to perform make-ready work on other attachers’ facilities”); *see also* CenterPoint Energy et al. May 25, 2018 *Ex Parte* Letter Attach. at 4 (“[M]ake-ready transactions [should] be made directly between the new attacher, and the contractor who ultimately performs the make-ready prescribed by the pole owner.”).

³³⁵ We also remind utilities of the 14-day deadline in our rules to provide the estimate of make-ready charges to the new attacher. *See* 47 CFR § 1.1412(d).

³³⁶ *See* ACA Wireline & Wireless NPRM Comments at 24-25, 49-50; NCTA Wireline & Wireless NPRM Comments at 11-12; Crown Castle Wireline NPRM Reply at 8.

³³⁷ *See* CCU Wireline NPRM Reply at 19 (arguing that detailing charges on a per-pole basis would be overly time consuming and cost prohibitive); Electric Utilities Wireline NPRM Reply at 26.

prohibitive.³³⁸ Requiring per-pole estimates and invoices will also enable new attachers to better determine whether invoices are accurate, saving new attachers the unnecessary time and cost they currently devote to such a task.³³⁹

105. As part of the detailed estimate, the utility must disclose to the new attacher its projected material, labor, and other related costs that form the basis of its estimate, including specifications of what costs, if any, the utility is passing through to the new attacher from the utility's use of a third-party contractor. We agree with ACA that this requirement will allow new attachers to understand the basis for each individual make-ready charge and prevent disputes over "unreasonable or simply unnecessary make-ready charges in aggregate cost estimates."³⁴⁰ If in compiling the estimate (or invoice) the utility determines that make-ready charges will (or did) not vary from pole-to-pole, the utility may aggregate individual charges (i.e., present one charge for labor, one charge for projected materials, etc.) rather than present a pole-by-pole estimate.

106. We decline to adopt the request of some commenters that we require utilities to provide new attachers with a publicly-available schedule of common make-ready charges. These commenters argue that easy access to make-ready rates could promote fair and predictable rates, a more efficient process, and a level playing field between attachers and utilities during attachment rate negotiations, as well as averting disputes over rates and the process used.³⁴¹ The record indicates that make-ready costs vary considerably, however, based on a wide variety of factors, including geographic area, soil, vegetation conditions, the accessibility of the pole, and the availability of contractors in the area.³⁴² Contractors charge varying rates for their work based on the "labor requirements, equipment used[,] and travel time to the jobsite" of the particular make-ready job.³⁴³ Other issues, such as the complexity of the job, rights-of-way, age of the pole, what is on the pole, and size of the pole, also contribute to the determination of a make-ready rate.³⁴⁴ The variety and complexity of these variables suggest that requiring utilities nationwide to produce a schedule of make-ready rates would be unreasonably burdensome unless the schedule were at such a level of generality that it would be of little use to attachers in predicting the actual costs of their planned pole attachments.³⁴⁵ At the same time, we encourage utilities to voluntarily make publicly available schedules of make-ready charges in circumstances in

³³⁸ See ACA Wireline & Wireless NPRM Comments at 24-25, 49-50; NCTA Wireline & Wireless NPRM Comments at 11-12; Crown Castle Wireline NPRM Reply at 8.

³³⁹ See ACA Wireline & Wireless NPRM Comments at 24-25, 49-50; NCTA Wireline & Wireless NPRM Comments at 11-12; Crown Castle Wireline NPRM Reply at 8.

³⁴⁰ See ACA Wireline & Wireless NPRM Comments at 49-50.

³⁴¹ See, e.g., ACA Wireline & Wireless NPRM Comments at 47-48; AT&T Wireline NPRM Comments at 24; Comcast Wireline & Wireless NPRM Comments at 28; Lumos Wireline NPRM Comments at 14; NCTA Wireline & Wireless NPRM Comments at 12; Comcast Wireline & Wireless NPRM Reply at 11; Crown Castle Wireline NPRM Reply at 7-8.

³⁴² See, e.g., EEI Wireline NPRM Comments at 38; Frontier Wireline NPRM Comments at 21-22; USTelecom Wireline NPRM Comments at 18-19; UTC Wireline NPRM Comments at 15.

³⁴³ UTC Wireline NPRM Comments at 15; see also Electric Utilities Wireline NPRM Comments at 40 (quoting *2011 Pole Attachment Order*, 26 FCC Rcd at 5279, para. 86) ("Actual charges vary depending on numerous unique factors, including material and labor costs which fluctuate. As such, the price of make-ready does not lend itself well to fixed schedule of charges.").

³⁴⁴ See CCU Wireline NPRM Comments at 30-31.

³⁴⁵ See EEI Wireline NPRM Comments at 40.

which it is feasible to do so, such as where the utility operates in an area of the country with homogenous terrain.³⁴⁶

3. Treatment of Overlapping

107. We codify our longstanding policy that utilities may not require an attacher to obtain its approval for overlapping.³⁴⁷ In addition, we adopt a rule that allows utilities to establish reasonable advance notice requirements. As the Commission has previously found, the ability to overlap often “marks the difference between being able to serve a customer’s broadband needs within weeks versus six or more months when delivery of service is dependent on a new attachment.”³⁴⁸ In codifying the existing overlapping precedent while adopting a pre-notification option, we seek to promote faster, less expensive broadband deployment while addressing important safety concerns relating to overlapping.³⁴⁹ We find that our codification will hasten deployment by resolving disagreements over whether utilities may impose procedural requirements on overlapping by existing attachers.³⁵⁰

108. While we make clear that pre-approval for overlapping is not permissible, we adopt a rule that utilities may, but are not required to, establish reasonable pre-notification requirements including a requirement that attachers provide 15 days (or fewer) advance notice of overlapping work.³⁵¹

³⁴⁶ EEI asserts that utilities that currently provide a schedule of common make-ready charges typically operate in areas of the country with homogenous terrain. EEI Wireline NPRM Comments at 40.

³⁴⁷ *Amendment of Commission’s Rules and Policies Governing Pole Attachments*, CS Docket Nos. 97-98 and 97-151, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12141, para. 75 (2001) (2001 Pole Attachment Order) (“We affirm our policy that neither the host attaching entity nor the third-party overlasher must obtain additional approval from or consent of the utility for overlapping other than the approval obtained for the host attachment.”), *aff’d Southern Co. v. FCC*, 313 F.3d 574, 582 (D.C. Cir. 2002).

³⁴⁸ Crown Castle Wireline FNPRM Comments at 2; *see also* ACA Wireline and Wireless NPRM Comments at 11.

³⁴⁹ *See 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, Report and Order 13 FCC Rcd 6777, 6807, para. 62 (1998); *see also* CTIA Wireline FNPRM Reply, WC Docket No. 17-84, at 3-4 (Feb. 16, 2008); FBA Wireline FNPRM Reply, WC Docket No. 17-84, at 1 (Feb. 16, 2018) (FBA Wireline FNPRM Reply).

³⁵⁰ *See* ACA Wireline and Wireless NPRM Comments at 10-11; Crown Castle Wireline FNPRM Comments at 4-5; Verizon Wireline FNPRM Comments, WC Docket No. 17-84, at 19 (Jan. 17, 2018) (Verizon Wireless FNPRM Comments).

³⁵¹ *See* AT&T Wireline FNPRM Comments, WC Docket No. 17-84, at 15 (Jan. 17, 2018) (AT&T Wireline FNPRM Comments); CPS Energy Wireline FNPRM Comments, WC Docket No. 17-84, at 2 (Jan. 17, 2018) (CPS Energy Wireline FNPRM Comments); Edison Electric Institute Wireline FNPRM Comments, WC Docket No. 17-84, at 12 (Jan. 17, 2018) (EEI Wireline FNPRM Comments); Ameren et al. Wireline FNPRM Comments, WC Docket No. 17-84, at 25 (Electric Utilities Wireline FNPRM Comments); NTCA Wireline FNPRM Comments, WC Docket No. 17-84, at 5 (Jan. 17, 2018) (NTCA Wireline FNPRM Comments); CenterPoint Energy et al. Wireline FNPRM Comments, WC Docket No. 17-84, at 6 (Jan. 17, 2018) (POWER Coalition Wireline FNPRM Comments); Utility Coalition on Overlapping Wireline FNPRM Comments, WC Docket No. 17-84, at 10 (Jan. 17, 2018) (Utility Coalition on Overlapping Wireline FNPRM Comments); Utilities Technology Council Wireline FNPRM Comments, WC Docket No. 17-84, at 4 (Jan. 17, 2018) (UTC Wireline FNPRM Comments); Xcel Energy Wireline FNPRM Comments, WC Docket No. 17-84, at 1-2 (Jan. 17, 2018) (Xcel Energy Wireline FNPRM Comments); ACA Wireline FNPRM Reply, WC Docket No. 17-84, at 10 (Feb. 16, 2018) (ACA Wireline FNPRM Reply); CPS Energy Wireline FNPRM Reply, WC Docket No. 17-84, at 3 (Feb. 16, 2018) (CPS Energy Wireline FNPRM Reply); Ameren et al. Wireline FNPRM Reply, WC Docket No. 17-84, at ii-iii, 4 (Feb. 16, 2018) (Electric Utilities Wireline FNPRM Reply); National Association of State Utility Advocates Wireline FNPRM Reply, WC Docket No. 17-84, at 2-3 (Feb. 16, 2018) (NASUCA Wireline FNPRM Reply); National Rural Electric Cooperative Association Wireline FNPRM Reply, WC Docket No. 17-84, at 2 (Feb. 18, 2018) (NRECA Wireline FNPRM Reply); CenterPoint Energy et al. Wireline FNPRM Reply, WC Docket No. 17-84, at 8 (Feb. 16, 2018) (POWER Coalition Wireline FNPRM Reply); Utilities Technology Council Wireline FNPRM Reply, WC Docket No. 17-84, at 1-2

Commenters express the concern that poles may not always be able to reliably support additional weight due to age and environmental factors, such as ice and wind, and as a result, overloading even one additional cable on a pole may cause an overloading.³⁵² Such pole overloading could “hamper the installation or maintenance of electric facilities, or other on-going wireline or wireless facility installations.”³⁵³ We find these concerns to be valid and supported by the record.³⁵⁴ Thus, we agree with commenters that allowing utilities to require advance notice will promote safety and reliability and allow the utility to protect its interests without imposing unnecessary burdens on attachers.³⁵⁵ If after receiving this advance notice, a utility determines, through its own engineering analysis, that there is insufficient capacity on the pole for a noticed overlash, the noticed overlash would be inconsistent with generally applicable engineering practices, or the noticed overlash would compromise the pole’s safety or reliability,³⁵⁶ the utility must provide specific documentation demonstrating that the overlash creates a

(Feb. 16, 2018) (UTC Wireline FNPRM Reply). Further, a handful of states also require advance notice of overloading; *see also* UTC Wireline FNPRM Comments at 5 (noting that Arkansas, Ohio, Louisiana, Iowa and Utah provide “for advance notice of overloading.”); Electric Utilities Wireline FNPRM Comments at 12-18 (stating that the public utility commissions of Arkansas, Ohio, Washington, Louisiana, Iowa, Utah, Connecticut have ratified or adopted an advance notice requirement to some degree); Utility Coalition on Overloading Wireline FNPRM Comments at ii, 23-24 (noting that states such as Louisiana, California, Ohio and Michigan recognize the impact of overloading “must be analyzed in advance of the overloading”); ACA Wireline FNPRM Reply at 11, n. 47 (“Washington and Louisiana require 15 days’ notice, while Utah requires 10 days’ notice for most overloading projects and Iowa requires 7 days’ notice”).

³⁵² *See, e.g.*, AT&T Wireline FNPRM Comments at 15; EEI Wireline FNPRM Comments at 5; Electric Utilities Wireline FNPRM Comments at 18-19; UTC Wireline FNPRM Comments at 3; CCU Wireline FNPRM Reply at 30; Utility Coalition on Overloading Wireline FNPRM Reply, WC Docket No. 17-84, at 4, 6-7 (Feb. 16, 2018); Letter from Robin F. Bromberg, Counsel, Electric Utilities, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2-3 (filed Nov. 13, 2017) (Electric Utilities Nov. 13, 2017 Wireline *Ex Parte* Letter); CenterPoint Energy/FPL Feb. 13, 2018 Wireline *Ex Parte* Letter at 2.

³⁵³ CPS Energy Wireline FNPRM Comments at 8.

³⁵⁴ For instance, the Coalition of Concerned Utilities argues that overloading may cause the pole line “to sag to such an extent that it violates required vertical safety clearance requirements over streets and highways.” CCU Wireline FNPRM Reply at 30. Edison Electric suggests that overloading may cause pole failure, interrupt electrical service and endanger the public. EEI Wireline FNPRM Comments at 5. Similarly, the Electric Utilities contend that the combination of overloading and environmental factors, such as wind and ice, could cause pole line overload and that a utility-performed engineering analysis may prevent such an overload. Electric Utilities Wireline FNPRM Comments at 18-19.

³⁵⁵ *See* AT&T Wireline FNPRM Comments at 15; CPS Energy Wireline FNPRM Comments at 2; NTCA Wireline FNPRM Comments at 5; POWER Coalition Wireline FNPRM Comments at 6; Utility Coalition on Overloading Wireline FNPRM Comments at 10; UTC Wireline FNPRM Comments at 4; Xcel Energy Wireline FNPRM Comments at 1-2; ACA Wireline FNPRM Reply at 10-11; CPS Energy Wireline FNPRM Reply at 3-4; Electric Utilities Wireline FNPRM Reply at ii-iii, 4; NASUCA Wireline FNPRM Reply at 2-3; NRECA Wireline FNPRM Reply at 2; POWER Coalition Wireline FNPRM Reply at 8; UTC Wireline FNPRM Reply at 1-2. The record indicates that several states already require advance notice of overloading. *See* UTC Wireline FNPRM Comments at 5; Electric Utilities Wireline FNPRM Comments at 12-18; Utility Coalition on Overloading Wireline FNPRM Comments at ii, 23-24; ACA Wireline FNPRM Reply at 11, n. 47. This 15-day notice period is consistent with the OTMR notice period that we adopt for simple make-ready work in the communications space. *See supra* section III.A.1.c.(v).

³⁵⁶ 47 U.S.C. § 224(f)(2).

capacity, safety, reliability, or engineering issue within the 15 day advance notice period and the overlasher must address any identified issues before continuing with the overlash.³⁵⁷

109. We find that an approach to overlashing that allows for pre-notification without requiring pre-approval is superior to more extreme solutions advocated by some commenters. We are unpersuaded, for example, by arguments that utility pre-approval for overlashing is necessary to ensure safety.³⁵⁸ Pre-approval is not currently required, and the record does not demonstrate that significant safety or reliability issues have arisen from the application of the current policy. Rather, the record reflects that an advance notice requirement has been sufficient to address safety and reliability concerns, as it provides utilities with the opportunity to conduct any engineering studies or inspections either prior to the overlash being completed or after completion.³⁵⁹ For instance, after an Edison Electric Institute member received advance notice of overlashing on 5,186 poles, its inspection found that 716 of those poles “‘had preexisting violations for failure to meet NESC requirements for clearance between communications attachments and power facilities.’”³⁶⁰ Similarly, in 2016, Oncor Electric Delivery in Texas received advance notice of overlashing and discovered 13.8% of the poles had existing clearance violations between existing attachments and power facilities.³⁶¹ Further requiring that attachers receive prior approval for overlashing would unnecessarily increase costs for attachers and delay deployment.³⁶²

110. On the other hand, we also reject commenters’ arguments for notice only after overlashing (i.e., “attach-and-notify”).³⁶³ While attach-and-notify advocates assert that advance notice is time-consuming, cumbersome, and inefficient,³⁶⁴ we find the burden of advance notice minimal compared to the importance of ensuring that any new overlashed facilities will not “‘compromise the safety or integrity of existing electric distribution and communications infrastructure.’”³⁶⁵ Providing the utility with

³⁵⁷ To the extent a utility can document that an overlash would require modifications to the pole or replacement of the pole, the overlasher will be held responsible for the costs associated with ensuring that the pole can safely accommodate the overlash. *See Southern Co. v. FCC*, 313 F.3d 574, 582 (D.C. Cir. 2002).

³⁵⁸ *See, e.g.*, CCU Wireline NPRM Reply at 29-30; EEI Wireline FNPRM Comments at 13.

³⁵⁹ *See, e.g.*, UTC Wireline FNPRM Comments at 4; Utility Coalition on Overlashing Wireline FNPRM Comments at 10. Conversely, the record indicates that in at least one case, a utility was not able to detect and prevent a problem because it did not receive advance notice. Specifically, Ameren Missouri identifies a situation in which a truck hit improperly low-hanging wires; it asserts that the problem was exacerbated by overlashing and claims that if it had received advance notice of the overlashing, it would have been able to perform an inspection, discover the existing violation, and prevent a company from overlashing when there was a public safety threat of a low hanging wire over a public road. *See Electric Utilities Wireline FNPRM Comments at 21-22.*

³⁶⁰ EEI Wireline FNPRM Comments at 6.

³⁶¹ Electric Utilities Wireline FNPRM Comments at 21.

³⁶² *See, e.g.*, ACA Wireline FNPRM Comments, WC Docket No. 17-84, at 9 (Jan. 17, 2018); NCTA Wireline FNPRM Comments, WC Docket No. 17-84, at 2 (Jan. 17, 2018) (NCTA Wireline FNPRM Comments).

³⁶³ *See FBA Wireline FNPRM Reply at 1, 9; Verizon Wireline FNPRM Reply, WC Docket No. 17-84, at 16 (Feb. 16, 2018) (Verizon Wireline FNPRM Reply).*

³⁶⁴ *See, e.g.*, Comcast Wireline FNPRM Comments, WC Docket No. 17-84, at 3 (Jan. 17, 2018) (Comcast Wireline FNPRM Comments); Verizon Wireline FNPRM Comments at 19; Comcast Wireline FNPRM Reply, WC Docket No. 17-84, at 10 (Comcast Wireline FNPRM Reply); FBA Wireline FNPRM Reply at 8; NCTA Wireline FNPRM Reply at 2-3.

³⁶⁵ Xcel Energy Wireline FNPRM Comments at 4; *see also* AT&T Wireline FNPRM Comments at 15 (“[A]dvance notice to the pole owner and any host attaching entity . . . promotes safety and the integrity and reliability of the wireline network by affording an opportunity to validate that the attacher has considered the impact overlashing will have on the pole and the host cables.”); Electric Utilities Wireline FNPRM Comments at 1 (“[T]he Commission should clarify that pole owners may require advanced notice of overlashing in order to ensure that overlashing

advance notice of overlashing will allow it to better monitor and ensure the safety, integrity, and reliability of its poles both before and after the overlash is completed³⁶⁶ without overburdening overlashers or requiring multiple trips to the pole.³⁶⁷

111. We also take this opportunity to clarify several points related to overlashing. First, if the utility elects to establish an advance notice requirement, the utility must provide advanced written notice to attachers or include the requirement in its pole attachment agreements. We find that providing this guidance will give clarity to all parties as to when the utility must receive advance notice, thereby reducing the likelihood of disputes. Utilities may require pre-notification of up to 15 days, the same notice period that we adopt for OTMR attachments.³⁶⁸ We also emphasize that utilities may not use advanced notice requirements to impose quasi-application or quasi-pre-approval requirements, such as requiring engineering studies.³⁶⁹ Finally, just as new attachers electing OTMR are responsible for any corrective measures needed because of their work,³⁷⁰ in the event that damage to the pole or other existing attachment results from overlashing, the overlasher will be responsible for any necessary repairs arising from such overlashing.³⁷¹ Poorly performed overlashing can create safety and reliability risks,³⁷² and the Commission has consistently found that overlashers must ensure that they are complying with reasonable safety, reliability, and engineering practices.³⁷³

B. New Attachers are Not Responsible for Preexisting Violations

112. Consistent with the BDAC's recommendation, we clarify that new attachers are not responsible for the costs associated with bringing poles or third-party equipment into compliance with current safety and pole owner construction standards to the extent such poles or third-party equipment

complies with applicable standards for safety, reliability, and engineering.”); AT&T Wireline FNPRM Reply, WC Docket No. 17-84, at 1 (Feb. 16, 2018) (“Prior notice of overlashing promotes safety and the integrity and reliability of poles.”).

³⁶⁶ Xcel Energy Wireline FNPRM Comments at 6; *see also* Electric Utilities Wireline FNPRM Comments at ii (“Without advance notice of overlashing, electric utilities cannot evaluate the impact of the proposed overlashing (loading/clearance) or determine whether there are existing violations (loading/clearance) that must be corrected prior to overlashing.”); UTC Wireline FNPRM Comments at 4 (“[U]tilities need *advance* notice of overlashing in order to conduct an engineering study and inspect the poles to assess additional loading and ensure there are no existing violations of the electric utilities’ standards or applicable codes on the pole that must be remedied prior to the proposed overlashing.”); Utility Coalition on Overlashing Wireline FNPRM Comments at 10 (“[A]dequate advance notice containing adequate information about the overlashing is necessary to enable utilities to analyze the capacity, safety, reliability and generally applicable engineering concerns of the utility pole owner.”).

³⁶⁷ *See, e.g.*, Xcel Energy Wireline FNPRM Comments at 6; CPS Energy Wireline FNPRM Comments at 6-7.

³⁶⁸ *See supra* section III.A.1.c.(v).

³⁶⁹ *See* ACA Wireline FNPRM Reply at 12.

³⁷⁰ *See supra* section III.A.1.c.(vi).

³⁷¹ *See* Crown Castle Wireline FNPRM Reply, WC Docket No. 17-84, at 10 (Feb. 16, 2018).

³⁷² *See* NRECA Wireline FNPRM Reply at 1-2 (describing “poorly constructed overlashing, overlashing that results in excessive wind and ice loads, overlashing with insufficient guying to maintain pole integrity, [and] vehicles snagging overlashed wires that hang too low to the ground”); AT&T Wireline FNPRM Reply at 3-4 (“AT&T has experienced a number of incidences where sagging cables from overlashing without proper engineering caused trucks to unknowingly snag cables, felling poles on roads and sidewalks, endangering the public from pole impact and energized electric lines, and creating avoidable service outages.”).

³⁷³ *See 2001 Pole Attachment Order*, 16 FCC Rcd at 12141, para. 73. We reach this conclusion under our authority pursuant to 47 U.S.C. § 224(b)(1).

were out of compliance prior to the new attachment.³⁷⁴ Although utilities have sometimes held new attachers responsible for the costs of correcting preexisting violations,³⁷⁵ this practice is inconsistent with our long-standing principle that a new attacher is responsible only for actual costs incurred to accommodate its attachment.³⁷⁶ The new attachment may precipitate correction of the preexisting violation, but it is the violation itself that causes the costs, not the new attacher. Holding the new attacher liable for preexisting violations unfairly penalizes the new attacher for problems it did not cause, thereby deterring deployment, and provides incentives for attachers to complete make-ready work irresponsibly and count on later attachers to fix the problem.³⁷⁷

113. We also clarify that utilities may not deny new attachers access to the pole based on safety concerns arising from a pre-existing violation, as Lightower alleges sometimes occurs.³⁷⁸ Simply denying new attachers access prevents broadband deployment and does nothing to correct the safety issue. We also clarify that a utility cannot delay completion of make-ready while the utility attempts to identify or collect from the party who should pay for correction of the preexisting violation.

C. Addressing Outdated Rate Disparities

114. In the interest of promoting infrastructure deployment, the Commission adopted a policy in 2011 that similarly situated attachers should pay similar pole attachment rates for comparable access.³⁷⁹ Incumbent LECs allege, however, that electric “utilities continue to charge pole attachment rates significantly higher” than the rates charged to similarly situated telecommunications attachers,³⁸⁰ and that these higher rates inhibit broadband deployment.³⁸¹ To address this problem, we revise our rules to

³⁷⁴ BDAC January 2018 Recommendations at 24; *see also* Lumos Wireline NPRM Comments at 15; Electric Utilities Wireline NPRM Comments at 44; CCU Wireline NPRM Comments at 19-20; Lightower Wireline NPRM Comments at 12; ACA Wireline NPRM Reply Comments at 28-31.

³⁷⁵ *See, e.g.*, ACA Wireline NPRM Comments at 22, 48-49; Lumos Wireline NPRM Comments at 15.

³⁷⁶ *See, e.g., Knology, Inc. v. Georgia Power Co.*, Memorandum Opinion and Order, 18 FCC Rcd 24615, 24625, para. 26 (2003); *Kansas City Cable Partners d/b/a Time Warner Cable of Kansas City v. Kansas City Power & Light Co.*, File Nos. PA 99-001, PA 99-002, Consolidated Order, 14 FCC Rcd 11599, 11606-07, para. 19 (CSB 1999).

³⁷⁷ *See* ExteNet Wireline NPRM Comments at 56; Lightower Wireline NPRM Comments at 12; Lumos Wireline NPRM Comments at 15; ACA Wireline NPRM Reply at 28-31. We therefore reject CPS Energy’s approach in which “the applicant is required to remedy existing technical violations of third-party attachments at its expense as part of the one-touch make-ready process.” CPS Energy Wireline NPRM Reply at 10.

³⁷⁸ Lightower Wireline NPRM Comments at 12.

³⁷⁹ *See 2011 Pole Attachment Order*, 26 FCC Rcd at 5328, 5333-5337, paras. 203, 214-219 (establishing process by which incumbent LECs can show they are similarly situated to telecommunications attachers in order to receive comparable rates to those attachers).

³⁸⁰ Verizon Wireline NPRM Comments at 11; *see also* AT&T Wireline NPRM Comments at 23 (describing the “higher attachment rates paid by AT&T’s ILECs to electric utilities relative to competitors that benefit from the telecommunications rate”); Frontier Wireline NPRM Comments at 4 (“ILEC attachers currently pay disproportionately higher rates compared to other broadband attachers.”); USTelecom Wireline NPRM Comments at 7 (“ILEC attachers do not currently benefit from . . . rate parity.”).

³⁸¹ *See* USTelecom Wireline NPRM Comments at 7 (“The lack of regulatory parity between ILECs and their cable and CLEC counterparts in the provision of broadband services complicates investment decisions for ILECs and has undoubtedly inhibited broadband deployment in the United States.”); *see also* Letter from Kevin G. Rupy, Vice President, Law & Policy, USTelecom, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2-3 (filed June 6, 2018) (USTelecom June 6, 2018 Wireline *Ex Parte* Letter) (arguing that “rationalizing antiquated monopoly-era cost structures for pole inputs is necessary for efficient investment to bring more and better broadband infrastructure to a larger share of Americans, particularly in rural areas.”).

establish a presumption that, for newly-negotiated pole attachment agreements between incumbent LECs and utilities, an incumbent LEC will receive comparable pole attachment rates, terms, and conditions as a similarly-situated telecommunications carrier or a cable television system providing telecommunications services (telecommunications attachers).³⁸² The utility can rebut the presumption with clear and convincing evidence that the incumbent LEC receives benefits under its pole attachment agreement with the utility that materially advantage the incumbent LEC over other telecommunications attachers.

115. As the Commission has recognized, historically, incumbent LECs owned approximately the same number of poles as electric utilities and were able to ensure just and reasonable rates, terms, and conditions for their attachments by negotiating long-term joint use agreements with utilities.³⁸³ These joint use agreements provide benefits to the incumbent LECs that are not typically found in pole attachment agreements between utilities and other telecommunications attachers, such as lower make-ready costs, the right to attach without advance utility approval, and use of the rights-of-way obtained by the utility, among other benefits.³⁸⁴ By 2011, however, incumbent LECs owned fewer poles than utilities, and the Commission found that incumbent LECs “may not be in equivalent bargaining position with electric utilities in pole attachment negotiations in some cases.”³⁸⁵ In 2011, the Commission determined that it had the authority “to ensure that incumbent LECs’ attachments to other utilities’ poles are pursuant to rates, terms and conditions that are just and reasonable,”³⁸⁶ and placed the burden on incumbent LECs to rebut the presumption that they are not similarly situated to an existing telecommunications attacher in order to obtain access on rates, terms, and conditions that are comparable to the existing telecommunications attacher.³⁸⁷

116. The record clearly demonstrates that incumbent LEC pole ownership continues to decline.³⁸⁸ Incumbent LECs argue that a reversal of the current presumption is warranted because incumbent LECs’ bargaining power vis-à-vis utilities has eroded since 2011 as their percentage of pole ownership relative to utilities has dropped, thus resulting in increased attachment rates relative to their fellow telecommunications attachers.³⁸⁹ To bolster this claim, USTelecom provides the results of a recent

³⁸² See USTelecom Wireline NPRM Comments at 9; Verizon Wireline NPRM Comments at 10.

³⁸³ See *2011 Pole Attachment Order*, 26 FCC Rcd at 5244, para. 8. As the Commission explained at the time, “joint use agreements are structured as cost-sharing arrangements, with each party agreeing to own a certain percentage of the joint use poles. This percentage typically is 40–50% for the incumbent LEC and 50–60% for the electric utility, and generally reflects the relative ratio of pole ownership that existed at the time these agreements originally were negotiated. No money changes hands under these agreements if each party owns its specified percentage of joint use poles. . . . When pole ownership deviates from the agreement, the party that owns less than the specified percentage typically pays the other party an amount based on a per pole rate.” *Id.* at 5334-35, n.651 (internal citations omitted).

³⁸⁴ See EEI Wireline NPRM Reply at 14; UTC Wireline NPRM Reply at 27-28.

³⁸⁵ *2011 Pole Attachment Order*, 26 FCC Rcd at 5329, para. 206.

³⁸⁶ *2011 Pole Attachment Order*, 26 FCC Rcd at 5330, para. 208.

³⁸⁷ See 47 CFR § 1.1414; see also *2011 Pole Attachment Order*, 26 FCC Rcd at 5336, para. 217 (stating that, “to the extent that the incumbent LEC demonstrates that it is obtaining pole attachments on terms and conditions that leave them comparably situated to telecommunications carriers or cable operators, we believe it will be appropriate to use the rate of the comparable attacher as [a] ‘just and reasonable’ rate”).

³⁸⁸ See AT&T Wireline NPRM Comments at 23; Frontier Wireline NPRM Comments at 6; Letter from Kevin G. Rupy, Vice President, Law & Policy, USTelecom, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at Attach. at 7 (USTelecom Nov. 21, 2017 Wireline *Ex Parte* Letter) (“In the 46 states surveyed, USTelecom’s data show that for every ILEC pole to which IOUs attach, ILECs attach to three IOU poles. Specifically, ILECs attach to approximately 13.9 million IOU poles, whereas IOUs attach to only 4.6 million ILEC poles.”).

³⁸⁹ See AT&T Wireline NPRM Comments at 23; Frontier Wireline NPRM Comments at 4-7; USTelecom Wireline NPRM Comments at 3-4; Verizon Wireline NPRM Comments at 11. According to a recent USTelecom survey, its

member survey showing that its incumbent LEC members “pay an average of \$26.12 [per year] to [investor-owned utilities] today in Commission-regulated states (an *increase* from \$26.00 in 2008), compared to cable and CLEC provider payments to ILECs, which average \$3.00 and \$3.75 [per year], respectively (a *decrease* from \$3.26 and \$4.45, respectively, in 2008).”³⁹⁰

117. We are convinced by the record evidence showing that, since 2008, incumbent LEC pole ownership has declined and incumbent LEC pole attachment rates have increased (while pole attachment rates for cable and telecommunications attachers have decreased).³⁹¹ We therefore conclude that incumbent LEC bargaining power vis-à-vis utilities has continued to decline. Therefore, based on these changed circumstances, we agree with both incumbent LEC and electric utility commenters’ arguments that, for new pole attachment agreements between utilities and incumbent LECs,³⁹² we should presume that incumbent LECs are similarly situated to other telecommunications attachers and entitled to pole attachment rates, terms, and conditions that are comparable to the telecommunications attachers.³⁹³ We conclude that, for determining a comparable pole attachment rate for new pole attachment agreements, the presumption is that the incumbent LEC should be charged no higher than the pole attachment rate for telecommunications attachers calculated in accordance with section 1.1407(e)(2) of the Commission’s rules.³⁹⁴ In making this determination, we agree with the Electric Utilities that presumptively applying

members in 2017 paid investor owned utilities nearly nine times what incumbent LECs charge cable provider attachers on incumbent LEC-owned poles, and almost seven times the rates incumbent LECs charge competitive LEC attachers on incumbent LEC-owned poles. See USTelecom Nov. 21, 2017 Wireline *Ex Parte* Letter at Attach. at 3. According to USTelecom, this disparity has risen from 2008 when its members paid eight times more than cable providers and six times more than competitive LECs. See *id.* at Attach. at 4.

³⁹⁰ USTelecom Nov. 21, 2017 Wireline *Ex Parte* Letter at Attach. at i (italics in original).

³⁹¹ See AT&T Wireline NPRM Comments at 23; Frontier Wireline NPRM Comments at 4-7; USTelecom Wireline NPRM Comments at 3-4; Verizon Wireline NPRM Comments at 11; USTelecom Nov. 21, 2017 Wireline *Ex Parte* Letter at Attach. at 2-11.

³⁹² A new pole attachment agreement is one entered into after the effective date of this Order. Consistent with the Commission’s conclusion in 2011, the pre-2011 pole attachment rate for telecommunications carriers will continue to serve as a reference point in complaint proceedings regarding agreements that materially advantage an incumbent LEC and which are entered into after that Order and before the effective date of the Order we release today. See *2011 Pole Attachment Order*, 26 FCC Rcd at 5337, para. 218. This extends to circumstances where an agreement has been terminated and the parties continue to operate under an “evergreen” clause. See *Verizon Florida LLC v. Florida Power and Light Company*, Pole Attachment Complaint, Docket No. 15-73, File No. EB-15-MD-002, at 6 (filed Mar. 13, 2015) (describing how the parties had terminated a joint use agreement but continued to operate under rates established by the joint use agreement for existing attachments pursuant to the agreement’s evergreen clause); cf. Electric Utilities Apr. 24, 2018 Wireline *Ex Parte* Letter at 5-6 (“[I]n almost all joint use agreements, investor-owned electric utilities have no right to demand removal of attachments upon termination.”) (emphasis omitted).

³⁹³ See USTelecom Wireline NPRM Comments at 6-8; AT&T Wireline NPRM Comments at 23; Frontier Wireline NPRM Comments at 5-7; Verizon Wireline NPRM Comments at 11-12; see also Electric Utilities Wireline NPRM Comments at 24 (“The Electric Utilities do not oppose a rule that creates a rebuttable presumption that ILEC attachments made pursuant to pole license agreements—thus lacking the advantages typically associated with historical joint use agreements—are subject to the telecom rate.”). As the Electric Utilities comment, under new pole license agreements, “ILECs and the Electric Utilities would be permitted to attach to each other’s new poles as licensees on terms similar to those the Electric Utilities offer to other wireline licensees. This would mean, by way of example, that ILECs would be required to follow the Electric Utilities’ permitting processes, would not be guaranteed the lowest space on the pole, would pay annual rental on a per attachment (and not a per pole) basis, would be required to pay full make-ready costs, would be required to meet insurance, security, and indemnification requirements, and would not be afforded the historical deference afforded to ILECs as co-custodians of the joint use network.” Electric Utilities Wireline NPRM Comments at 24-25.

³⁹⁴ See 47 CFR § 1.1407(e)(2).

comparable attachment rates, terms, and conditions to incumbent LECs is a fair result “where ILECs are truly attaching on terms comparable to other wireline licensees.”³⁹⁵ We find that reversing our presumption in the case of new agreements will promote broadband deployment; we agree with USTelecom that greater rate parity between incumbent LECs and their telecommunications competitors “can energize and further accelerate broadband deployment.”³⁹⁶ However, we recognize there may be some cases in which incumbent LECs that enter into new pole attachment agreements with utilities may continue to possess greater bargaining power than other attachers, for example in geographic areas where the incumbent LEC continues to own a large number of poles. Therefore, we establish a presumption that may be rebutted, rather than a more rigid rule.

118. We decline to extend this rebuttable presumption to existing joint use agreements between utilities and incumbent LECs. We agree with electric utility commenters that reversing the current presumption would disrupt joint use relationships between them and incumbent LECs, and it is not our intent to interfere with the arm’s-length benefits previously bargained for by parties to existing joint use agreements.³⁹⁷ Rather than treating incumbent LECs similarly to other parties, the record indicates that existing joint use agreements give incumbent LECs benefits beyond those granted to other parties and typically were negotiated long ago at a time of more equal bargaining power between the parties.³⁹⁸

119. Where the presumption that incumbent LECs are similarly situated to other telecommunications attachers applies, utilities can rebut the presumption in a complaint proceeding by demonstrating that the incumbent LEC receives benefits that materially advantage the incumbent LEC over other telecommunications attachers.³⁹⁹ As the Commission has previously found, such material benefits include: “[p]aying significantly lower make-ready costs; [n]o advance approval to make attachments; [n]o post-attachment inspection costs; [r]ights-of-way often obtained by electric company; [g]uaranteed space on the pole; [p]referential location on pole; [n]o relocation and rearrangement costs; and [n]umerous additional rights such as approving and denying pole access, collecting attachment rents and input on where new poles are placed.”⁴⁰⁰ If the utility can demonstrate that the incumbent LEC

³⁹⁵ Electric Utilities Wireline NPRM Comments at 25.

³⁹⁶ USTelecom Nov. 21, 2017 Wireline *Ex Parte* Letter at Attach. at 1.

³⁹⁷ See UTC Wireline NPRM Comments at 20; Midwest Electric Utilities Wireline NPRM Reply at 32; POWER Coalition Wireline NPRM Reply at 24-25; 2011 Pole Attachment Order, 26 FCC Rcd at 5335, para. 216 & n.654; see also CCU Wireline NPRM Comments at 53; Electric Utilities Wireline NPRM Reply at 2. USTelecom argues that incumbent LECs lack the ability to terminate and renegotiate existing agreements. See USTelecom June 6, 2018 Wireline *Ex Parte* Letter at 4. Despite this argument, we decline to apply the presumption to pre-existing, freely-negotiated joint use agreements. The presumption we adopt today will offer incumbent LECs another option going forward, when current agreements expire or in cases where an incumbent LEC does terminate an agreement. Cf. Letter from Eric B. Langley, Counsel, Electric Utilities, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 7 (filed Apr. 24, 2018) (Electric Utilities Apr. 24, 2018 Wireline *Ex Parte* Letter) (“[I]n the experience of the Electric Utilities, it is almost always the ILEC terminating the joint use agreement.”) (emphasis omitted).

³⁹⁸ See CCU Wireline NPRM Comments at 41-49; Electric Utilities Wireline NPRM Reply at 3-5; Midwest Electric Utilities Wireline NPRM Reply at 34; Electric Utilities Apr. 24, 2018 Wireline *Ex Parte* Letter at 7-8; 2011 Pole Attachment Order, 26 FCC Rcd at 5334-35, para. 216 & n.654; see also UTC Wireline NPRM Comments at 20-21. Although USTelecom argues that the operational and financial benefits of joint use to incumbent LECs are limited, see USTelecom June 6, 2018 Wireline *Ex Parte* Letter at 4-7, USTelecom admits that incumbent LECs receive some benefit in the form of a distinct approach to make-ready costs. *Id.* at 5.

³⁹⁹ See 2011 Pole Attachment Order, 26 FCC Rcd at 5336-37, para. 218; see also Verizon Wireline NPRM Comments at 12.

⁴⁰⁰ 2011 Pole Attachment Order, 26 FCC Rcd at 5335, n.654 (quoting Comcast Reply, WC Docket No. 07-245, GN Docket No. 09-51, at 25 (Oct. 4, 2010)); see also CCU Wireline NPRM Comments at 45-49 (stating that “ILECs

receives significant material benefits beyond basic pole attachment or other rights given to another telecommunications attachers, then we leave it to the parties to negotiate the appropriate rate or tradeoffs to account for such additional benefits.

120. If the presumption we adopt today is rebutted, the pre-2011 *Pole Attachment Order* telecommunications carrier rate is the maximum rate that the utility and incumbent LEC may negotiate. This conclusion builds on and clarifies the Commission's determination in the 2011 *Pole Attachment Order* that the pre-2011 telecommunications carrier rate should serve "as a reference point in complaint proceedings" where a joint use agreement was found to materially advantage an incumbent LEC.⁴⁰¹ The Commission "[found] it prudent to identify a specific rate to be used as a reference point in these circumstances because it [would] enable better informed pole attachment negotiations . . . [and] reduce the number of disputes" regarding pole attachment rates.⁴⁰² We reaffirm the conclusion that reference to this rate is appropriate where incumbent LECs receive material advantages in a pole attachment agreement. And because we agree with commenters that "establishment of . . . an upper bound will provide further certainty within the pole attachment marketplace, and help to further limit pole attachment litigation,"⁴⁰³ we make this rate a hard cap.⁴⁰⁴ In so doing, we remove the potential for uncertainty caused by considering the rate merely as a "reference point."

D. Other Pole Attachment Issues

121. Below, we respond to several pole attachment related proposals raised in the record in the *Wireline Infrastructure* proceeding. We do not at this time address all outstanding issues raised in the notices or record in this proceeding, and we will take further action as warranted in this proceeding to address outstanding issues.

122. *Uniform Pole Attachment Application.* We decline to adopt rules requiring utilities to use a uniform pole application form as requested by certain commenters.⁴⁰⁵ We agree with a previous Commission decision that it is best to "leave the details of specific application criteria and processes to individual utilities,"⁴⁰⁶ and we do not find a compelling case in the record to change course, so long as the

receive a host of advantages that third party attachers like cable companies and CLECs do not enjoy," before enumerating many of those specific advantages); Electric Utilities Wireline NPRM Comments at 26-30 (stating the benefits to ILECs of joint use agreements and claiming that "it is highly unlikely that ILECs made their existing attachments on 'comparable terms' to other attachers because the ILECs made them with the immense capital cost savings and operational advantages of joint use agreements"); Midwest Electric Utilities Wireline NPRM Comments at 45-46 (asserting that "ILECs generally obtain numerous benefits under their existing joint use agreements that offset any increased rates they might pay for pole access in certain circumstances").

⁴⁰¹ 2011 *Pole Attachment Order*, 26 FCC Rcd at 5337, para. 218.

⁴⁰² *Id.* The Commission further concluded that this rate, "which historically has been used in the marketplace," accounted for "particular arrangements that provide net advantages to incumbent LECs" because it was higher than the rate available to telecommunications attachers. *Id.*

⁴⁰³ USTelecom Wireline NPRM Comments at 11; *see also* Verizon Wireline NPRM Comments at 14 ("If the pre-existing telecom rate is . . . an upper bound, it will focus the parties' negotiations by cabining the range of rates at issue.").

⁴⁰⁴ *See* USTelecom Wireline NPRM Comments at 11; POWER Coalition Wireline NPRM Reply at 25 (submitting that if the utility overcomes the presumption, then "the old telecom rate should apply" if the incumbent LEC receives joint use benefits not enjoyed by other telecommunications carriers).

⁴⁰⁵ *See, e.g.*, Charter Feb. 5, 2018 Wireline *Ex Parte* Letter at 3 ("Utilize a pole attachment application that requires applicants to submit only the information reasonably necessary for the application process."); FBA Wireline NPRM Comments at 8-9; Mobilite Wireline & Wireless NPRM Comments at 10; ACA Wireline NPRM Reply at 14-17.

⁴⁰⁶ 2011 *Pole Attachment Order*, 26 FCC Rcd at 5274, para. 73.

criteria and processes a utility uses are reasonable. We also agree with the Coalition of Concerned Utilities that implementation and use of a standard pole application would likely prove difficult because “[e]ach utility has its own operational, design, construction, geographical and state regulatory requirements that call for different pole attachment application information.”⁴⁰⁷

123. *Automated Tracking of Pole Attachment Progress.* We decline to adopt ACA’s proposal that we require utilities to adopt a web-based pole attachment ticket management system.⁴⁰⁸ Attachers and utilities are in the best position to develop systems, and we are reluctant to interfere in the market absent greater evidence of need. Rather, the market appears to be working in this regard. As ACA points out, “the great majority of utilities use NJUNS, NOTIFY, or some other management system.”⁴⁰⁹ Similarly, Alliant Energy developed and implemented its own online portal for processing and tracking pole attachment applications.⁴¹⁰

124. *Utility Construction Standards and Requirements.* We decline the requests of certain commenters to establish limits on the construction standards and requirements that utilities adopt for their poles.⁴¹¹ We agree with those utility commenters who argue that one-size-fits-all national pole construction standards (even if they were based on the NESC or similar codes) are not a good idea, and the better policy is to defer to reasonable and targeted construction standards established by states, localities, and the utilities themselves where appropriate.⁴¹²

125. At this time, we decline to adopt Crown Castle’s request that we prohibit blanket bans by utilities on the attachment of equipment in the unusable space on a pole because we have an insufficient record on which to reach a clear determination.⁴¹³ Crown Castle argues that it “has encountered a growing number of pole owners, whose territories cover many states, who have adopted blanket bans on attaching any equipment in the [unusable] space – despite the fact that this is a well-established and long-standing practice.”⁴¹⁴ Two utility commenters argue that where utilities prohibit such attachments, they do so based on legitimate safety and engineering considerations, such as fall hazards, climbing obstructions, and the difficulty of moving equipment in the common space when poles have to be replaced.⁴¹⁵ No other commenter addressed this issue. We recognize that there are likely to be circumstances in which using the lower portion of poles to install equipment associated with DAS and other small wireless facilities will be safe and efficient.⁴¹⁶ However, given the paucity of the record, we are not in a position to be certain whether we should mandate that utilities permit certain uses. We would be open to revisiting this issue in the future.

⁴⁰⁷ CCU Wireline NPRM Reply at 14; *see also* Electric Utilities Wireline NPRM Reply at 28-29 (claiming that “[d]ifferences in application forms reflect differences in electric utilities’ internal construction standards, pole attachment policies, and even the specific geography and weather conditions of the utilities’ service area”).

⁴⁰⁸ *See* ACA Wireline NPRM Reply at 17; Charter Wireline & Wireless NPRM Comments at 56; Crown Castle Wireline NPRM Reply at 9; NCTA Wireline & Wireless NPRM Reply at 22-23; UTC Wireline NPRM Reply at 7.

⁴⁰⁹ ACA Wireline NPRM Reply at 17.

⁴¹⁰ Midwest Electric Utilities Wireline NPRM Reply at 12, 29-30.

⁴¹¹ *See* Crown Castle Wireline NPRM Comments at 4-5; ExeNet Wireline & Wireless NPRM Comments at 55.

⁴¹² *See* CenterPoint Energy/FPL Feb. 13, 2018 Wireline *Ex Parte* Letter at 4.

⁴¹³ Crown Castle Wireline NPRM Comments at 5-6.

⁴¹⁴ *Id.* at 5.

⁴¹⁵ CCU Wireline NPRM Reply at 28; Electric Utilities Wireline NPRM Reply at 24-25.

⁴¹⁶ *Cf.* 2011 Pole Attachment Order, 26 FCC Rcd at 5276, para. 77 (prohibiting blanket bans on wireless pole-top attachments).

E. Legal Authority

126. We conclude that we have ample authority under section 224 to take the actions above to adopt a new pole attachment process, amend our current pole attachment process, clarify responsibility for pre-existing violations, and address outdated rate disparities. Section 224 authorizes us to prescribe rules ensuring that the rates, terms, and conditions of pole attachments are just and reasonable.⁴¹⁷ We find that the actions we take today to speed broadband deployment further these statutory goals. In addition, while we rely solely on section 224 for legal authority, our prioritization of broadband deployment throughout today's *Report and Order* finds support in section 706(a) of the Telecommunications Act of 1996, which exhorts us to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" by "remov[ing] barriers to infrastructure investment."⁴¹⁸

F. Rebuilding and Repairing Broadband Infrastructure After Disasters

127. We will not allow state and local laws to stand in the way of post-disaster restoration of essential communications networks. In the November 2017 *Further Notice of Proposed Rulemaking* in this proceeding, we sought comment on whether there are targeted circumstances related to disasters in which the Commission should use its preemption authority.⁴¹⁹ We find that we have authority under sections 253 and 332(c)(7) of the Act⁴²⁰ to preempt state or local laws that prohibit or have the effect of prohibiting the rebuilding or restoration of facilities used to provide telecommunications services, and we commit to exercising that authority on a case-by-case basis where needed.⁴²¹ Sections 253 and 332(c)(7) both permit us to preempt state and local laws that "prohibit or have the effect of prohibiting" the deployment of telecommunications services, and we agree with Verizon that we can use this authority to preempt state or local legal action that effectively prohibit the deployment of telecommunications services in the wake of a disaster.⁴²² As the Commission has previously recognized, certain federal regulations may impede restoration efforts, and we are working to address those too⁴²³—where it is within our

⁴¹⁷ 47 U.S.C. §§ 224(b)(1), (2). As we have stated previously, "the broad language of section 224(b)(1) and (b)(2) indicate a delegation of comprehensive rulemaking authority over all attachment issues, including access." *2011 Pole Attachment Order*, 26 FCC Rcd at 5282, para. 91. Our comprehensive authority covers the various rules we adopt today, including new requirements on attachers. We note that other provisions of the Act also confer broad authority to regulate providers of telecommunications service or cable television systems. *See, e.g.*, 47 U.S.C. §§ 154(i), 201, 202, 536.

⁴¹⁸ 47 U.S.C. § 1302(a). While section 706(a) does not provide a grant of regulatory authority, we look to it as guidance from Congress on how to implement our statutorily-assigned duties. *See Restoring Internet Freedom*, WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311, 471-480, paras. 268-83 (2018).

⁴¹⁹ *See Wireline Infrastructure Order*, 32 FCC Rcd at 11194, paras. 178-79.

⁴²⁰ 47 U.S.C. §§ 253, 332(c)(7).

⁴²¹ Our finding that the Commission has such authority should not be construed to mean that the Commission's preemption authority under Section 253 is limited only to times of natural disasters. *See Illinois Electric Cooperative Wireline FNRPM Comments* at 4.

⁴²² 47 U.S.C. §§ 253(a), 332(c)(7); *see Verizon Wireline FNPRM Comments* at 20. We find that our preemption authority under section 253 and 332 is not limited to natural disasters, and also extends to *force majeure* events generally, including man-made disasters. *Cf., e.g., Wireline Infrastructure Order*, 32 FCC Rcd at 11157-59, paras. 71-78 (adopting streamlined copper retirement notice procedures for *force majeure* events).

⁴²³ *See Wireline Infrastructure Order*, 32 FCC Rcd at 11157-59, paras. 71-78 (exempting incumbent LECs from certain requirements for copper retirements that are a direct result of damage to network infrastructure caused by a *force majeure* event); *Second Wireline Infrastructure Order* at paras. 58-59 (extending streamlined notice procedures for *force majeure* events to all types of network changes); *Telephone Number Portability; Numbering Resource Optimization*, CC Docket Nos. 95-116, 99-200, Order, 32 FCC Rcd 6723 (2017) (granting a temporary waiver of the Commission's numbering rules for providers affected by Hurricane Harvey); *Telephone Number*

authority, we are committed to addressing all legal requirements that stand in the way of prompt restoration of communications infrastructure.

128. We prefer to exercise our authority to preempt state and local requirements that inhibit network restoration, to the extent necessary and warranted under section 253 and/or 332(c)(7), on an expedited adjudicatory case-by-case basis, in which we can take into account the particularized circumstances of the state or local law in question and the impact of the disaster, and other relevant factors, rather than through adoption of a rule.⁴²⁴ In such cases, we direct the Wireline Competition Bureau and the Wireless Telecommunications Bureau to expedite the consideration of disaster relief petitions by placing petitions on public notice in a timely fashion and adopting expedited comment cycles. In entertaining such petitions, the Bureaus should consider whether the state or local law in question, even if it otherwise may be prudent, materially inhibits or limits the rebuilding of telecommunications infrastructure in the wake of a disaster.⁴²⁵

129. We agree with the City of New York that state and local officials are often best positioned to respond to disasters and implement disaster response protocol and will be cognizant not to exercise our preemption authority in a manner that could disrupt these efforts.⁴²⁶ In the wake of Hurricanes Harvey, Irma, and Maria, the Commission worked closely with state and local partners to support restoration of communications networks in affected areas,⁴²⁷ and going forward, we reiterate the need for ongoing coordination and cooperation between the Commission and state and local governments to rebuild damaged telecommunications infrastructure as quickly as possible.⁴²⁸ As the Public Safety and Homeland Security Bureau is responsible for coordinating the Commission's disaster response and recovery activities⁴²⁹ and is most closely in contact with state, local, and Federal public safety, disaster relief and restoration agencies in such instances, we direct the Wireline Competition Bureau and Wireless Telecommunications Bureau to consult with the Public Safety and Homeland Security Bureau in the adjudication of any petitions.

Portability; Numbering Resource Optimization, CC Docket Nos. 95-116, 99-200, Order, 32 FCC Rcd 6831 (2017) (granting a temporary waiver of the Commission's number assignment rules for providers affected by Hurricane Irma); *Telephone Number Portability; Numbering Resource Optimization*, CC Docket Nos. 95-116, 99-200, Order, 32 FCC Rcd 7005 (2017) (granting a temporary waiver of section 52.15(f)(ii) of the Commission's rules for providers affected by Hurricanes Maria and Jose).

⁴²⁴ See Verizon Wireline FNPRM Comments at 20-22.

⁴²⁵ See *California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California Pursuant to Section 253(d) of the Communications Act of 1934*, CCB Pol 96-26, Memorandum Opinion and Order, 12 FCC Rcd 14191, 14206, para. 31 (1997) (*California Payphone*).

⁴²⁶ See City of New York Wireline FNPRM Comments at 3.

⁴²⁷ See Statement of Chairman Ajit Pai, *FCC Response to Hurricanes Harvey, Irma, and Maria* (Sept. 26, 2017), <https://www.fcc.gov/document/presentation-fcc-response-hurricanes-harvey-irma-and-maria>. As of December 7, 2017, in response to all three hurricanes, the FCC issued over 30 public notices and orders, permitting the flexible use of spectrum or other non-standard actions to support incident response; granted over 200 requests for Special Temporary Authorizations; granted temporary waivers of Lifeline requirements; and waived number portability rules to facilitate restoration of telephone services. See *Public Safety and Homeland Security Bureau Seeks Comment on Response Efforts Undertaken During 2017 Hurricane Season*, PS Docket No. 17-344, Public Notice, DA 17-1180, at 2-3 (PSHSB Dec. 7, 2017); see also *Uniendo a Puerto Rico Fund and the Connect USVI Fund* at paras. 13-27 (establishing the Uniendo a Puerto Rico Fund and the Connect USVI Fund to rebuild, improve and expand voice and broadband networks in Puerto Rico and the U.S. Virgin Islands).

⁴²⁸ See CWA Wireline FNPRM Comments at 7; Uniti Fiber Wireline FNPRM Comments at 5.

⁴²⁹ See 47 C.F.R. § 0.191.

IV. DECLARATORY RULING

130. Section 253(a) of the Act specifies that “[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”⁴³⁰ Notwithstanding that clear admonition, some states and localities have adopted moratoria on the deployment of telecommunications services or telecommunications facilities, including explicit refusals to authorize deployment and dilatory tactics that amount to *de facto* refusals to allow deployment. To provide regulatory certainty and further deployment, we issue this Declaratory Ruling making clear that such state and local moratoria violate section 253(a) and strike at the heart of the ban on barriers to entry that Congress enacted in that provision.

A. Background

131. As the Eighth Circuit has explained, section 253(a) of the Act provides “a rule of preemption[.]” that “articulates a reasonably broad limitation on state and local governments’ authority to regulate telecommunications providers.”⁴³¹ Section 253(b) provides an exception for state requirements that are competitively neutral, consistent with section 254 of the Act, and “necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.”⁴³² Section 253(c) provides another set of exceptions to the limits on state and local authority by specifying that nothing in section 253 “affects the authority of a State or local government to manage their public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for the use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.”⁴³³ Section 253(d) requires the Commission, after notice and comment, to preempt the enforcement of specific state or local requirements that are contrary to section 253(a) or (b) “to the extent necessary to correct such violation or inconsistency.”⁴³⁴ Pursuant to section 253(d), the Commission has preempted both state and local actions that prohibit or have the effect of prohibiting the ability of any entity to provide telecommunications services, such as a locality’s denial of franchise applications from a new competitor,⁴³⁵ provisions in state

⁴³⁰ 47 U.S.C. § 253(a).

⁴³¹ *Level 3 Commc’ns, LLC. v. City of St. Louis, Mo.*, 477 F.3d 528, 531–32 (8th Cir. 2007) (*Level 3*).

⁴³² 47 U.S.C. § 253(b); *see also* *Western Wireless Corp. Petition for Preemption of Statutes and Rules Regarding the Kansas State Universal Service Fund Pursuant to Section 253 of the Communications Act of 1934*, File No. CWD 98-90, Memorandum Opinion and Order, 15 FCC Rcd 16227, 16231–32, para. 9 (2000).

⁴³³ 47 U.S.C. § 253(c).

⁴³⁴ 47 U.S.C. § 253(d). In the discussion below, we discuss the relation between subsections (d) and (a) and find that the former does not preclude us from issuing this *Declaratory Ruling* under subsection (a). *See infra* section IV.B.3.

⁴³⁵ *See Classic Telephone, Inc.; Petition for Preemption, Declaratory Ruling and Injunctive Relief*, CCBPol 96-10, Memorandum Opinion and Order, 11 FCC Rcd 13082, 13101, para. 36 (1996) (*Classic Telephone*).

codes that protect rural incumbents,⁴³⁶ and a state grant of an exclusive license to provide telecommunications services.⁴³⁷

132. Section 253 applies to wireless and wireline telecommunications services.⁴³⁸ In the *Wireline Infrastructure Notice of Inquiry*, the Commission asked whether “moratoria on market entry or the deployment of telecommunications facilities[]” are inconsistent with section 253(a).⁴³⁹ The Commission also sought comment on whether to provide an exception if moratoria were imposed with “sharply restricted time limits[]” or under “exigent circumstances[.]”⁴⁴⁰ In the *Wireless Infrastructure NPRM*, the Commission sought comment on promulgating a preemption rule to address state or local zoning authorities’ unreasonable delays in acting on applications.⁴⁴¹ That item also initiated a Notice of Inquiry, which sought comment, among other things, on whether state or local governments have imposed restrictions on deployment comparable to moratoria.⁴⁴²

133. In response to the *Wireline Infrastructure Notice of Inquiry* and the *Wireless Infrastructure NPRM*, we received numerous comments about states and localities imposing moratoria on the deployment of telecommunications infrastructure. The record includes comments from a broad array of large and small wireline and wireless providers operating throughout the country. For example, AT&T describes an Ohio municipality that “enacted a 145-day moratorium on permits for construction in rights-of-way” and an Illinois city that “imposed a five-year moratorium on pavement cuts to roadways that have been resurfaced or reconstructed.”⁴⁴³ Uniti Fiber identifies 44 jurisdictions in Florida that have

⁴³⁶ See *Public Utility Commission of Texas et al., Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, CCBPol 96-14 et al., Memorandum Opinion and Order, 13 FCC Rcd 3460, 3466, para. 13 (1997) (*Public Utility Comm’n of Texas*); *Silver Star Telephone Company, Inc. Petition for Preemption and Declaratory Ruling*, CCB Pol 97-1, Memorandum Opinion and Order, 12 FCC Rcd 15639, 15658, para. 42 (1997), *aff’d sub nom. RT Commc’ns, Inc. v. FCC*, 201 F.3d 1264 (10th Cir. 2000) (*RT Commc’ns*).

⁴³⁷ See *Connect America Fund (Sandwich Isles Communications, Inc.) Petition for Waiver of the Definition of “Study Area” Contained in Part 36, Appendix-Glossary and Sections 36.611 and 69.2(hh) of the Commission’s Rules*, WC Docket No. 10-90, CC Docket No. 96-45, Memorandum Opinion and Order, 32 FCC Rcd 5878, 5888, para. 26 (2017).

⁴³⁸ Section 253(a) on its face applies to “any interstate or intrastate telecommunications service[.]” and the Supreme Court has held that wireless telecommunications services are included in that term. 47 U.S.C. § 253(a); *Nat’l Cable & Telecom. Ass’n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 340 (2002) (“[a] provider of wireless telecommunications service is a ‘provider of telecommunications service’”). The Commission has previously recognized that section 253 applies to Commercial Mobile Radio Services (CMRS). See *Federal-State Joint Board on Universal Service; Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge*, CC Docket Nos. 96-45 et al., Fourth Order on Reconsideration and Report and Order, 13 FCC Rcd 5318, 5486, para. 302 (1997) (“To demonstrate that state universal service contribution requirements for CMRS providers violate section 253, there must be a showing that the state universal service programs act as a barrier to entry for CMRS providers and are not competitively neutral.”). We therefore disagree with Smart Communities that section 253 does not apply to wireless facilities. See *Smart Communities Wireless NPRM Comments* at 56-57.

⁴³⁹ *Wireline Infrastructure Notice*, 32 FCC Rcd at 3297, para. 102.

⁴⁴⁰ *Id.*

⁴⁴¹ *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, Second Report and Order, 32 FCC Rcd 3330, 3336-37, paras. 15-16 & n.30 (*Wireless NPRM*).

⁴⁴² *Id.* at 3364-65, paras. 95-96.

⁴⁴³ AT&T *Wireline NPRM Comments* at 74.

implemented wireless moratoria.⁴⁴⁴ Frontier offers examples of several states that have issued moratoria, including Indiana, which “issued a complete moratorium” on broadband deployment in March 2017; Illinois, where localities “often refuse to issue work permits unless a carrier pays”; Michigan, which “has frost and freeze laws that prevent construction of facilities for extended periods of time during the winter”; and Washington, which “issued a moratorium banning Frontier from building new infrastructure” between August 2016 and January 2017.⁴⁴⁵ The record demonstrates that moratoria are numerous, geographically diverse, and occur at both the state and local level, showing that this issue affects the deployment of telecommunications services in many cases across the nation.

B. Discussion

134. The records in both the wireline and wireless infrastructure proceedings reflect the existence of two types of moratoria, express and *de facto*. We find that both types of moratoria violate section 253(a) and generally do not fall within the section 253(b) and (c) exceptions.

1. Moratoria Violate Section 253(a)

135. *Express Moratoria.* For purposes of this Declaratory Ruling, we define express moratoria as state or local statutes, regulations, or other written legal requirements that expressly, by their very terms, prevent or suspend the acceptance, processing, or approval of applications or permits necessary for deploying telecommunications services and/or facilities.⁴⁴⁶ Commenters identify numerous instances of express moratoria that harm the public by prohibiting or having the effect of prohibiting the provision and deployment of telecommunications services and/or facilities. For example, despite the Commission’s direction in 2009 and 2014 that states and localities must complete their review of wireless siting applications for collocation deployments within 90 days and for deployments other than collocation

⁴⁴⁴ See Letter from Ronald W. Del Sesto, Jr., Counsel for Uniti Fiber, to Marleen H. Dortch, Secretary, FCC, WC Docket No. 17-84, WT Docket No. 17-79, at Exh. A (filed Oct. 30, 2017) (Uniti Fiber Oct. 30, 2017 Wireless NPRM *Ex Parte* Letter); see also Conterra Broadband Services et al. (Conterra) Wireline NPRM Comments at 28 (describing one instance where a municipality placed a moratorium on competitive deployments, and others where state highway officials “refused to issue permits for deploying fiber on bridges, even where spare conduit is available”); T-Mobile Wireline & Wireless NPRM Comments at 37 (describing a *de facto* moratorium outside Indianapolis); Wireless Infrastructure Association (WIA) Wireline & Wireless NPRM Comments at 11-12 (describing *de facto* moratoria in jurisdictions in Massachusetts and Illinois).

⁴⁴⁵ Frontier Wireline NPRM Comments at 32-33; see also Mobilite Wireline & Wireless NPRM Comments at Attach. 2, 11-12 (describing *de facto* moratoria in jurisdictions in Arizona, California, Michigan, Minnesota, New York, Ohio, and Oregon); Sprint Wireline & Wireless NPRM Comments at 41-42 (describing instances of *de facto* moratoria in the south and with a state DOT).

⁴⁴⁶ We specifically include facilities where such facilities are necessary for the provision of covered services within the scope of section 253. See *Public Utility Comm’n of Texas*, 13 FCC Rcd at 3496, para. 74 (finding that “section 253(a) bars state or local requirements that restrict the means or facilities through which a party is permitted to provide service”); *Petition of the State of Minnesota for a Declaratory Ruling Regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way*, CC Docket No. 98-1, Memorandum Opinion and Order, 14 FCC Rcd 21697, 21705, para. 14 (1999) (*Minnesota Preemption Order*) (concluding that Section 253(a) preempts a state’s agreement with an infrastructure developer—even though the developer deployed facilities rather than provided telecommunications services—because the operative inquiry is whether the state’s action has an effect on the provision of telecommunications services); cf. *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901, 5922-23, paras. 60-62 (2007) (concluding that where the same infrastructure would provide “both telecommunications and wireless broadband Internet access service,” the provisions of section 224 governing pole attachments would continue to apply to such infrastructure used to provide both types of service).

within 150 days,⁴⁴⁷ the record in response to the *Wireless Infrastructure NPRM* shows that express moratoria on wireless deployments are all too common. Uniti Fiber, for example, identifies dozens of local jurisdictions that have implemented moratoria on wireless deployment.⁴⁴⁸ Commenters also provide specific examples of moratoria related to the processing of siting applications involving deployment of small cells.⁴⁴⁹ For instance, Crown Castle describes an Amherst, New York resolution prohibiting town staff from accepting or processing any applications or issuing any permits “relating to the placement or installation of telecommunication towers, facilities and antennae within the Town’s public rights-of-way until the moratorium is rescinded and/or a Local Law addressing this matter is adopted.”⁴⁵⁰ Similarly, Uniti Fiber identifies a Jacksonville, Florida ordinance which was passed on an ‘emergency’ basis,⁴⁵¹ and which imposed a “temporary moratorium on the acceptance, processing or approval of rights-of-way permit applications for personal wireless communication systems in the City’s rights-of-way.”⁴⁵²

136. Likewise, in response to the *Wireline Infrastructure Notice of Inquiry*, several commenters provide examples of state and local moratoria that have prohibited or had the effect of prohibiting the deployment of telecommunications services.⁴⁵³ For example, Crown Castle highlights persistent problems of moratoria imposed by local governments on the processing and acceptance of applications for new sites.⁴⁵⁴ As another example, AT&T states that a community in Ohio enacted a 145-day moratorium on permits for construction in rights-of-ways.⁴⁵⁵

137. Express moratoria are facially inconsistent with section 253(a). By their terms, express moratoria prohibit the provision of telecommunications services by halting the acceptance, processing, or approval of applications or permits for such services or the facilities used to provide such services. Express moratoria also “have the effect of prohibiting” the provision of telecommunications service. The Commission has previously held that a state or local requirement has the effect of prohibiting service under section 253(a) if it “materially inhibits or limits the ability of any competitor or potential competitor

⁴⁴⁷ See *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, WT Docket No. 08-165, Declaratory Ruling, 24 FCC Rcd 13994, 14016-19, paras. 56-65 (2009) (*2009 Wireless Siting Declaratory Ruling*), *aff’d sub nom. City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff’d*, 569 U.S. 290 (2013); *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, WT Docket Nos. 13-238, 13-32, WC Docket No. 11-59, Report and Order, 29 FCC Rcd 12865, 12971, para. 265 (2014) (*Wireless Facilities Siting Order*).

⁴⁴⁸ See Uniti Fiber Oct. 30, 2017 Wireless NPRM *Ex Parte* Letter at Exh. A (providing a list of 44 jurisdictions in Florida that have implemented wireless moratoria).

⁴⁴⁹ See, e.g., Crown Castle Wireless NPRM Comments at 14-19; CTIA Wireline & Wireless NPRM Comments, Attach. 1 at 12; Verizon Wireline & Wireless NPRM Comments at 6; AT&T Wireless NPRM Comments at 14.

⁴⁵⁰ Crown Castle Wireless NPRM Comments at 32 (quoting Town of Amherst, New York, Resolution 2017-674, adopted June 5, 2017).

⁴⁵¹ Uniti Fiber Oct. 30, 2017 Wireless NPRM *Ex Parte* Letter at Exh. B.

⁴⁵² *Id.*

⁴⁵³ See e.g., Frontier Wireline NPRM Comments at 32-33; Conterra Wireline & Wireless NPRM Comments at 28; AT&T Wireline NPRM Comments at 74; Letter from T. Scott Thompson, Counsel to Crown Castle, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 3-4 (filed Aug. 29, 2017) (Crown Castle Aug. 29, 2017 Wireline *Ex Parte* Letter); Letter from T. Scott Thompson, Counsel to Crown Castle, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, GN Docket No. 17-83, at 4 (filed Nov. 13, 2017) (Crown Castle Nov. 13, 2017 Wireline *Ex Parte* Letter).

⁴⁵⁴ See Crown Castle Aug. 29, 2017 Wireline *Ex Parte* Letter at 3-4; Crown Castle Nov. 13, 2017 Wireline *Ex Parte* Letter at 4.

⁴⁵⁵ See AT&T Wireline NPRM Comments at 74.

to compete in a fair and balanced legal and regulatory environment.”⁴⁵⁶ As the record demonstrates, express moratoria materially inhibit and limit the provision of service, harming competition, and they create an unfair and imbalanced regulatory environment that imposes significant costs that impede the deployment of telecommunications infrastructure and thereby exacerbates the digital divide.⁴⁵⁷ And the impact of moratoria extend beyond the telecommunications services market. As the Wireless Internet Service Providers Association states, “a blanket moratorium that freezes all applications across the board will by definition impede the deployment of broadband services and effectively serve as a complete ban on market entry by small broadband providers that cannot afford to endure excessive delays.”⁴⁵⁸

138. We reject the argument that all “temporary” moratoria are permissible simply because they are of a limited, defined duration.⁴⁵⁹ As an initial matter, the record indicates that some states and localities impose so-called “temporary” moratoria without setting an end date, or continually extend temporary moratoria to create *de facto* indefinite moratoria on deployment.⁴⁶⁰ We agree with commenters that even moratoria that are actually time limited “force providers either to delay or cancel their planned deployments.”⁴⁶¹ Moreover, assertions that “temporary” moratoria are necessary for planning purposes or government study⁴⁶² provide insufficient justification for imposing such moratoria in light of clear congressional intent to severely limit state and local authorities’ ability to take actions that prohibit or

⁴⁵⁶ *California Payphone*, 12 FCC Rcd at 14206, para. 31. The Commission has applied this standard in subsequent cases as well. *See, e.g., Public Utility Comm’n of Texas*, 13 FCC Rcd at 3463, para. 3; *TCI Cablevision of Oakland County, Inc.; Petition for Declaratory Ruling, Preemption, and Other Relief Pursuant to 47 U.S.C. §§ 541, 544(e), and 253*, CSR-4790, Memorandum Opinion and Order, 12 FCC Rcd 21396, 21439, para. 98 (1997). Several courts have also followed the Commission’s *California Payphone* standard. *See, e.g., Puerto Rico Tel. Co., Inc. v. Municipality of Guayanilla*, 450 F.3d 9, 18 (1st Cir. 2006); *Sprint Telephony PCS, L.P. v. Cty. of San Diego*, 543 F.3d 571, 578 (9th Cir. 2008) (*Sprint Telephony*); *T-Mobile USA Inc. v. City of Anacortes*, 572 F.3d 987, 993 (9th Cir. 2009); *Level 3*, 477 F.3d at 532.

⁴⁵⁷ *See* Conterra Wireline NPRM Comments at 29; Frontier Wireline NPRM Comments at 32; CTIA Wireline & Wireless NPRM Comments, Attach. 1 at 25; Mobile Future Wireless NPRM Comments at 9; Mobilite Wireline & Wireless NPRM Comments at 7; R Street Institute Wireline NPRM Comments at 13-14; Samsung Wireless NPRM Comments at 7-8; *see also* Conterra Wireline & Wireless NPRM Comments at 29 (describing situations where deployment on bridges and highways was prohibited, creating situations where the only alternative was to “bore under a significant body of water” at a cost-prohibitive price of \$500,000). *Cf.* Conterra Wireline & Wireless NPRM Comments at 28 (“In one municipality, applicants were informed there was a moratorium on competitive deployments, allowing incumbent phone companies and cable operators to operate without fear of competitive deployment on the horizon.”).

⁴⁵⁸ Wireless Internet Service Providers Ass’n (WISPA) Wireline NPRM Comments at 5.

⁴⁵⁹ *See* City of Norfolk Wireline NPRM Comments at 16; Minnesota Cities Coalition (MCC) Wireline NPRM Comments at 18-19; Washington State City Coalition (WSCC) Wireline NPRM Comments at 17-18; Illinois Municipal League (IML) Wireless NPRM Comments at 2; League of Minnesota Cities (LMC) Wireline NPRM Comments at 10-11; City of New York Wireline NPRM Comments at 4; League of Arizona Cities and Towns et al. (LACT) Wireless NPRM Comments at 12.

⁴⁶⁰ *See, e.g., AT&T Wireless NPRM Comments at 14* (“A Florida city imposed a ‘six-month’ moratorium on [right-of-way] wireless siting that was extended multiple times over two years.”); *Sprint Wireless NPRM Comments at 41–42* (“One Southern city . . . imposed a moratorium on new builds in the downtown area until it revises its standards for fees, designs, and deployment in underserved areas. This moratorium has continued for 18 months.”).

⁴⁶¹ *See* AT&T Wireline NPRM Comments at 74; *see also* AT&T Wireless NPRM Comments at 13-14 (explaining how AT&T had to cancel deployment plans after being faced with a supposedly temporary six-month moratorium that was repeatedly extended by a Florida city).

⁴⁶² *See* City of Norfolk Wireline NPRM Comments at 16; MCC Wireline NPRM Comments at 18–19; WSCC Wireline NPRM Comments at 17; IML Wireless NPRM Comments at 2.

have the effect of prohibiting the ability of any entity to provide telecommunications services.⁴⁶³ We recognize, and discuss further below, that there may be limited instances where temporary moratorium could fall within the exception of 253(b)⁴⁶⁴ and that 253(c) provides an exception for certain conduct that involves legitimate “rights-of-way” management.⁴⁶⁵ But Congress did not countenance generalized government study and planning that stands in the way of additional competition and service upgrades, and we decline to create additional exceptions beyond those expressed by Congress.

139. *De Facto Moratoria.* We find that section 253(a) also prohibits *de facto* moratoria, which we define for the purpose of this Declaratory Ruling as state or local actions that are not express moratoria, but that effectively halt or suspend the acceptance, processing, or approval of applications or permits for telecommunications services or facilities in a manner akin to an express moratorium.⁴⁶⁶ *De facto* moratoria are not formally codified by state or local governments as outright prohibitions but have the same effect as express moratoria since they, by their operation, prohibit deployment of telecommunications services and/or telecommunications facilities. Examples of *de facto* moratoria in the record include, but are not limited to, blanket refusals to process applications,⁴⁶⁷ refusals to issue permits for a category of structures,⁴⁶⁸ frequent and lengthy delays of months or even years in issuing permits and processing applications,⁴⁶⁹ and claims that applications cannot be granted until pending local, state, or federal legislation is adopted.⁴⁷⁰

⁴⁶³ We observe that if describing a law or regulation as “temporary” was sufficient to insulate that law against section 253(a), every express moratorium would be adopted as “temporary” in order to evade the statute.

⁴⁶⁴ See *infra* at Section IV.B.2.

⁴⁶⁵ 47 U.S.C. § 253(c). We find below that express and *de facto* moratoria do not fall within the section 253(c) exception. See *infra* at Section IV.B.2.

⁴⁶⁶ For purposes of this Declaratory Ruling we exclude fees—even highly excessive fees—from the definition of *de facto* moratoria. In doing so, we do not suggest that excessive fees are consistent with section 253(a). Rather, we choose to proceed incrementally and limit our discussion to moratoria as defined herein.

⁴⁶⁷ See WIA Wireless NPRM Comments at 11 (noting multiple jurisdictions in Massachusetts and Illinois that “have not specifically passed ordinances putting moratoria in place, but have informally suspended applications or indicated that all applications will be denied while small wireless facility-targeted policies, procedures, and proposed ordinances are considered”); Mobilite Wireless NPRM Comments at Attach. 2, 11–12 (citing local practices, including refusals to process site permit applications or negotiate master rights-of-way agreements, which, while not explicit moratoria, still have the same practical effect).

⁴⁶⁸ See Conterra Wireline & Wireless NPRM Comment at 28 (citing instances where “state highway officials have refused to issue permits for deploying fiber on bridges, even where spare conduit is available”); Sprint Wireless NPRM Comments at 41 (stating that “[s]ome municipalities have dragged their feet for such a long time in establishing a process [to act on permitting applications for small cell deployment] that their actions have imposed a *de facto* moratorium on the use of the rights of way”); WIA Wireless NPRM Comments at 11 (stating that while some jurisdictions “have not specifically passed ordinances putting moratoria in place,” they have refused to process requests to deploy small cell facilities or issue permits for small cells); CTIA Wireline & Wireless NPRM Comments, Attach. 1 at 12 (describing several localities that have imposed *de facto* moratoria by declining to process applications to locate new wireless facilities or modify existing facilities).

⁴⁶⁹ See Conterra Wireline & Wireless NPRM Comments at 28 (claiming that “municipally-owned utilities frequently delay issuance of pole attachment applications”); Lightower Wireline NPRM Comments at 18 (claiming that it has been “involved in a number of scenarios in which, in spite of no pronouncement by local government that a moratorium has been imposed, the governmental entity is simply not moving forward in such a way as to process applications” related to deployment, a scenario which “may be characterized as an effective prohibition”); T-Mobile Wireline & Wireless NPRM Comments at 37 (complaining of *de facto* moratoria where localities simply fail to act on applications, and citing the example of one jurisdiction outside Indianapolis where small cell rights-of-way applications have been pending for nearly three years without being either approved or denied). Cf. *Sprint*

140. We distinguish *de facto* moratoria, which inherently violate section 253(a), from state and local actions that simply entail some delay in deployment.⁴⁷¹ Situations cross the line into *de facto* moratoria where the delay continues for an unreasonably long or indefinite amount of time such that providers are discouraged from filing applications, or the action or inaction has the effect of preventing carriers from deploying certain types of facilities or technologies. For example, T-Mobile describes one jurisdiction outside Indianapolis, in which small cell right-of-way applications “have been pending for nearly three years, but the jurisdiction will neither approve nor deny the applications.”⁴⁷² WIA states that its members have encountered refusals to process small cell applications in Myrtle Beach, South Carolina and DeKalb County, Georgia.⁴⁷³ CTIA describes situations where localities refuse to process applications to locate or modify wireless facilities until and unless the locality adopts regulations governing small cell deployment.⁴⁷⁴ Other localities allegedly place onerous conditions on accepting or reviewing applications that would constitute *de facto* moratoria. For instance, Lighttower describes situations where jurisdictions use *de facto* moratoria as punitive measures, stating that where Lighttower “has contested the conditions or costs[] [of deploying telecommunications infrastructure], jurisdictions have often refused to continue processing or grant pending deployment applications.”⁴⁷⁵ These types of conduct are prohibited by section 253(a). Although we do not reach specific determinations on the numerous examples discussed by parties in our record, we find that these types of conduct are prohibited by section 253(a).

141. Like express moratoria, *de facto* moratoria prohibit or have the effect of prohibiting the provision of service, and are thus prohibited by section 253(a). Indeed, we view the formulation that Congress used in section 253(a)—“prohibit or have the effect of prohibiting”—as anticipating the distinction we draw today between express and *de facto* moratoria, and recognizing that not all barriers to the provision of service will come expressly labeled as such. As the examples above show, the presence of a formal, express moratorium is not necessary for a state or locality to take action that prohibits or has the effect of prohibiting the provision of telecommunications service through *de facto* moratoria. A *de facto* moratorium can prohibit an entity from providing telecommunications service if the provider cannot obtain approval or authorization to deploy from the state or local government due to inaction or refusal, even if there is no statute, regulation, or other express legal requirement restricting the acceptance,

Telephony, 543 F.3d at 580 (municipal ordinance that “impose[s] an excessively long waiting period [could] amount to an effective prohibition”).

⁴⁷⁰ See Conterra Wireline & Wireless NPRM Comments at 29 (citing some instances where local governments cite to pending state or federal legislation as grounds to halt or delay the filing or processing of right-of-way permits or franchise applications); CTIA Wireline & Wireless NPRM Comments at 24 (citing the example of localities that “refuse to process applications, or that tell applicants to wait until the locality develops siting policies, without making any commitment” as to whether or when they will do so).

⁴⁷¹ This Declaratory Ruling is limited to express and *de facto* moratoria. We do not reach the limits of what actions violate section 253(a) or other provisions of the Act.

⁴⁷² T-Mobile Wireline & Wireless NPRM Comments at 37; see also Verizon Wireline & Wireless NPRM Comments at 6 (describing “jurisdictions, like a Midwestern suburb, where Verizon has been trying unsuccessfully to get approval for small cells since 2014, [that] have no established procedures for small cell approvals and are extremely slow to respond”); Mobilite Wireline & Wireless NPRM Comments, Attach. 2 at 11-12 (describing jurisdictions in Arizona, Minnesota, and New York which are not processing or accepting applications).

⁴⁷³ See WIA Wireline & Wireless NPRM Comments at 11.

⁴⁷⁴ CTIA Wireline & Wireless NPRM Comments, Attach. 1 at 12; see also WIA Wireless NPRM Comments at 11 (stating that jurisdictions in Massachusetts and Illinois “have not specifically passed ordinances putting moratoria in place, but have informally suspended applications or indicated that all applications will be denied while small wireless facility-targeted policies, procedures, and proposed ordinances are considered”).

⁴⁷⁵ Lighttower Wireline NPRM Comments at 21.

processing, or grant of applications or authorizations.⁴⁷⁶ This is true even though some *de facto* moratoria may leave the hypothetical possibility of a locality taking action on an application; if applicants cannot reasonably foresee when approval will be granted because of indefinite or unreasonable delay, then an impermissible *de facto* moratorium is in place.⁴⁷⁷

142. There may be situations in which states or localities impose limitations on deployment, but allow for alternative means of deployment in a manner that is reasonably comparable in cost and ease. Providers sometimes inaccurately characterize these limitations as moratoria, but we find that characterization to be inapt where the limitations do not foreclose deployments and do not materially limit carriers' ability to build the facilities they need to provide service. For example, some "street-cut" requirements, which providers sometimes refer to as moratoria, are not designed to thwart construction, but to promote "dig once" policies "in order to preserve the roadway and incentivize interested providers to deploy telecommunications conduit," and would not qualify as unlawful moratoria if the state or locality imposing such street-cut requirements does not bar alternative means of deployment such as aerial lines or sublicensing existing underground conduits.⁴⁷⁸ Consistent with the Commission's ruling in the *Minnesota Preemption Order*, such requirements do not violate section 253(a) if they provide for deployment alternatives that are viable, reasonable, and competitively neutral—if they, in short, do not have the effect of prohibiting the deployment of telecommunications networks.⁴⁷⁹

2. Moratoria Are Generally Not Protected Under the Section 253(b) and (c) Exceptions

143. With rare exception, neither express nor *de facto* moratoria are protected by the exceptions found in either section 253(b) or section 253(c).⁴⁸⁰

144. Section 253(b) allows certain "State" requirements, even if such requirements otherwise violate section 253(a), that are (i) "competitively neutral"; (ii) "consistent with section 254" of the Act; and (iii) "necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers."⁴⁸¹ As an initial matter, we find that no local or municipal moratoria can fall within the section 253(b) exception absent a specific delegation of regulatory authority by a state to the locality or municipality in question.⁴⁸² Given that section 253(c) discusses the authority of "a State or local government," but section 253(b) only discusses the authority of "a State," we find Congress's omission of the phrase "local government" from the latter to be persuasive evidence that the section 253(b) exception does not

⁴⁷⁶ See, e.g., T-Mobile Wireline & Wireless NPRM Comments at 37; CTIA Wireline & Wireless NPRM Comments at 24, Attach. 1 at 12; Mobilitie Wireline & Wireless NPRM Comments, Attach. 2 at 11; Verizon Wireline & Wireless NPRM Comments at 6; WIA Wireline & Wireless NPRM Comments at 11.

⁴⁷⁷ Section 253(a) does not require that a bar to entry be "insurmountable before the FCC must preempt it." *RT Commc'ns*, 201 F.3d at 1268.

⁴⁷⁸ See *LACT Wireline NPRM Comments* at 13-14; *but see Tekify Fiber Wireline NPRM Comments* at 2 (arguing against moratoria that require a utility to grind and re-pave entire street lengths in a manner that effectively prohibits deployment projects within those areas). To promote deployment, we encourage state and local governments that enact a street-cut requirement that allows for alternative means of deployment to still provide advance notice to enable providers to deploy in the right-of-way in the least disruptive manner possible. See *Liberty Cablevision of Puerto Rico Wireline NPRM Comments* at 17 (arguing for six months' notice in advance of a right-of-way related moratorium for repaving or other work).

⁴⁷⁹ See *Minnesota Preemption Order*, 14 FCC Rcd at 21709-14, paras. 23-31.

⁴⁸⁰ See 47 U.S.C. § 253(b), (c).

⁴⁸¹ 47 U.S.C. § 253(b).

⁴⁸² See *Classic Telephone*, 11 FCC Rcd at 13100-101, para. 34.

generally apply to the conduct of local governments.⁴⁸³ Indeed, some courts have held that the plain text of section 253(b) requires a finding that the provision protects only certain state activities “and does not speak to local regulation.”⁴⁸⁴ However, consistent with past Commission precedent, we need not go so far and make clear that section 253(b) does not apply to local or municipal legal requirements absent a specific delegation of authority from the state.⁴⁸⁵

145. Further, we find that most moratoria are not competitively neutral—they almost certainly will favor incumbents over new entrants and existing modalities over new technologies. We also find they are unlikely to fall within the ambit of any of the four public interest exceptions contained in section 253(b).⁴⁸⁶ Neither the Commission nor a court has upheld a state requirement that violated section 253(a) on the grounds that it was necessary to “preserve and advance universal service.”⁴⁸⁷ Moreover, as a practical matter, moratoria run counter to the goal of preserving and advancing universal service as

⁴⁸³ See 47 U.S.C. § 253(b), (c).

⁴⁸⁴ *TCG N.Y., Inc. v. City of White Plains, N.Y.*, 125 F. Supp. 2d 81, 87 (S.D.N.Y. 2000), *aff’d in part, rev’d in part on other grounds* *TCG N.Y.*, 305 F.3d 67; see also *Southwestern Bell Wireless Inc. v. Johnson Cty. Bd. of Cty. Comm’rs*, 199 F.3d 1185, 1192 (10th Cir. 1999) (“[S]ection 253(b) applies only to state, not local, regulation, since, in the remainder of section 253, Congress clearly says ‘State or local’ when it so intends.”); *City of Dallas v. Metropolitan Fiber Systems of Dallas, Inc.*, 98 civ. 2128, 2000 WL 198104, at *4 (N.D.Tex. Feb.17, 2000) (holding that section 253(b) was not applicable to municipalities).

⁴⁸⁵ See *Classic Telephone*, 11 FCC Rcd at 13100-101, para. 34; see also *N.J. Payphone Ass’n, Inc. v. Town of W. N.Y.*, 130 F. Supp. 2d 631, 639 (D.N.J. 2001), *aff’d* *N.J. Payphone Ass’n*, 299 F.3d 235 (3rd Cir. 2001); *Bd. of Cty. Comm’rs of Grant Cty., N.M.*, 169 F. Supp. 2d 1243, 1247 (D.N.M. 2001) (“Local governments may only manage the rights of way, unless specifically delegated authority to impose requirements under § 253(b).”); *AT&T Comm. of the Southwest, Inc. v. City of Dallas*, 8 F. Supp.2d 582, 591 (N.D.Tex.1998), *dismissed as moot on other grounds*, 243 F.3d 928 (5th Cir. 2001) (“The language of § 253 is straightforward. Absent explicit delegation by the state legislature, cities do not have the more general authority to regulate to protect public safety and welfare, advance universal service and ensure quality—this is a function reserved to states by § 253(b), not to local governments.”); *Cox Comm. PCS, LP v. City of San Marcos*, 204 F. Supp. 2d 1260, 1264 (S.D. Cal. 2002) (section 253(b) only applies to states, and not municipalities, unless a state specifically delegates authority to its local governments); *BellSouth Telecomm., Inc. v. City of Coral Springs*, 42 F. Supp.2d 1304, 1307 (S.D. Fla.1999), *aff’d in part, rev’d in part on other grounds*, 252 F.3d 1169 (11th Cir. 2001) (“While states may regulate universal service, protect consumers, ensure quality and protect the public safety and welfare, local governments can only manage the public rights-of-way, unless of course a state specifically delegated the state authority to its local governments.”); *BellSouth Telecomm., Inc. v. Town of Palm Beach*, 127 F. Supp. 2d 1348, 1356 (S.D. Fla. 1999) (quoting *BellSouth Telecomm. Inc v. City of Coral Springs*, 42 F. Supp. 2d 1304 (S.D. Fla. 1999)), *aff’d in part, rev’d in part on other grounds*, 252 F.3d 1169 (11th Cir. 2001). To the extent that previous Commission decisions discussed section 253(b) as applying to either state or local requirements, we find that such decisions should be understood to be referring to only those local legal requirements that were enacted pursuant to specific delegated authority from a state. See, e.g., *Public Utility Commission of Texas*, 13 FCC Rcd at 3480, 3501, paras. 41, 83; *Silver Star Telephone*, 12 FCC Rcd at 15647, 15658, paras. 17, 42 (1997), *aff’d sub nom. RT Communications, Inc.*, 201 F.3d 1264; *Sandwich Isles Communications, Inc.*, 32 FCC Rcd at 5885, para. 19 (2017).

⁴⁸⁶ See 47 U.S.C. § 253(b).

⁴⁸⁷ 47 U.S.C. § 253(b). While the Commission has never upheld a state requirement on such a basis, it has preempted state requirements on the grounds that they are not necessary to preserve and advance universal service. See, e.g., *Federal-State Joint Board on Universal Service Western Wireless Corporation Petition for Preemption of an Order of The South Dakota Public Utilities Commission*, CC Docket No. 96-45, Declaratory Ruling, 15 FCC Rcd 15168, 15168-69, paras. 1-2 (2000) (*Western Wireless Preemption Declaratory Ruling*) (finding that the regulation at issue—which required common carriers to provide supported services throughout a service area prior to being designated as eligible telecommunications carriers who may receive federal universal service support—was not competitively neutral, consistent with section 254, or necessary to preserve and advance universal service, and thus did “not fall within the authority reserved to the states in section 253(b)”).

moratoria prevent or materially limit deployments that could assist in achieving universal service. Neither the Commission nor a court has ever evaluated whether a state requirement that violated section 253(a) was permissible on the grounds that it was nevertheless necessary to “ensure the continued quality of telecommunications services,”⁴⁸⁸ and it is difficult to envision how a ban on deployment could conceivably improve the quality of such services. If anything, a moratorium is likely to decrease the quality of telecommunications services by barring competitive entry into the market, reducing the quality and quantity of services available to consumers, and inhibiting providers’ ability to deploy the facilities needed to broaden the geographic areas they can serve, fill coverage gaps, expand capacity, and/or upgrade the technology used in their networks.⁴⁸⁹

146. With limited exception, moratoria are also unlikely to be necessary to “protect the public safety and welfare” or “safeguard the rights of consumers.”⁴⁹⁰ Both the Eighth and Ninth Circuits have noted that these exceptions can be applicable to legal requirements intended to protect the public from deceptive business practices.⁴⁹¹ On its own, the public safety and welfare exception has been understood to apply, at a minimum, to legal requirements that ensure emergency services such as 911 are made readily available.⁴⁹² Rather than preserving these vital interests, moratoria on deployment that violate section 253(a) decrease competition—thereby dampening the ability of a free and open market to act as a check against unfair or deceptive practices—and prevent the deployment of facilities that may be used in the provision of emergency services.

147. We recognize that there may be limited situations in the case of a natural disaster or other comparable emergency where an express or *de facto* moratoria that violates section 253(a) may nonetheless be “necessary” to “protect the public safety and welfare” or to “ensure the continued quality of telecommunications services.”⁴⁹³ For example, in the event of a widespread power or telecommunications outage, a state might need to limit access to poles in a specific, affected area until existing power and telecommunications facilities can be restored. We interpret section 253(b) to allow for these state-imposed “emergency” express moratoria only if they are (1) “competitively neutral,” as expressly required by section 253(b),⁴⁹⁴ (2) necessary to address the emergency or disaster or related

⁴⁸⁸ 47 U.S.C. § 253(b).

⁴⁸⁹ See, e.g., R Street Wireline NPRM Comments at 13-14; Mobile Future Wireless NPRM June 15, 2017 Comments at 9.

⁴⁹⁰ 47 U.S.C. § 253(b).

⁴⁹¹ See *Cedar Rapids Cellular Tel., L.P. v. Miller*, 280 F.3d 874, 880 (8th Cir. 2002) (“[T]he Supreme Court has recognized that states have an important interest in protecting the public from deceptive business practices. . . . Federal telecommunications law implicitly acknowledges the importance of this interest by leaving states some latitude to ‘protect the public safety and welfare’ and ‘safeguard the rights of consumers.’”); *Comm’ns Telesystems Int’l v. Cal. Pub. Util. Comm’n*, 196 F.3d 1011, 1017 (9th Cir. 1999) (noting that the California Public Utility Commission has the power under section 253(b) to “implement regulations that are ‘necessary’ to ‘protect the public’ against slamming,” or the unauthorized switching of consumers’ long-distance carriers); see also *Classic Telephone*, 11 FCC Rcd at 13101, para. 35 (“Section 253(b) . . . ensures that States continue to have authority to require telecommunications service providers to make emergency services available to the public and comply with local consumer protection laws.”).

⁴⁹² See *Freeman v. Burlington Broadcasters, Inc.*, 204 F.3d 311, 324 (2d Cir. 2000) (“[T]he legislative history indicates that ‘[b]y “public safety and welfare,” the Committee means, among other things, making certain that emergency services, such as 911, are available to the public.”); see also *Classic Telephone*, 11 FCC Rcd at 13101, para. 35 (“Section 253(b) . . . ensures that States continue to have authority to require telecommunications service providers to make emergency services available to the public and comply with local consumer protection laws.”).

⁴⁹³ 47 U.S.C. § 253(b).

⁴⁹⁴ As the Commission has previously held, to be considered “competitively neutral” for purposes of section 253(b), a legal requirement must have a like effect on all types of providers and technologies, and must not unfairly

public safety needs, and (3) targeted only to those geographic areas that are affected by the disaster or emergency. Given that the emergency giving rise to such an express moratorium will be finite in time, a moratorium that extends beyond the duration of the emergency and associated repair efforts would not be permissible under section 253(b) because it would not be “necessary” to protect the safety and welfare of the public as section 253(b) requires.⁴⁹⁵ Similarly, an express, statewide deployment moratorium that is not targeted to the geographic areas affected by the natural disaster or emergency would not be permissible as it would not be “necessary” in the unaffected areas and would thus be impermissibly overbroad.⁴⁹⁶ We caution that mere assertions that express or *de facto* moratoria are necessary to achieve these goals do not suffice to invoke section 253(b).⁴⁹⁷ Emergency moratoria must be identified as such and clearly communicated to applicants; states and localities may not use a natural disaster or similar emergency as a guise for implementing *de facto* moratoria. While narrowly tailored emergency moratoria may be legally permissible under section 253, we encourage states to work collaboratively with providers before resorting to express moratoria in the wake of natural disasters or emergencies. The burden is on states to justify the imposition of a moratorium by specifically demonstrating that a moratorium serves, and is narrowly-tailored in a manner that makes it necessary to achieve, one of the goals articulated in section 253(b).

148. We also take this opportunity to remind states that section 253(b) only permits them to impose requirements that are “necessary” to preserve or advance the interests identified in section 253(b).⁴⁹⁸ Moratoria are “blunt instruments.”⁴⁹⁹ There may well be instances where a more limited legal requirement could reasonably be said to be “necessary” to advance universal service, protect the public safety, ensure the continued quality of telecommunications services, or safeguard the rights of consumers, but most moratoria are, by their very nature, too broad and far-ranging to satisfy such a strict standard. Such bans cannot be considered “necessary” to further a specific interest if that interest could be advanced by the imposition of some other, more targeted measure.⁵⁰⁰

advantage or hamper one type of provider or technology over another. *See Western Wireless Preemption Declaratory Ruling*, 15 FCC Rcd at 15176-177, paras. 21-22 (citing *Federal-State Joint Board on Universal Service*, 12 FCC Rcd at 8801, para. 47); *see also Nixon v. Mo. Mun. League*, 541 U.S. 125, 137 (2004) (citing the Commission’s holding in *Western Wireless Preemption Declaratory Ruling* and reaffirming that the Commission has “understood § 253(b) neutrality to require a statute or regulation affecting all types of utilities in like fashion”).

⁴⁹⁵ 47 U.S.C. § 253(b); *see also New England Public Communications Council Petition for Preemption Pursuant to Section 253*, CCBPOL 96-11, Memorandum Opinion and Order, 11 FCC Rcd 19713, 19722, para. 21 (1996) (*New England Payphone Order*) (stating that “[a]n interpretation of section 253(b) that a state’s action merely be reasonable ignores the specific language of the statute requiring such state action to be ‘necessary’”).

⁴⁹⁶ 47 U.S.C. § 253(b).

⁴⁹⁷ *See, e.g., City of Norfolk Wireline NPRM Comments* at 16-17 (claiming generally that “[m]oratoria also allow local officials to consider the legitimate concerns of members of the public, such as health, public safety and environmental issues, and how best to responsibly address them”); *MCC Wireline NPRM Comments* at 18; *WSSC Wireline NPRM Comments* at 17.

⁴⁹⁸ 47 U.S.C. § 253(b).

⁴⁹⁹ AT&T Wireline NPRM Comments at 74.

⁵⁰⁰ *See New England Payphone Order*, 11 FCC Rcd at 19722, para. 22 (rejecting a measure prohibiting incumbent LECs from providing in-state payphone services as “the most restrictive means available” and concluding that the record “does not support a finding that such an extreme approach is ‘necessary’” under section 253(b)); *id.*, 11 FCC Rcd at 19722, para. 21 (“An interpretation of section 253(b) that a state’s action merely be reasonable ignores the specific language of the statute requiring such state action to be ‘necessary.’”); *Classic Telephone*, 11 FCC Rcd at 13102, para. 38 (“Congress envisioned that in the ordinary case, States and localities would enforce the public interest goals delineated in section 253(b) through means other than absolute prohibitions on entry.”) (citing S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 1, at 126 (1996)). We recognize that outside the context of section 253(b), the

149. It is even less likely that the section 253(c) exceptions could shield moratoria that violate section 253(a) from preemption. Section 253(c) specifies that “[n]othing in this section affects the authority of the State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and non-discriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.”⁵⁰¹ For purposes of this Declaratory Ruling, we exclude the imposition of fees from the definition of *de facto* moratoria.⁵⁰² Thus, the applicability of 253(c) depends on whether moratoria may constitute management of the public rights-of-way.⁵⁰³

150. While the Act does not define “manage[ment of] rights-of-way,” the Commission has recognized in the context of section 253(c) that “[l]ocal governments must be allowed to perform the range of vital tasks necessary to preserve the physical integrity of streets and highways, to control the orderly flow of vehicles and pedestrians, [and] to manage gas, water, cable . . . and telephone facilities that crisscross the streets and public rights-of-way.”⁵⁰⁴ The Commission has described the “types of activities that fall within the sphere of appropriate rights-of-way management” as including “coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement of building codes, and keeping track of the various systems using the rights-of-way to prevent interference between them.”⁵⁰⁵ Thus, section 253(c) protects certain activities that involve the actual use of the right-of-way. In contrast, to the extent they implicate rights-of-way

Commission has sometimes interpreted the term “necessary” as simply meaning “used” or “useful.” See *New England Payphone Order*, 11 FCC Rcd at 19723-25, paras. 24-25 (distinguishing the use of the term “necessary” as used in section 253(b) from the duty imposed on ILECs by section 251(c)(6) to provide collocation of equipment that is “necessary” for interconnection or access to unbundled network elements at the ILEC’s premises, and noting that the term “necessary” is interpreted to mean “used” or “useful” in the context of 251(c)(6)). Several courts have also recognized that the word “necessary” may not automatically mean absolutely essential or required. See *U.S. v. Comstock*, 560 U.S. 126, 134 (2010) (interpreting the term as used in the necessary and proper clause of the Constitution) (citing *McCulloch v. Maryland*, 17 U.S. 316, 413-15 (1819)); *Fish v. Kobach*, 840 F.3d 710, 734 (10th Cir. 2016) (interpreting the term as used in the National Voter Registration Act); *Nat. Res. Def. Council v. Thomas*, 838 F.2d 1224, 1236 (D.C. Cir. 1988) (interpreting the term as used in the Clean Air Act); *FTC v. Rockefeller*, 591 F.2d 182, 188 (2d Cir. 1979) (interpreting the term as used in the Federal Trade Commission Act). However, the Commission in the *New England Payphone Order* and *Classic Telephone*, relying in part on congressional guidance, established that it construes “necessary” in section 253(b) as meaning essential.

⁵⁰¹ 47 U.S.C. § 253(c).

⁵⁰² We do not take up in this Declaratory Ruling the question of the circumstances in which the imposition of fees may violate section 253(a).

⁵⁰³ LMC Wireline NPRM Comments at 8–9; WSCC Wireline NPRM Comments at 20; City of Norfolk Wireline NPRM Comments at 2; LACT Wireline & Wireless NPRM Reply at 51. Cf. IML Wireless NPRM Comments at 3-4 (arguing that municipalities have a public duty to regulate the right-of-way).

⁵⁰⁴ *TCI Cablevision of Oakland County, Inc.; Petition for Declaratory Ruling, Preemption and Other Relief Pursuant to 47 U.S.C. §§ 541, 544(e), and 253*, Memorandum Opinion and Order, 12 FCC Rcd 21396, 21441, para. 103 (1997) (*TCI Cablevision of Oakland County*).

⁵⁰⁵ *TCI Cablevision of Oakland County*, 12 FCC Rcd at 21441, para. 103. The Ninth Circuit determined that the following activities were beyond the management of rights-of-way under section 253(c): regulations requiring applicants to submit proof of financial, technical, and legal qualifications; ordinances imposing requirements or other controls over matters not directly related to management of rights-of-way; franchise agreements that contain conditions unrelated to the management of rights-of-way; ordinance requirements that companies provide free and excess capacity for the use of the locality; and ordinances that grant the locality unfettered discretion to insist on unspecified franchise terms and to grant, deny, or revoke a franchise based on unnamed factors. See *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1178-79 (9th Cir. 2001), *vacated on other grounds Sprint Telephony*, 543 F.3d at 571.

issues at all, moratoria bar providers from obtaining approval to access the right-of-way.⁵⁰⁶ Hence, we fail to see how section 253(c) could save a moratorium from preemption.

3. Authority to Act

151. We issue this authoritative interpretation of section 253 pursuant to our broad authority to interpret key provisions of the Communications Act.⁵⁰⁷ We also have authority under the Administrative Procedure Act (APA) and our rules to issue a declaratory ruling to terminate a controversy or remove uncertainty on our own motion.⁵⁰⁸ In this instance, we find issuing a declaratory ruling on our own motion is necessary to remove what the wireline and wireless infrastructure records reveal are substantial uncertainty and significant legal controversies caused by the state and local imposition of moratoria.⁵⁰⁹

⁵⁰⁶ See *Minnesota Preemption Order*, 14 FCC Rcd at 12728-29 (while section 253(c) protects state and local governments' authority to issue construction permits regulating how and when road construction may be conducted does not mean that it protects a state or local government's refusal to issue construction permits to most entities); see also AT&T Wireline NPRM Comments at 74 (arguing that moratoria "fall outside the § 253(c) savings clause that allows local governments 'to manage the public rights of way': that authority must be limited to *reasonable* regulations to avoid permitting evasion of the basic purpose of the provision").

⁵⁰⁷ See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984) (holding that courts must grant considerable weight to an agency's reasonable interpretation of a statute it is charged with administering where the statute is ambiguous); *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 296 (2013) (stating that statutory ambiguities will be resolved, within the bounds of reasonable interpretation, by the agency that administers the statute); *id.* at 307 (holding that "Congress has unambiguously vested the FCC with general authority to administer the Communications Act through rulemaking and adjudication"); see also *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980-84 (2005) (*NCTA v. Brand X*) (holding that the agency's interpretation of the terms "telecommunications service" and "offer" is entitled to *Chevron* deference and is a reasonable construction of the Act); *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 396 (1999) (holding that the Commission's interpretation of the interconnection requirement in 47 U.S.C. § 252(i) was reasonable).

⁵⁰⁸ 5 U.S.C. § 554(e); 47 CFR § 1.2; see also *City of Arlington, Tex. v. FCC*, 668 F.3d 229, 243 (5th Cir. 2012) (stating that an "agency need not be presented with a specific dispute between two parties in order to use section 554(e)'s declaratory ruling mechanism" and that section 554 "empowers agencies to use declaratory rulings to 'remove uncertainty'" by issuing statutory interpretations in cases involving "concrete and narrow questions of law the resolutions of which would have an immediate and determinable impact on specific factual scenarios"), *aff'd on other grounds*, 569 U.S. 290 (2013); *Chisholm v. FCC*, 538 F.2d 349, 365 (D.C. Cir. 1976) (reiterating that "the choice whether to proceed by rulemaking or adjudication is primarily one for the agency regardless of whether the decision may affect agency policy and have general prospective application") (citing *N.L.R.B. v. Bell Aerospace Co.*, 416 U.S. 267, 291-95 (1974)); *N.C. Utilities Comm'n v. FCC*, 537 F.2d 787, 790 n.2 (4th Cir. 1976), *cert. denied*, 429 U.S. 1027 ("[F]ederal administrative agencies are not restricted to adjudication of matters that are 'cases and controversies' within the meaning of Article III of the Constitution."); *N.Y. State Comm'n on Cable Television v. FCC*, 749 F.2d 804, 815 (D.C. Cir. 1984) (holding that the Commission, in preempting state and local entry regulation of satellite master antenna television, did not abuse its discretion in labeling its action a declaratory ruling and a consolidation of precedent, rather than engaging in a rule-making procedure).

⁵⁰⁹ See Verizon Wireline NPRM Comments at 33; Conterra Wireline Comments at 30; Frontier Wireline NPRM Comments at 3; Competitive Carriers Association (CCA) Wireline & Wireless NPRM Comments, WC Docket Nos. 17-84 & 17-79, at executive summary (2017); ITTA Wireline NPRM Comments, WC Docket No. 17-84, at 35 (2017); CTIA Wireline & Wireless NPRM Comments at 3; WIA Wireline & Wireless NPRM Reply Comments at executive summary, 17; WISPA Wireline NPRM Comments at 5; Crown Castle Wireline NPRM Reply Comments at iii-iv; Letter from Joshua S. Turner, Counsel to Crown Castle, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 4 (filed Nov. 10, 2017); Quintillion Networks Wireline & Wireless NPRM Reply, WC Docket Nos. 17-84 & 17-79, at 7; P.R. Telephone Company, Inc. Wireline NPRM Reply, WC Docket No. 17-84, at 16; Lightower Wireline NPRM Comments at 18; Letter from Scott K. Bergmann, VP, Regulatory Aff., CTIA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 12 (filed Sept. 8, 2017); see also AT&T Wireless NPRM Comments, WC Docket No. 17-79, at 13-14 (2017); Conterra Wireless NPRM Comments at 28; CTIA Wireline & Wireless NPRM Comments at 23-24; Crown Castle Wireless NPRM Comments at 32; Mobile Future

152. We exercise that authority in this *Declaratory Ruling* to make clear that express and *de facto* moratoria violate section 253(a) as legal requirements that “prohibit or have the effect of prohibiting” the provision of telecommunications service.⁵¹⁰ We further find the exceptions set forth in sections 253(b) and (c) to be generally inapplicable to express and *de facto* moratoria.

153. We disagree with those commenters that argue that section 253(d) precludes the Commission from interpreting the applicability of section 253(a) to certain kinds of state and local laws or policies.⁵¹¹ Nothing in section 253 purports to limit the exercise of our general interpretive authority. There is no dispute that section 253(d) provides an express mechanism for the Commission to preempt specific state or local legal requirements.⁵¹² However, Congress’ inclusion of this express mechanism to consider whether specific state and local requirements are preempted, does not limit our ability, pursuant to sections 303, 201(b), and other sections of the Act,⁵¹³ to define and provide an authoritative interpretation as to what constitutes a violation of section 253(a) and what qualifies for the section 253(b) or (c) exceptions.

154. Because we interpret section 253(a) and do not specifically preempt any state or local law, the Supreme Court’s holding in *City of Rancho Palos Verdes v. Abrams* that “the express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others,”⁵¹⁴ is not applicable here. In issuing this Declaratory Ruling we are not exercising our authority to enforce a substantive rule; rather, we are interpreting the scope of the substantive prohibition set forth in section 253(a).

155. Moreover, most courts that have considered the matter have *not* read section 253(d) as the exclusive enforcement mechanism for pursuing a claim that a state or local legal requirement violates section 253(a).⁵¹⁵ Some Circuit courts have held that section 253 includes an implied private cause of

Wireless NPRM Comments at 9; Mobilite Wireless NPRM Comments at 12; NCTA Wireless NPRM Comments, WC Docket No. 17-79, at 29 (2017); R Street Wireless NPRM Comments, WC Docket No. 17-79, at 5 (2017); Samsung Wireless NPRM Comments at 7; T-Mobile Wireless NPRM Comments, WC Docket No. 17-79, at 36-37 (2017); Verizon Wireless NPRM Comments, WC Docket No. 17-79, at 33 (2017); WIA Wireless NPRM Comments at 55.

⁵¹⁰ 47 U.S.C. § 253(a).

⁵¹¹ See, e.g., Public Knowledge Wireline NPRM Comments at 17-18; City of N.Y. Wireline NPRM Comments, WC Docket No. 17-84, at 1-2 (2017); Smart Communities Wireline NPRM Comments, WC Docket No. 17-84, at 10-11 (2017) (Smart Communities Wireline NPRM Comments); City of Alexandria et al. (Virginia Joint Commenters) Wireline NPRM Comments, WC Docket No. 17-84, at 42-43 (2017). *But see* Conterra Wireline & Wireless NPRM Comments at 15-16 (“Section 253(d) is drafted broadly and provides the Commission ample latitude to elect the best procedure for utilizing its preemption power. . . . At a minimum, reviewing courts must afford the Commission broad deference in construing the ambiguous provisions in Section 253.”).

⁵¹² See 47 U.S.C. § 253(d). Section 253(d) expressly grants the Commission preemption authority. As such, we disagree with EEI’s view that the Commission lacks the authority to preempt state and local laws such as moratoria because Congress left such decisions to the states. EEI Wireline NPRM Comments at 4.

⁵¹³ See *Wireless Infrastructure NPRM*, 32 FCC Rcd at 3336, para. 15 & nn. 28-30.

⁵¹⁴ *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 121 (2005) (quoting *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001)).

⁵¹⁵ See, e.g., *P.R. Tel. Co.*, 450 F.3d at 16; *N.J. Payphone Ass’n*, 299 F.3d at 241-42; *Qwest Corp. v. City of Santa Fe, N.M.*, 380 F.3d 1258, 1266 (10th Cir. 2004) (*Qwest Corp. v. City of Santa Fe*); *BellSouth Telecomm., Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1191 (11th Cir. 2001); *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 624 (6th Cir. 2000).

action to seek relief.⁵¹⁶ Other Circuit courts have entertained preemption claims under the Supremacy Clause of the United States Constitution, which is a legal avenue for preemption regardless of whether a statute authorizes a private cause of action.⁵¹⁷ As the First Circuit has explained, “under the Supremacy Clause, any state or local law that is inconsistent with the requirements of §253(a) will be null and void, unless it falls under one of the safe harbor provisions in §253.”⁵¹⁸ Accordingly, courts have concluded that parties may bring section 253(a) preemption challenges directly in federal court, regardless of the availability of the Commission as a forum to resolve preemption disputes pursuant to section 253(d).⁵¹⁹ But whatever enforcement mechanisms may be available to preempt specific state and local requirements, nothing in section 253 prevents us from declaring that a category of state or local laws is inconsistent with section 253(a) because it prohibits or has the effect of prohibiting service.

156. Indeed, in issuing our interpretation of section 253(a) and the scope of the section 253(b) and (c) exceptions, we further the notice objectives that underlie section 253(d), which requires that the Commission provide “notice and an opportunity for public comment” prior to taking any preemptive action.⁵²⁰ Adopting a general interpretation enhances certainty around frequently arising, factually similar issues. By issuing this Declaratory Ruling, we place states and localities on notice that express and *de facto* moratoria are inconsistent with section 253(a).⁵²¹ In so doing, we provide states and localities the opportunity to ensure that their requirements comply with federal law. Therefore, construing section 253(d) as not limiting the Commission’s authority to interpret the remainder of section 253 furthers important policy goals as well. Otherwise, the Commission would only have authority to act retrospectively to target individual laws, which would be inefficient, increase uncertainty, and impose additional costs on states and localities both from the sunk costs of enacting subsequently preempted legal requirements and the costs of litigating more section 253(d) preemption proceedings and judicial actions.⁵²²

⁵¹⁶ See *BellSouth Telecomm., Inc.*, 252 F.3d at 1191; *TCG Detroit v. City of Dearborn*, 206 F.3d at 624. But see *Spectra Comm. Group, LLC v. City of Cameron*, 806 F.3d 1113, 1119-20 (8th Cir. 2015); *NextG Networks of N.Y., Inc. v. City of N.Y.*, 513 F.3d 49, 53 (2d Cir. 2008); *Sprint Telephony*, 543 F.3d at 580-81; *Sw. Bell Tel., L.P. v. City of Houston*, 529 F.3d 257, 261 (5th Cir. 2008); *Qwest Corp. v. City of Santa Fe*, 380 F.3d at 1266-67.

⁵¹⁷ See *P.R. Tel. Co.*, 450 F.3d at 16; *N.J. Payphone Ass’n*, 299 F.3d at 242-43; *Qwest Corp. v. City of Santa Fe*, 380 F.3d at 1266. The Supremacy Clause invalidates state or local laws that “interfere with or are contrary to” federal law. U.S. Const. art. VI, Cl. 2.

⁵¹⁸ *P.R. Tel. Co.*, 450 F.3d at 16 (citing U.S. Const. art. VI, Cl. 2. and *Qwest Corp. v. City of Santa Fe*, 380 F.3d at 1269).

⁵¹⁹ See *P.R. Tel. Co.*, 450 F.3d at 16; *N.J. Payphone Ass’n*, 299 F.3d at 242-43; *Qwest Corp. v. City of Santa Fe*, 380 F.3d at 1266.

⁵²⁰ See 47 U.S.C. § 253(d).

⁵²¹ The League of Minnesota Cities claims that “[c]ourts continue to uphold moratoria used in limited circumstance as ‘interim controls on the use of land that seek to maintain the status quo with respect to land development in an area by either “freezing” existing land uses or by allowing the issuance of . . . permits for only certain land uses that would not be inconsistent with a contemplated zoning plan or zoning change.’” LMC Wireline NPRM Comments at 10 (citing *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Plan. Agency*, 535 U.S. 302 (2002)). While the *Tahoe* case stands for the proposition that moratoria may be permitted under the Fifth Amendment to the U.S. Constitution, the fact that moratoria may be permissible under the Fifth Amendment does not limit our authority to interpret section 253 as prohibiting moratoria that prohibit or have the effect of prohibiting the ability of an entity to provide telecommunication services.

⁵²² Our decision today is consistent with the Commission’s earlier decisions that state and local moratoria do not toll the “shot clocks” for state or municipal review of wireless siting applications pursuant to section 332(c)(7)(B)(ii) of the Act; that these “shot clocks continue to run” regardless of whether state or local governments purport to impose moratoria that suspend the acceptance or processing of siting applications for some period of time; and that

157. We also disagree with assertions that the change in regulatory classification of broadband Internet access service in the *Restoring Internet Freedom Order* affects the validity of this Declaratory Ruling.⁵²³ Consistent with prior Commission decisions, we have authority over infrastructure that can be used for the provision of both telecommunications and other services on a commingled basis.⁵²⁴ Infrastructure for wireline and wireless telecommunication services frequently is the same infrastructure used for the provision of broadband Internet access service,⁵²⁵ and our ruling today will promote broadband deployment, in concert with our actions in the *Restoring Internet Freedom Order*.

158. We expect that this Declaratory Ruling, which provides our authoritative interpretation of the scope of section 253(a) as it pertains to state and local moratoria, will have several consequences that will benefit the public. First, we expect states and localities to comply with federal law by repealing existing moratoria, refusing to enforce moratoria that remain on the books, and declining to adopt new moratoria. Second, the interpretation of section 253 in this Declaratory Ruling will apply when conducting subsequent proceedings under section 253(d) to preempt specific legal rules permitted or imposed by specific states or localities. To further effectuate the benefits of issuing this Declaratory Ruling, we direct the Wireline Competition Bureau and/or the Wireless Telecommunications Bureau to act expeditiously on section 253(d) petitions challenging alleged state or local moratoria.⁵²⁶ Finally, this Declaratory Ruling sets forth the Commission's reasoned interpretation of section 253(a), which will inform judicial resolution of preemption claims brought by providers, states, or localities under the Supremacy Clause of the United States Constitution.

“applicants can challenge moratoria in court when the shot clock expires without State or local government action.” See *Wireless Facilities Siting Order*, 29 FCC Rcd at 12971, paras. 265-67; see also *2009 Wireless Siting Declaratory Ruling*, 24 FCC Rcd at 14016-19, paras. 56-65 (stating that a state or local agency's failure to render a decision within “shot clock” deadlines – *i.e.*, 90 days for an application to deploy collocated antennas or within 150 days for an application to deploy facilities other than collocations – would presumptively constitute a “failure to act” that may be challenged under section 332(c)(7)(B)(v) of the Act).

⁵²³ See, *e.g.*, Public Knowledge Wireline NPRM Comments at 13; Smart Communities Wireline NPRM Comments at 5-6; Smart Communities Wireline & Wireless NPRM Reply Comments at 37-39; Cities of San Antonio, Tex. et al. Wireline & Wireless NPRM Reply Comments at 17.

⁵²⁴ See *Restoring Internet Freedom*, 33 FCC Rcd at 424-425, para. 188-190 (reaffirming that the Commission retains statutory authority to regulate facilities that provide commingled services where the Commission has statutory authority over one of the services); *Wireless Facilities Siting Order*, 29 FCC Rcd at 12973, para. 270-272 (“[T]o the extent [distributed antenna system] or small-cell facilities, including third-party facilities such as neutral host [distributed antenna system] deployments, are or will be used for the provision of personal wireless services, their siting applications are subject to [section 332(c)(7)].”); *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901, 5924, para. 65 (2007) (applying section 224 to facilities that provide both telecommunications and wireless broadband Internet access service, and applying section 332(c)(7)(B) to facilities providing personal wireless service and wireless broadband Internet access service).

⁵²⁵ *Restoring Internet Freedom*, 33 FCC Rcd at 423, para. 185 (citing Cisco Systems, Inc. Comments, WC Docket No. 17-108, at 2-3 (July 17, 2017)); Mobilite, LLC Comments, WC Docket No. 17-108, at 4 (July 17, 2017).

⁵²⁶ Petitioners must follow the Commission's previously adopted procedural guidelines for section 253(d) petitions. See 47 CFR §§ 1.1204(b) Note 4; 1.1206(a) Note 1; and 1.1206(a)(13) Note 2; *Suggested Guidelines for Petitions for Ruling Under Section 253 of the Communications Act*, Public Notice, 13 FCC Rcd 22970 (1998); *Amendment of 47 C.F.R. § 1.1200 et seq. Concerning Ex Parte Presentations in Commission Proceedings*, GC Docket No. 95-21, Memorandum Opinion and Order, 14 FCC Rcd 18831 (1999). The Commission has adopted similar requirements for certain types of petitions pursuant to section 332(c)(7)(B). See *Procedures for Reviewing Requests for Relief From State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934*, WT Docket No. 97-192, Report and Order, 15 FCC Rcd 22821 (2000).

V. PROCEDURAL MATTERS

159. *Congressional Review Act.* The Commission will send a copy of this Third Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking, including a copy of the Final Regulatory Flexibility Certification, in a report to Congress and the Government Accountability Office pursuant to the Congressional Review Act.⁵²⁷ In addition, the *Report and Order* and this final certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration (SBA) and will be published in the Federal Register.⁵²⁸

160. *Final Regulatory Flexibility Analysis.* As required by the Regulatory Flexibility Act of 1980 (RFA),⁵²⁹ the Commission has prepared a Final Regulatory Flexibility Analysis (FRFA) relating to this *Report and Order*. The FRFA is contained in Appendix B.

161. *Paperwork Reduction Act of 1995 Analysis.* The *Report and Order* contains modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. OMB, the general public, and other federal agencies are invited to comment on the new or modified information collection requirements contained in this proceeding. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4), we seek specific comment on how the Commission might further reduce the information collection burden for small business concerns with fewer than 25 employees.⁵³⁰

162. In this document, we have assessed the effects of reforming our pole attachment regulations and find that doing so will serve the public interest and is unlikely to directly affect businesses with fewer than 25 employees.

VI. ORDERING CLAUSES

163. Accordingly, IT IS ORDERED that, pursuant to sections 1-4, 201, 224, 253, 303(r), and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 201, 224, 253, 303(r), and 332, and section 5(e) of the Administrative Procedure Act, 5 U.S.C. § 554(e), this Third Report and Order and Declaratory Ruling IS ADOPTED.

164. IT IS FURTHER ORDERED that part 1 of the Commission's rules IS AMENDED as set forth in Appendix A, and that any such rule amendments that contain new or modified information collection requirements that require approval by the Office of Management and Budget under the Paperwork Reduction Act SHALL BE EFFECTIVE after announcement in the Federal Register of Office of Management and Budget approval of the rules, and on the effective date announced therein.

165. IT IS FURTHER ORDERED that this *Report and Order* SHALL BE effective 30 days after publication in the Federal Register, except for 47 CFR §§ 1.1412(c)(1), 1.1412(c)(3), 1.1412(d), 1.1412(d)(3), 1.1412(e)(3), 1.1412(h)(2)-(3), 1.1412(i)(1)-(2), 1.1412(j)(1)-(5), 1.1413(a)-(b), 1.1414(b), 1.1416(b), which contain information collection requirements that have not been approved by OMB. The Federal Communications Commission will publish a document in the Federal Register announcing the effective date of these provisions.

⁵²⁷ *See* 5 U.S.C. § 801(a)(1)(A).

⁵²⁸ *See* 5 U.S.C. § 605(b).

⁵²⁹ *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996). The SBREFA was enacted as Title II of the Contract with America Advancement Act of 1996 (CWAAA).

⁵³⁰ *See Wireline Infrastructure Notice*, 32 FCC Rcd at 3306, para. 127.

166. IT IS FURTHER ORDERED that the *Declaratory Ruling* and the obligations set forth therein ARE EFFECTIVE upon release of this Order.

167. IT IS FURTHER ORDERED, pursuant to section 253(d) of the Communications Act of 1934, as amended, that the Wireline Competition Bureau and the Wireless Telecommunications Bureaus ARE DIRECTED to review specific petitions and, as necessary, preempt state or local statutes, regulations, or other legal requirements that materially limit or inhibit the rebuilding of telecommunications infrastructure in the wake of a disaster or constitute express moratoria or *de facto* moratoria.

168. IT IS FURTHER ORDERED that the Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Report and Order* to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

169. IT IS FURTHER ORDERED that the Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis and this *Declaratory Ruling*, to the Chief Counsel for Advocacy of the SBA.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Final Rules

For the reasons set forth above, Part 1 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 1 – PRACTICE AND PROCEDURE

1. The authority for part 1 is amended to read as follows:

AUTHORITY: 47 U.S.C. 151, 154(i) and (j), 155, 157, 160, 201, 224, 225, 227, 303, 309, 310, 332, 1403, 1404, 1451, 1452, and 1455.

SUBPART J – POLE ATTACHMENT COMPLAINT PROCEDURES

Amend section 1.1402 by adding paragraphs (o), (p), (q), and (r) to read as follows:

§ 1.1402 Definitions.

* * *

(o) The term *make-ready* means the modification or replacement of a utility pole, or of the lines or equipment on the utility pole, to accommodate additional facilities on the utility pole.

(p) The term *complex make-ready* means transfers and work within the communications space that would be reasonably likely to cause a service outage(s) or facility damage, including work such as splicing of any communication attachment or relocation of existing wireless attachments. Any and all wireless activities, including those involving mobile, fixed, and point-to-point wireless communications and wireless internet service providers, are to be considered complex.

(q) The term *simple make-ready* means make-ready where existing attachments in the communications space of a pole could be transferred without any reasonable expectation of a service outage or facility damage and does not require splicing of any existing communication attachment or relocation of an existing wireless attachment.

(r) The term *communications space* means the lower usable space on a utility pole, which typically is reserved for low-voltage communications equipment.

3. Amend section 1.1403 by revising paragraph (c) to read as follows:

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

* * *

(c) A utility shall provide a cable television system or telecommunications carrier no less than 60 days written notice prior to:

* * *

(3) Any modification of facilities by the utility other than make-ready, routine maintenance, or modification in response to emergencies.

* * * * *

3. Amend section 1.1412 by revising paragraphs (a), (c), (d), (e), (f), (g), (h), and (i) and adding paragraph (j) to read as follows:

§ 1.1412 Timeline for access to utility poles.

(a) Definitions.

(1) The term “attachment” means any attachment by a cable television system or provider of telecommunications service to a pole owned or controlled by a utility.

(2) The term “new attacher” means a cable television system or telecommunications carrier requesting to attach new or upgraded facilities to a pole owned or controlled by a utility.

(3) The term “existing attacher” means any entity with equipment on a utility pole.

* * *

(c) Application Review and Survey.

(1) *Application Completeness.* A utility shall review a new attacher’s attachment application for completeness before reviewing the application on its merits. A new attacher’s attachment application is considered complete if it provides the utility with the information necessary under its procedures, as specified in a master service agreement or in requirements that are available in writing publicly at the time of submission of the application, to begin to survey the affected poles.

(i) A utility has 10 business days after receipt of a new attacher’s attachment application in which to determine whether the application is complete and notify the attacher of that decision. If the utility does not respond within 10 business days after receipt of the application, or if the utility rejects the application as incomplete but fails to specify any reasons in the application, then the application is deemed complete. If the utility timely notifies the new attacher that its attachment application is not complete, then it must specify all reasons for finding it incomplete.

(ii) Any resubmitted application need only address the utility’s reasons for finding the application incomplete and shall be deemed complete within 5 business days after its resubmission, unless the utility specifies to the new attacher which reasons were not addressed and how the resubmitted application did not sufficiently address the reasons. The new attacher may follow the resubmission procedure in this paragraph as many times as it chooses so long as in each case it makes a bona fide attempt to correct the reasons identified by the utility, and in each case the deadline set forth in this paragraph shall apply to the utility’s review.

(2) *Application Review on the Merits.* A utility shall respond as described in §1.1403(b) to a new attacher within 45 days of receipt of a complete application to attach facilities to its utility poles (or within 60 days in the case of larger orders as described in paragraph (g) of this section).

(3) Survey.

(i) A utility shall complete a survey of poles for which access has been requested within 45 days of receipt of a complete application to attach facilities to its utility poles (or within 60 days in the case of larger orders as described in paragraph (g) of this section).

(ii) A utility shall permit the new attacher and any existing attachers on the affected poles to be present for any field inspection conducted as part of the utility's survey. A utility shall use commercially reasonable efforts to provide the affected attachers with advance notice of not less than 3 business days of any field inspection as part of the survey and shall provide the date, time, and location of the surveys, and name of the contractor performing the surveys.

(iii) A utility can elect to satisfy its survey obligations in this paragraph by notifying affected attachers of its intent to use a survey conducted by a new attacher pursuant to § 1.1412(j)(3) and by providing a copy of the survey to the affected attachers within the time period set forth in paragraph (c)(3)(i) of this section.

(d) *Estimate.* Where a new attacher's request for access is not denied, a utility shall present to a new attacher a detailed, itemized pole-by-pole estimate of charges to perform all necessary make-ready within 14 days of providing the response required by §1.1412(c), or in the case where a new attacher has performed a survey, within 14 days of receipt by the utility of such survey. Where the utility determines that make-ready charges will not vary from pole-to-pole, the utility may aggregate individual charges rather than present a pole-by-pole estimate for those charges. The utility shall provide documentation that is sufficient to determine the basis of all estimated charges, including any projected material, labor, and other related costs that form the basis of its estimate.

* * *

(2) A new attacher may accept a valid estimate and make payment any time after receipt of an estimate, except it may not accept after the estimate is withdrawn.

(3) *Final invoice.* After the utility completes make-ready, it shall provide the new attacher with a detailed final invoice of the actual make-ready charges incurred on a pole-by-pole basis to accommodate the new attacher's attachment. Where the utility determines that make-ready charges did not vary from pole-to-pole, the utility may aggregate individual charges rather than present a pole-by-pole invoice for those charges.

(e) * * *

(1) For attachments in the communications space, the notice shall:

(i) Specify where and what make-ready will be performed.

(ii) Set a date for completion of make-ready in the communications space that is no later than 30 days after notification is sent (or up to 75 days in the case of larger orders as described in paragraph (g) of this section).

(iii) State that any entity with an existing attachment may modify the attachment consistent with the specified make-ready before the date set for completion.

(iv) State that if make-ready is not completed by the completion date set by the utility in paragraph (e)(1)(ii) in this section, the new attacher may complete the specified make-ready.

(v) State the name, telephone number, and e-mail address of a person to contact for more information about the make-ready procedure.

(2) For attachments above the communications space, the notice shall:

(i) Specify where and what make-ready will be performed.

(ii) Set a date for completion of make-ready that is no later than 60 days after notification is sent (or 105 days in the case of larger orders, as described in paragraph (g) of this section).

(iii) State that any entity with an existing attachment may modify the attachment consistent with the specified make-ready before the date set for completion.

(iv) State that the utility may assert its right to 15 additional days to complete make-ready.

(v) State that if make-ready is not completed by the completion date set by the utility in paragraph (e)(2)(ii) in this section (or, if the utility has asserted its 15-day right of control, 15 days later), the new attacher may complete the specified make-ready.

(vi) State the name, telephone number, and e-mail address of a person to contact for more information about the make-ready procedure.

(3) Once a utility provides the notices described in this section, it then must provide the new attacher with a copy of the notices and the existing attachers' contact information and address where the utility sent the notices. The new attacher shall be responsible for coordinating with existing attachers to encourage their completion of make-ready by the dates set forth by the utility in paragraph (e)(1)(ii) for communications space attachments or paragraph (e)(2)(ii) for attachments above the communications space.

(f) A utility shall complete its make-ready in the communications space by the same dates set for existing attachers in paragraph (e)(1)(ii) or its make-ready above the communications space by the same dates for existing attachers in paragraph (e)(2)(ii) of this section (or if the utility has asserted its 15-day right of control, 15 days later).

(g) * * *

(1) A utility shall apply the timeline described in paragraphs (c) through (e) of this section to all requests for attachment up to the lesser of 300 poles or 0.5 percent of the utility's poles in a state.

* * *

(4) A utility shall negotiate in good faith the timing of all requests for attachment larger than the lesser of 3000 poles or 5 percent of the utility's poles in a state.

(5) A utility may treat multiple requests from a single new attacher as one request when the requests are filed within 30 days of one another.

(h) *Deviation from the time limits specified in this section:*

(1) A utility may deviate from the time limits specified in this section before offering an estimate of charges if the parties have no agreement specifying the rates, terms, and conditions of attachment.

(2) A utility may deviate from the time limits specified in this section during performance of make-ready for good and sufficient cause that renders it infeasible for the utility to complete make-ready within the time limits specified in this section. A utility that so deviates shall immediately notify, in writing, the new attacher and affected existing attachers and shall include a detailed explanation of the reason for the deviation and a new completion date. The utility shall deviate from the time limits specified in this section

for a period no longer than necessary and shall resume make-ready without discrimination when it returns to routine operations.

(3) An existing attacher may deviate from the time limits specified in this section during performance of complex make-ready for reasons of safety or service interruption that renders it infeasible for the existing attacher to complete complex make-ready within the time limits specified in this section. An existing attacher that so deviates shall immediately notify, in writing, the new attacher and other affected existing attachers and shall include a detailed explanation of the reason for the deviation and a new completion date, which in no event shall extend beyond 60 days from the date the notice described in paragraph (e)(1) of this section is sent by the utility (or up to 105 days in the case of larger orders described in paragraph (g) of this section). The existing attacher shall deviate from the time limits specified in this section for a period no longer than necessary to complete make-ready.

(i) *Self-help remedy.*

(1) *Surveys.* If a utility fails to respond as specified in paragraph (c) of this section, then a new attacher may, as specified in §1.1413, hire a contractor to complete a survey.

(i) A new attacher shall permit the affected utility and existing attachers to be present for any field inspection conducted as part of the new attacher's survey.

(ii) A new attacher shall use commercially reasonable efforts to provide the affected utility and existing attachers with advance notice of not less than 3 business days of a field inspection as part of any survey it conducts. The notice shall include the date and time of the survey, a description of the work involved, and the name of the contractor being used by the new attacher.

(2) *Make-ready.* If make-ready is not complete by the date specified in paragraph (e) of this section, then a new attacher may, as specified in §1.1413, hire a contractor to complete make-ready.

(i) A new attacher shall permit the affected utility and existing attachers to be present for any make-ready. A new attacher shall use commercially reasonable efforts to provide the affected utility and existing attachers with advance notice of not less than 5 days of the impending make-ready. The notice shall include the date and time of the make-ready, a description of the work involved, and the name of the contractor being used by the new attacher.

(ii) A new attacher shall notify the affected utility and existing attachers within 15 days after completion of make-ready on a particular pole. The notice shall provide the affected utility and existing attachers 30 days from receipt in which to inspect the make-ready. The affected utility and existing attachers have 14 days after completion of their inspection to notify the new attacher of any damage caused by make-ready conducted by the new attacher on their equipment. If the utility or existing attachers discover damage caused by make-ready conducted by the new attacher on equipment belonging to the utility or an existing attacher, then the utility or existing attacher may either (A) complete any necessary remedial work and bill the new attacher for the reasonable costs related to fix the damage, or (B) require the new attacher to fix the damage at its expense within 14 days following notice from the utility or existing attacher.

(j) *One-touch make-ready option.* For attachments involving simple make-ready, new attachers may elect to proceed with the process described in this paragraph in lieu of the attachment process described in paragraphs (c)-(f) and (i) of this section.

(1) Attachment Application.

(i) A new attacher electing the one-touch make-ready process must elect the one-touch make-ready process in writing in its attachment application and must identify the simple make-ready that it will perform. It is the responsibility of the new attacher to ensure that its contractor determines whether the make-ready requested in an attachment application is simple.

(ii) The utility shall review the new attacher's attachment application for completeness before reviewing the application on its merits. An attachment application is considered complete if it provides the utility with the information necessary under its procedures, as specified in a master service agreement or in publicly-released requirements at the time of submission of the application, to make an informed decision on the application.

(A) A utility has 10 business days after receipt of a new attacher's attachment application in which to determine whether the application is complete and notify the attacher of that decision. If the utility does not respond within 10 business days after receipt of the application, or if the utility rejects the application as incomplete but fails to specify any reasons in the application, then the application is deemed complete.

(B) If the utility timely notifies the new attacher that its attachment application is not complete, then the utility must specify all reasons for finding it incomplete. Any resubmitted application need only address the utility's reasons for finding the application incomplete and shall be deemed complete within 5 business days after its resubmission, unless the utility specifies to the new attacher which reasons were not addressed and how the resubmitted application did not sufficiently address the reasons. The applicant may follow the resubmission procedure in this paragraph as many times as it chooses so long as in each case it makes a bona fide attempt to correct the reasons identified by the utility, and in each case the deadline set forth in this paragraph shall apply to the utility's review.

(2) *Application Review on the Merits.* The utility shall review on the merits a complete application requesting one-touch make-ready and respond to the new attacher either granting or denying an application within 15 days of the utility's receipt of a complete application (or within 30 days in the case of larger orders as described in paragraph (g) of this section).

(i) If the utility denies the application on its merits, then its decision shall be specific, shall include all relevant evidence and information supporting its decision, and shall explain how such evidence and information relate to a denial of access for reasons of lack of capacity, safety, reliability, or engineering standards.

(ii) Within the 15-day application review period (or within 30 days in the case of larger orders as described in paragraph (g) of this section), an electric utility may object to the designation by the new attacher's contractor that certain make-ready is simple. If the electric utility objects to the contractor's determination that make-ready is simple, then it is deemed complex. The electric utility's objection is final and determinative so long as it is specific and in writing, includes all relevant evidence and information supporting its decision, made in good faith, and explains how such evidence and information relate to a determination that the make-ready is not simple.

(3) *Surveys.* The new attacher is responsible for all surveys required as part of the one-touch make-ready process and shall use a contractor as specified in §1.1413(b).

(i) The new attacher shall permit the utility and any existing attachers on the affected poles to be present for any field inspection conducted as part of the new attacher's surveys. The new attacher shall use commercially reasonable efforts to provide the utility and affected existing attachers with advance notice of not less than 3 business days of a field inspection as part of any survey and shall provide the

date, time, and location of the surveys, and name of the contractor performing the surveys.

(4) *Make-ready*. If the new attacher's attachment application is approved and if it has provided 15 days prior written notice of the make-ready to the affected utility and existing attachers, the new attacher may proceed with make-ready using a contractor in the manner specified for simple make-ready in §1.1413(b).

(i) The prior written notice shall include the date and time of the make-ready, a description of the work involved, the name of the contractor being used by the new attacher, and provide the affected utility and existing attachers a reasonable opportunity to be present for any make-ready.

(ii) The new attacher shall notify an affected utility or existing attacher immediately if make-ready damages the equipment of a utility or an existing attacher or causes an outage that is reasonably likely to interrupt the service of a utility or existing attacher. Upon receiving notice from the new attacher, the utility or existing attacher may either (A) complete any necessary remedial work and bill the new attacher for the reasonable costs related to fix the damage, or (B) require the new attacher to fix the damage at its expense within 14 days following notice from the utility or existing attacher.

(5) *Post-make-ready timeline*. A new attacher shall notify the affected utility and existing attachers within 15 days after completion of make-ready on a particular pole. The notice shall provide the affected utility and existing attachers 30 days from receipt in which to inspect the make-ready. The affected utility and existing attachers have 14 days after completion of their inspection to notify the new attacher of any damage caused by make-ready conducted by the new attacher on their equipment. If the utility or existing attacher notifies the new attacher of such damage, then the utility or existing attacher can either complete any necessary remedial work and bill the new attacher for the reasonable costs related to fix the damage or require the new attacher to fix the damage at its expense within 14 days following notice from the utility or existing attacher.

7. Amend section 1.1413 by revising paragraphs (a), (b), and (c) to read as follows:

§ 1.1413 Contractors for surveys and make-ready.

(a) *Contractors for self-help complex and above the communications space make-ready*. A utility shall make available and keep up-to-date a reasonably sufficient list of contractors it authorizes to perform self-help surveys and make-ready that is complex and self-help surveys and make-ready that is above the communications space on its poles. The new attacher must use a contractor from this list to perform self-help work that is complex or above the communications space. New and existing attachers may request the addition to the list of any contractor that meets the minimum qualifications in §§1.1413(c)(1)-(5) and the utility may not unreasonably withhold its consent.

(b) *Contractors for simple work*. A utility may, but is not required to, keep up-to-date a reasonably sufficient list of contractors it authorizes to perform surveys and simple make-ready. If a utility provides such a list, and requires that a new attacher use a contractor from the list to perform surveys or simple make-ready, then the new attacher must choose a contractor from the list to perform the work. New and existing attachers may request the addition to the list of any contractor that meets the minimum qualifications in §§1.1413(c)(1)-(5) and the utility may not unreasonably withhold its consent.

(i) If the utility does not provide a list of approved contractors for surveys or simple make-ready or no utility-approved contractor is available within a reasonable time period, then the new attacher may choose its own qualified contractor that meets the requirements in paragraph (c) of this section. When choosing a contractor that is not on a utility-provided list, the new attacher must certify to the utility that its

contractor meets the minimum qualifications described in paragraph (c) of this section when providing notices required by §§1.1412(i)(1)(ii), 1.1412(i)(2)(i), 1.1412(j)(3)(i), and 1.1412(j)(4).

(ii) The utility may disqualify any contractor chosen by the new attacher that is not on a utility-provided list, but such disqualification must be based on safety or reliability concerns related to the contractor's failure to meet any of the minimum qualifications described in paragraph (c) of this section or to meet the utility's publicly available and commercially reasonable safety or reliability standards. The utility must provide notice of its contractor objection within the notice periods provided by the new attacher in §§1.1412(i)(1)(ii), 1.1412(i)(2)(i), 1.1412(j)(3)(i), and 1.1412(j)(4) and in its objection must identify at least one available qualified contractor.

(c) *Contractor minimum qualification requirements.* Utilities must ensure that contractors on a utility-provided list, and new attachers must ensure that contractors they select pursuant to paragraph (b)(i) of this section, meet the following minimum requirements:

(1) The contractor has agreed to follow published safety and operational guidelines of the utility, if available, but if unavailable, the contractor shall agree to follow National Electrical Safety Code (NESC) guidelines;

(2) The contractor has acknowledged that it knows how to read and follow licensed-engineered pole designs for make-ready, if required by the utility;

(3) The contractor has agreed to follow all local, state, and federal laws and regulations including, but not limited to, the rules regarding Qualified and Competent Persons under the requirements of the Occupational and Safety Health Administration (OSHA) rules;

(4) The contractor has agreed to meet or exceed any uniformly applied and reasonable safety and reliability thresholds set by the utility, if made available; and

(5) The contractor is adequately insured or will establish an adequate performance bond for the make-ready it will perform.

* * * * *

8. Amend section 1.1414 by revising to read as follows:

§ 1.1414 Complaints by incumbent local exchange carriers.

(a) A complaint by an incumbent local exchange carrier (as defined in 47 U.S.C. 251(h)) or an association of incumbent local exchange carriers alleging that it has been denied access to a pole, duct, conduit, or right-of-way owned or controlled by a local exchange carrier or that a utility's rate, term, or condition for a pole attachment is not just and reasonable shall follow the same complaint procedures specified for other pole attachment complaints in this part.

(b) In complaint proceedings challenging utility pole attachment rates, terms, and conditions for pole attachment contracts entered into after [INSERT EFFECTIVE DATE OF THIS SECTION], there is a presumption that an incumbent local exchange carrier (or an association of incumbent local exchange carriers) is similarly situated to an attacher that is a telecommunications carrier (as defined in 47 U.S.C. 251(a)(5)) or a cable television system providing telecommunications services for purposes of obtaining comparable rates, terms, or conditions. In complaint proceedings challenging pole attachment rates, there is a presumption that incumbent local exchange carriers (or an association of incumbent local exchange carriers) may be charged no higher than the rate determined in accordance with § 1.1407(e)(2). A utility can rebut either or both of the two presumptions in this paragraph (b) with clear and convincing evidence that the incumbent local exchange carrier receives benefits under its pole attachment agreement with a

utility that materially advantages the incumbent local exchange carrier over other telecommunications carriers or cable television systems providing telecommunications services on the same poles.

9. Add section 1.1416 to read as follows:

§ 1.1416 Overlashing.

(a) *Prior approval.* A utility shall not require prior approval for an existing attacher that overlashes its existing wires on a pole.

(b) *Advance notice.* A utility may require no more than 15 days' advance notice of planned overlashing. If a utility requires advance notice for overlashing, then the utility must provide existing attachers with advance written notice of the notice requirement or include the notice requirement in the attachment agreement with the existing attacher. A utility may deny access to the pole for overlashing within the 15-day advance notice period so long as the denial is accompanied by specific documentation demonstrating that the overlash creates a capacity, safety, reliability, or engineering issue.

(c) *Overlashers' Responsibility.* An existing attacher that engages in overlashing is responsible for its own equipment and shall ensure that it complies with reasonable safety, reliability, and engineering practices. If damage to a pole or other existing attachment results from overlashing, then the existing attacher is responsible at its expense for any necessary repairs.

APPENDIX B

Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),¹ an Initial Regulatory Flexibility Analysis (IRFA) was incorporated into the Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment (*Wireline Infrastructure Notice*) and into the Report and Order and Declaratory Ruling, and Further Notice of Proposed Rulemaking (*Wireline Infrastructure Order*) for the wireline infrastructure proceeding.² The Commission sought written public comment on the proposals in the *Wireline Infrastructure Notice* and in the *Wireline Infrastructure Order*, including comment on the IRFA. The Commission received no comments on the IRFA. Because the Commission amends its rules in this Order, the Commission has included this Final Regulatory Flexibility Analysis (FRFA). This present FRFA conforms to the RFA.³

A. Need for, and Objectives of, the Rules

2. In the *Wireline Infrastructure Notice*, the Commission continued its efforts to close the digital divide by removing barriers to broadband infrastructure investment. To this end, the Commission proposed numerous regulatory reforms to existing rules and procedures regarding pole attachments.⁴

3. On November 16, 2017, the Commission adopted the *Wireline Infrastructure Order*, which enacted reforms to pole attachment rules that: (1) bar utility pole owners from charging for certain capital costs that already have been recovered from make-ready fees;⁵ (2) set a 180-day shot clock for resolution of pole access complaints;⁶ and (3) grant incumbent local exchange carriers (LECs) reciprocal access to infrastructure controlled by other LECs.⁷ In addition, the Commission adopted reforms to speed the replacement of copper with fiber and Internet Protocol (OP) technologies.⁸ In the *Further Notice of Proposed Rulemaking*, the Commission sought comment on (1) additional steps to streamline the process for retiring legacy services and network change disclosure and discontinuance processes;⁹ (2) the treatment of overlashing by utilities;¹⁰ and (3) what actions the Commission can take to facilitate the rebuilding and repairing of broadband infrastructure after natural disasters.¹¹

4. Concurrently, the Commission's Broadband Deployment Advisory Committee (BDAC), a federal advisory committee chartered in 2017, formed five active working groups, as well as an ad hoc

¹ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996).

² *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, 32 FCC Rcd 3266 (2017) (*Wireline Infrastructure Notice*).

³ See 5 U.S.C. § 604.

⁴ See *Wireline Infrastructure Notice*, 32 FCC Rcd at 3266.

⁵ See *Wireline Infrastructure Order*, 32 FCC Rcd at 11131-32, paras. 7-8.

⁶ See *id.* at 11132-34, paras. 9-14.

⁷ See *id.* at 11134-37, paras. 51-21.

⁸ See *id.* at 11137-87, paras. 22-155.

⁹ See *id.* at 11187-94, paras. 156-159, 163-177.

¹⁰ See *id.* at 11188-89, paras. 160-62.

¹¹ See *id.* at 11194, paras. 178-79.

committee on rates and fees, to address the issues raised in the *Wireline Infrastructure Notice*.¹² During five public meetings, BDAC adopted recommendations related to competitive access to broadband infrastructure.¹³ These recommendations informed the Commission's policy decisions on pole attachment reform.

5. Pursuant to the objectives set forth in the *Wireline Infrastructure Notice*, this *Report and Order* and *Declaratory Ruling (Order)* adopts changes to Commission rules regarding pole attachments. The Order adopts changes to the current pole attachment rules that: (1) allow new attachers to perform all work, not reasonably likely to cause a service outage or facility damage, to prepare poles for new wireline attachments (make-ready work) in the communications space of a pole;¹⁴ (2) adopt a substantially shortened timeline for such application review and make-ready work (OTMR pole attachment timeline);¹⁵ (3) require new attachers to use a utility-approved contractor if a utility makes available a list of qualified contractors authorized to perform simple make ready work in the communications space of its pole and requires new attachers to choose contractors from this list to perform simple make-ready work;¹⁶ (4) create a more efficient pole attachment timeline;¹⁷ (5) enhance the new attacher's existing self-help remedy for surveys and make-ready work by extending it to all attachments (both wireless and wireline) above the communications space of a pole;¹⁸ (6) require new attachers to use utility-approved contractors when utilities and existing attachers miss their deadlines and the new attacher elects self-help to complete surveys and make-ready work that is complex or that involves work above the communications space on a pole;¹⁹ (7) require utilities to provide new attachers with detailed, itemized estimates and final invoices for all required make-ready work;²⁰ (8) codify the Commission's existing precedent that prohibits a pre-approval requirement for overlashing, and adopt a rule that allows utilities to establish reasonable advance notice requirements of up to 15 days for overlashing and holds overlashers responsible for ensuring that their practices and equipment do not cause safety or engineering issues;²¹ and (9) establish a rebuttable presumption that, for newly-negotiated pole attachment agreements between LECs and utilities, incumbent LECs will receive comparable pole attachment rates, terms, and conditions as similarly-situated telecommunications carriers or cable television system providing telecommunications services.²² The modifications to our pole attachment rules will facilitate deployment to and reduce barriers to access infrastructure by reducing costs and delays typically associated with the pole attachment process. Ultimately, these pole attachment reforms will contribute to increased broadband deployment, decreased costs for consumers, and increased service speeds.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

6. The Commission did not receive comments addressing the rules and policies proposed in the IRFAs in either the *Wireline Infrastructure Notice* or the *Wireline Infrastructure Order*.

¹² See *supra* section I.

¹³ See *supra* section I.

¹⁴ See *supra* section III.A.1.a.

¹⁵ See *supra* section III.A.1.c.

¹⁶ See *supra* section III.A.1.b.

¹⁷ See *supra* section III.A.2.a.

¹⁸ See *supra* section III.A.2.b.

¹⁹ See *supra* section III.A.2.c.

²⁰ See *supra* section III.A.2.d.

²¹ See *supra* section III.A.3.

²² See *supra* section III.C.

C. Response to Comments by the Chief Counsel for Advocacy of the SBA

7. Pursuant to the Small Business Jobs Act of 2010, which amended the RFA, the Commission is required to respond to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration (SBA), and to provide a detailed statement of any change made to the proposed rules as a result of those comments.²³

8. The Chief Counsel did not file any comments in response to this proceeding.

D. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

9. The RFA directs agencies to provide a description and, where feasible, an estimate of the number of small entities that may be affected by the final rules adopted pursuant to the *Order*.²⁴ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”²⁵ In addition, the term “small business” has the same meaning as the term “small-business concern” under the Small Business Act.²⁶ A “small-business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.²⁷

10. The changes to our pole attachment rules affect obligations on utilities that own poles, telecommunications carriers and cable television systems that seek to attach equipment to utility poles, and other LECs that own poles.²⁸

11. *Small Businesses, Small Organizations, Small Governmental Jurisdictions.* Our actions, over time, may affect small entities that are not easily categorized at present. We therefore describe here, at the outset, three comprehensive small entity size standards that could be directly affected herein.²⁹ First, while there are industry specific size standards for small businesses that are used in the regulatory flexibility analysis, according to data from the SBA’s Office of Advocacy, in general a small business is an independent business having fewer than 500 employees.³⁰ These types of small businesses represent 99.9% of all businesses in the United States which translates to 29.6 million businesses.³¹

12. Next, the type of small entity described as a “small organization” is generally “any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.”³²

²³ 5 U.S.C. § 604 (a)(3)

²⁴ See 5 U.S.C. § 604(a)(4).

²⁵ See 5 U.S.C. § 601(6).

²⁶ See 5 U.S.C. § 601(3) (incorporating by reference the definition of “small-business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

²⁷ See 15 U.S.C. § 632.

²⁸ The definitions of utility and telecommunications carrier for purposes of our pole attachment rules are found in 47 U.S.C. § 224(a)(1) and (a)(5), respectively.

²⁹ See 5 U.S.C. § 601(3)-(6).

³⁰ See SBA, Office of Advocacy, “Frequently Asked Questions, Question 1 – What is a small business?” <https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2017-WEB.pdf> (Aug. 2017)

³¹ See SBA, Office of Advocacy, “Frequently Asked Questions, Question 2- How many small business are there in the U.S.?” <https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2017-WEB.pdf> (Aug. 2017).

³² 5 U.S.C. § 601(4).

Nationwide, as of August 2016, there were approximately 356,494 small organizations based on registration and tax data filed by nonprofits with the Internal Revenue Service (IRS).³³

13. Finally, the small entity described as a “small governmental jurisdiction” is defined generally as “governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.”³⁴ U.S. Census Bureau data from the 2012 Census of Governments³⁵ indicate that there were 90,056 local governmental jurisdictions consisting of general purpose governments and special purpose governments in the United States.³⁶ Of this number there were 37,132 general purpose governments (county³⁷, municipal and town or township³⁸) with populations of less than 50,000 and 12,184 special purpose governments (independent school districts³⁹ and special districts⁴⁰) with populations of less than 50,000. The 2012 U.S. Census Bureau data for most types of governments in the local government category show that the majority of these governments have populations of less than 50,000.⁴¹ Based on this data we estimate that at least 49,316 local government jurisdictions fall in the category of “small governmental jurisdictions.”⁴²

³³ Data from the Urban Institute, National Center for Charitable Statistics (NCCS) reporting on nonprofit organizations registered with the IRS was used to estimate the number of small organizations. Reports generated using the NCCS online database indicated that as of August 2016 there were 356,494 registered nonprofits with total revenues of less than \$100,000. Of this number, 326,897 entities filed tax returns with 65,113 registered nonprofits reporting total revenues of \$50,000 or less on the IRS Form 990-N for Small Exempt Organizations and 261,784 nonprofits reporting total revenues of \$100,000 or less on some other version of the IRS Form 990 within 24 months of the August 2016 data release date. See <http://nccsweb.urban.org/tablewiz/bmf.php> where the report showing this data can be generated by selecting the following data fields: Show: “Registered Nonprofit Organizations”; By: “Total Revenue Level (years 1995, Aug to 2016, Aug)”; and For: “2016, Aug” then selecting “Show Results”.

³⁴ 5 U.S.C. § 601(5).

³⁵ See 13 U.S.C. § 161. The Census of Government is conducted every five years compiling data for years ending with “2” and “7.” See also Program Description Census of Government, <https://factfinder.census.gov/faces/affhelp/jsf/pages/metadata.xhtml?lang=en&type=program&id=program.en.COG#>.

³⁶ See U.S. Census Bureau, 2012 Census of Governments, Local Governments by Type and State: 2012 - United States-State, <https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG02.US01>. Local governmental jurisdictions are classified in two categories - General purpose governments (county, municipal and town or township) and Special purpose governments (special districts and independent school districts).

³⁷ See U.S. Census Bureau, 2012 Census of Governments, County Governments by Population-Size Group and State: 2012 - United States-States, <https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG06.US01>. There were 2,114 county governments with populations less than 50,000.

³⁸ See U.S. Census Bureau, 2012 Census of Governments, Subcounty General-Purpose Governments by Population-Size Group and State: 2012 - United States – States, <https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG07.US01>. There were 18,811 municipal and 16,207 town and township governments with populations less than 50,000.

³⁹ See U.S. Census Bureau, 2012 Census of Governments, Elementary and Secondary School Systems by Enrollment-Size Group and State: 2012 - United States-States, <https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG11.US01>. There were 12,184 independent school districts with enrollment populations less than 50,000.

⁴⁰ See U.S. Census Bureau, 2012 Census of Governments, Special District Governments by Function and State: 2012 - United States-States, <https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG09.US01>. The U.S. Census Bureau data did not provide a population breakout for special district governments.

⁴¹ See U.S. Census Bureau, 2012 Census of Governments, County Governments by Population-Size Group and State: 2012 - United States-States, <https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG06.US01>; Subcounty General-Purpose Governments by Population-Size Group and State: 2012 - United States–States,

14. *Wired Telecommunications Carriers.* The U.S. Census Bureau defines this industry as “establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired communications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services, wired (cable) audio and video programming distribution, and wired broadband internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.”⁴³ The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees.⁴⁴ Census data for 2012 show that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees.⁴⁵ Thus, under this size standard, the majority of firms in this industry can be considered small.

15. *Local Exchange Carriers (LECs).* Neither the Commission nor the SBA has developed a size standard for small businesses applicable to local exchange services. The closest applicable NAICS Code category is for Wired Telecommunications Carriers, as defined in paragraph 14 of this FRFA. Under that size standard, such a business is small if it has 1,500 or fewer employees.⁴⁶ Census data for 2012 show that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees.⁴⁷ The Commission therefore estimates that most providers of local exchange carrier service are small entities that may be affected by the rules adopted.

16. *Incumbent Local Exchange Carriers (incumbent LECs).* Neither the Commission nor the SBA has developed a small business size standard for incumbent local exchange services. The closest applicable NAICS Code category is Wired Telecommunications Carriers as defined in paragraph 14 of this FRFA. Under that size standard, such a business is small if it has 1,500 or fewer employees.⁴⁸ According to Commission data, 3,117 firms operated in that year. Of this total, 3,083 operated with fewer than 1,000 employees.⁴⁹ Consequently, the Commission estimates that most providers of incumbent local

<https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG07.US01>; and Elementary and Secondary School Systems by Enrollment-Size Group and State: 2012 - United States-States, <https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG11.US01>. While U.S. Census Bureau data did not provide a population breakout for special district governments, if the population of less than 50,000 for this category of local government is consistent with the other types of local governments the majority of the 38, 266 special district governments have populations of less than 50,000.

⁴² *Id.*

⁴³ U.S. Census Bureau, 2012 NAICS Definitions, “517311 Wired Telecommunications Categories,” <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

⁴⁴ See 13 C.F.R. § 120.201, NAICS Code 517311.

⁴⁵ 2012 U.S. Economic Census, NAICS Code 517311, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ2&prodT ype=table.

⁴⁶ See 13 C.F.R. § 120.201, NAICS Code 517311, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ2&prodT ype=table.

⁴⁷ 2012 U.S. Economic Census, NAICS Code 517311, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ2&prodT ype=table.

⁴⁸ See 13 C.F.R. § 120.201, NAICS Code 517311.

⁴⁹ 2012 U.S. Economic Census, NAICS Code 517311,

exchange service are small businesses that may be affected by the rules and policies adopted. One thousand three hundred and seven (1,307) Incumbent Local Exchange Carriers reported that they were incumbent local exchange service providers.⁵⁰ Of this total, an estimated 1,006 have 1,500 or fewer employees.⁵¹

17. *Competitive Local Exchange Carriers (competitive LECs), Competitive Access Providers (CAPs), Shared-Tenant Service Providers, and Other Local Service Providers.* Neither the Commission nor the SBA has developed a small business size standard for these service providers. The appropriate NAICS Code category is Wired Telecommunications Carriers, as defined in paragraph 14 of this FRFA. Under that size standard, such a business is small if it has 1,500 or fewer employees. U.S. Census data for 2012 indicate that 3,117 firms operated during that year. Of that number, 3,083 operated with fewer than 1,000 employees.⁵² Based on this data, the Commission concludes that the majority of Competitive LECs, CAPs, Shared-Tenant Service Providers, and Other Local Service Providers are small entities. According to Commission data, 1,442 carriers reported that they were engaged in the provision of either competitive local exchange services or competitive access provider services.⁵³ Of these 1,442 carriers, an estimated 1,256 have 1,500 or fewer employees. In addition, 17 carriers have reported that they are Shared-Tenant Service Providers, and all 17 are estimated to have 1,500 or fewer employees.⁵⁴ In addition, 72 carriers have reported that they are Other Local Service Providers.⁵⁵ Of this total, 70 have 1,500 or fewer employees.⁵⁶ Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, Shared-Tenant Service Providers, and Other Local Service Providers are small entities that may be affected by the adopted rules.

18. *Interexchange Carriers (IXCs).* Neither the Commission nor the SBA has developed a definition for Interexchange Carriers. The closest NAICS Code category is Wired Telecommunications Carriers as defined in paragraph 14 of this FRFA. The applicable size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees.⁵⁷ According to Commission data, 359 companies reported that their primary telecommunications service activity was the provision of interexchange services.⁵⁸ Of this total, an estimated 317 have 1,500 or fewer employees and 42 have more than 1,500 employees.⁵⁹ Consequently, the Commission estimates that the majority of interexchange service providers are small entities that may be affected by the adopted rules.

19. *Other Toll Carriers.* Neither the Commission nor the SBA has developed a size standard for small businesses applicable to Other Toll Carriers. This category includes toll carriers that do not fall

http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ2&prodType=table.

⁵⁰ See Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, Trends in Telephone Service at 5-5, Tbl. 5.3 (2010), (*Trends in Telephone Service*).

⁵¹ *Id.*

⁵²http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ5&prodType=table.

⁵³ See Trends in Telephone Service at 5-5, Tbl. 5.3.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ 13 C.F.R. § 121.201, NAICS Code 517311.

⁵⁸ See Trends in Telephone Service at 5-5, Tbl. 5.3.

⁵⁹ *Id.*

within the categories of interexchange carriers, operator service providers, prepaid calling card providers, satellite service carriers, or toll resellers. The closest applicable NAICS Code category is for Wired Telecommunications Carriers, as defined in paragraph 14 of this FRFA. Under that size standard, such a business is small if it has 1,500 or fewer employees.⁶⁰ Census data for 2012 shows that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees.⁶¹ Thus, under this category and the associated small business size standard, the majority of Other Toll Carriers can be considered small. According to Commission data, 284 companies reported that their primary telecommunications service activity was the provision of other toll carriage.⁶² Of these, an estimated 279 have 1,500 or fewer employees.⁶³ Consequently, the Commission estimates that most Other Toll Carriers that may be affected by our rules are small.

20. *Wireless Telecommunications Carriers (Except Satellite)*. This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves, such as cellular services, paging services, wireless internet access, and wireless video services.⁶⁴ The appropriate size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees. For this industry, Census data for 2012 show that there were 967 firms that operated for the entire year. Of this total, 955 firms had fewer than 1,000 employees.⁶⁵ Thus under this category and the associated size standard, the Commission estimates that the majority of wireless telecommunications carriers (except satellite) are small entities. Similarly, according to internally developed Commission data, 413 carriers reported that they were engaged in the provision of wireless telephony, including cellular service, Personal Communications Service (PCS), and Specialized Mobile Radio (SMR) services.⁶⁶ Of this total, an estimated 261 have 1,500 or fewer employees.⁶⁷ Consequently, the Commission estimates that approximately half of these firms can be considered small. Thus, using available data, we estimate that the majority of wireless firms can be considered small.

21. *Cable Companies and Systems (Rate Regulation)*. The Commission has developed its own small business size standards for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers nationwide.⁶⁸ Industry data indicate that there are currently 4,600 active cable systems in the United States.⁶⁹ Of this total, all but nine cable operators nationwide are small under the 400,000-subscriber size standard.⁷⁰ In addition,

⁶⁰ 13 C.F.R. § 121.201, NAICS Code 517311.

⁶¹http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ5&prodType=table.

⁶² See Trends in Telephone Service at 5-5, Tbl. 5.3.

⁶³ *Id.*

⁶⁴ NAICS Code 517210. See <https://www.census.gov/econ/isp/sampler.php?naicscode=517210&naicslevel=6#>.

⁶⁵http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ5&prodType=table.

⁶⁶ See Trends in Telephone Service at 5-5, Tbl. 5.3.

⁶⁷ *Id.*

⁶⁸ 47 C.F.R. § 76.901(e)

⁶⁹ Federal Communications Commission, Assessment and Collection of Regulatory Fees for Fiscal Year 2014; Assessment and Collection of Regulatory Fees for Fiscal Year 2013; and Procedures for Assessment and Collection of Regulatory Fees, 80 Fed. Reg. 66815 (Oct. 30, 2015) (citing Aug. 15, 2015 Report from the Media Bureau based on data contained in the Commission's Cable Operations and Licensing System (COALS)). See www.fcc.gov/coals.

⁷⁰ See SNL KAGAN, <https://www.snl.com/interactiveX/MyInteractive.aspx?mode=4&CDID=A-821-38606&KLPT=8> (subscription required).

under the Commission's rate regulation rules, a "small system" is a cable system serving 15,000 or fewer subscribers.⁷¹ Current Commission records show 4,600 cable systems nationwide.⁷² Of this total, 3,900 cable systems have fewer than 15,000 subscribers, and 700 systems have 15,000 or more subscribers, based on the same records.⁷³ Thus, under this standard as well, we estimate that most cable systems are small entities.

22. *Cable System Operators (Telecom Act Standard)*. The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than one percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000 are approximately 52,403,705 cable video subscribers in the United States today.⁷⁴ Accordingly, an operator serving fewer than 524,037 subscribers shall be deemed a small operator if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.⁷⁵ Based on available data, we find that all but nine incumbent cable operators are small entities under this size standard.⁷⁶ We clarify that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million.⁷⁷ Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed \$250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under *the* definition in the Communications Act.

23. *All Other Telecommunications*. "All Other Telecommunications" is defined as follows: "This U.S. industry is comprised of establishments that are primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Establishments providing Internet services or voice over Internet protocol (VoIP) services via client supplied telecommunications connections are also included in this industry."⁷⁸ The SBA has developed a small business size standard for "All Other Telecommunications," which consists of all such firms with

⁷¹ 47 C.F.R. § 76.901(c).

⁷² Federal Communications Commission, Assessment and Collection of Regulatory Fees for Fiscal Year 2014; Assessment and Collection of Regulatory Fees for Fiscal Year 2013; and Procedures for Assessment and Collection of Regulatory Fees, 80 Fed. Reg. 66815 (Oct. 30, 2015) (citing August 15, 2015 Report from the Media Bureau based on data contained in the Commission's Cable Operations and Licensing System (COALS)). See www.fcc.gov/coals.

⁷³ *Id.*

⁷⁴ *Assessment and Collection of Regulatory Fees for Fiscal Year 2016, Notice of Proposed Rulemaking*, 31 FCC Rcd 5757, Appendix E para. 23 (2016) (citing Office of Management and Budget (OMB) Memorandum M-10-06, Open Government Directive, Dec. 8, 2009).

⁷⁵ 47 C.F.R. § 76.901(f).

⁷⁶ *Assessment & Collection of Regulatory Fees for Fiscal Year 2016, Notice of Proposed Rulemaking*, 31 FCC Rcd 5757, Appx. E para. 23 (2016).

⁷⁷ The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to section 76.901(f) of the Commission's rules. See 47 C.F.R. § 76.901(f).

⁷⁸ <https://www.census.gov/econ/isp/sampler.php?naicscode=517919&naicslevel=6>.

gross annual receipts of \$32.5 million or less.⁷⁹ For this category, Census Bureau data for 2012 show that there were 1,442 firms that operated for the entire year. Of those firms, a total of 1,400 had annual receipts less than \$25 million.⁸⁰ Consequently, we conclude that the majority of All Other Telecommunications firms can be considered small.

24. *Electric Power Generation, Transmission and Distribution.* The Census Bureau defines this category as follows: “This industry group comprises establishments primarily engaged in generating, transmitting, and/or distributing electric power. Establishments in this industry group may perform one or more of the following activities: (1) operate generation facilities that produce electric energy; (2) operate transmission systems that convey the electricity from the generation facility to the distribution system; and (3) operate distribution systems that convey electric power received from the generation facility or the transmission system to the final consumer.”⁸¹ This category includes electric power distribution, hydroelectric power generation, fossil fuel power generation, nuclear electric power generation, solar power generation, and wind power generation. The SBA has developed a small business size standard for firms in this category based on the number of employees working in a given business.⁸² According to Census Bureau data for 2012, there were 1,742 firms in this category that operated for the entire year.⁸³

25. *Natural Gas Distribution.* This economic census category comprises: “(1) establishments primarily engaged in operating gas distribution systems (e.g., mains, meters); (2) establishments known as gas marketers that buy gas from the well and sell it to a distribution system; (3) establishments known as gas brokers or agents that arrange the sale of gas over gas distribution systems operated by others; and (4) establishments primarily engaged in transmitting and distributing gas to final consumers.”⁸⁴ The SBA has developed a small business size standard for this industry, which is all such firms having 1,000 or fewer employees.⁸⁵ According to Census Bureau data for 2012, there were 422 firms in this category that operated for the entire year.⁸⁶ Of this total, 399 firms had employment of fewer

⁷⁹ 13 C.F.R. § 121.201; NAICS Code 517919.

⁸⁰ U.S. Census Bureau, *2012 Economic Census of the United States*, Table EC0751SSSZ1, Information: Subject Series - Establishment and Firm Size: Receipts Size of Firms for the United States: 2012 NAICS Code 517919, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ1&prodType=table.

⁸¹ U.S. Census Bureau, 2017 NAICS Definitions, “2211 Electric Power Generation, Transmission and Distribution,” https://www.census.gov/eos/www/naics/2017NAICS/2017_NAICS_Manual.pdf.

⁸² U.S. Small Business Administration, Table of Small Business Size Standards Matched to North American Classification System Codes, “Sector 22 - Utilities” at 5 (2016), https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf.

⁸³ U.S. Census Bureau, 2012 Economic Census, Subject Series: Utilities, “Establishment and Firm Size: Summary Statistics by Employment Size of Firms for the U.S.: 2012,” NAICS codes 221111, 221112, 221113, 221114, 221115, 221116, 221117, 221118, 22112, 221121, (issued Mar. 2016), <https://www.census.gov/data/tables/2012/econ/census/utilities.html>.

⁸⁴ U.S. Census Bureau, 2017 NAICS Definitions, “221210 Natural Gas Distribution,” https://www.census.gov/eos/www/naics/2017NAICS/2017_NAICS_Manual.pdf.

⁸⁵ U.S. Small Business Administration, Table of Small Business Size Standards Matched to North American Classification System Codes, “Sector 22 - Utilities” at 5 (2016), https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf.

⁸⁶ U.S. Census Bureau, 2012 Economic Census, Subject Series: Utilities, “Establishment and Firm Size: Summary Statistics by Employment Size of Firms for the U.S.: 2012,” NAICS code 2212 (issued Mar. 2016), <https://www.census.gov/data/tables/2012/econ/census/utilities.html>.

than 1,000 employees, 23 firms had employment of 1,000 employees or more, and 37 firms were not operational.⁸⁷ Thus, the majority of firms in this category can be considered small.

26. *Water Supply and Irrigation Systems.* This economic census category “comprises establishments primarily engaged in operating water treatment plants and/or operating water supply systems. The water supply system may include pumping stations, aqueducts, and/or distribution mains. The water may be used for drinking, irrigation, or other uses.”⁸⁸ The SBA has developed a small business size standard for this industry, which is all such firms having \$27.5 million or less in annual receipts.⁸⁹ According to Census Bureau data for 2012, there were 3,261 firms in this category that operated for the entire year.⁹⁰ Of this total, 3,035 firms had annual sales of less than \$25 million⁹¹ Thus, the majority of firms in this category can be considered small.

E. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

27. *One-Touch Make Ready (OTMR) Alternative Pole Attachment Process.* The Order adopts an OTMR pole attachment alternative to the Commission’s existing pole attachment timeline. New attachers may perform all simple make-ready work required to accommodate new wireline attachments in the communications space on a pole. First, any OTMR work will be performed by a utility-approved contractor, although a new attacher can use its own qualified contractor to perform OTMR work when the utility does not provide a list of approved contractors. Second, new attachers must provide advanced notice and allow representatives of existing attachers and the utility a reasonable opportunity to be present when OTMR surveys and make-ready work are performed. Third, new attachers must allow existing attachers and the utility the ability to inspect and request any corrective measures soon after the new attacher performs the OTMR work.

28. The Order sets forth that the OTMR process begins upon utility receipt of a complete application by a new attacher to attach to its facilities. A complete application is defined as one that provides the utility with the information necessary under its procedures, as specified in a master service agreement or in publicly-released requirements at the time of submission of the application, to begin to survey the affected poles. The Order further establishes that a utility has ten business days after receipt of a pole attachment application to determine if the application is complete and notify the attacher of that decision. If the utility notifies the attacher that its application is not complete within the ten business-day review period, then the utility must specify where and how the application is deficient. If the utility provides no response within ten business days, or if the utility rejects the application as incomplete but fails to specify any deficiencies in the application, then the application is deemed complete. If the utility timely notifies the attacher that its application is incomplete and specifies the deficiencies, then a resubmitted application is only required to address the enumerated issues and will be deemed complete

⁸⁷ *Id.*

⁸⁸ U.S. Census Bureau, 2017 NAICS Definitions, “221310 Water Supply and Irrigation Systems,” https://www.census.gov/eos/www/naics/2017NAICS/2017_NAICS_Manual.pdf.

⁸⁹ U.S. Small Business Administration, Table of Small Business Size Standards Matched to North American Classification System Codes, “Sector 22 - Utilities” at 5 (2016), https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf.

⁹⁰ U.S. Census Bureau, 2012 Economic Census, Subject Series: Utilities, “Establishment and Firm Size: Summary Statistics by Employment Size of Firms for the U.S.: 2012,” NAICS code 221310 (issued Mar. 2016), <https://www.census.gov/data/tables/2012/econ/census/utilities.html>.

⁹¹ U.S. Census Bureau, 2012 Economic Census, Subject Series: Utilities, “Establishment and Firm Size: Summary Statistics by Revenue Size of Firms for the U.S.: 2012,” NAICS code 221310 (issued Mar. 2016), <https://www.census.gov/data/tables/2012/econ/census/utilities.html>.

within five business days after its resubmission, unless the utility specifies which deficiencies were not addressed. A new attacher may follow the resubmission procedure as many times as it chooses, so long as in each case it makes a bona fide attempt to correct the issues identified by the utility. A utility must respond to new attachers within 15 days of receiving complete pole attachment, or within 30 days for larger requests.

29. The Order further provides that under the OTMR process, it is the responsibility of the new attacher to conduct a survey of the affected poles to determine the make-ready work to be performed. In performing a field inspection as part of any pre-construction survey, the new attacher must permit representatives of the utility and any existing attachers potentially affected by the proposed make-ready work to be present for the survey, using commercially reasonable efforts to provide advance notice of the date, time, and location of the survey of not less than three (3) business days. The Order requires that the new attacher ensures that its contractor determines whether the make-ready work identified in the survey is simple or complex, subject to an electric utility's right to reasonably object to the determination. The new attacher – if it wants to use the OTMR process and is eligible to do so based on the survey – must elect OTMR in its pole attachment application and identify in its application the simple make-ready work to be performed. The Order requires an electric utility that wishes to object to a simple make-ready determination to raise such an objection during the 15-day application review period (or within 30 days in the case of larger orders). Any such objection by the electric utility is final and determinative, so long as it is specific and in writing, includes all relevant evidence and information supporting its decision, made in good faith, and explains how such evidence and information relate to a determination that the make-ready is not simple. In this case, the work is deemed complex and must follow the existing pole attachment timeline that is modified in this Order. If the make-ready work involves a mix of simple and complex work, then the new attacher may elect to bifurcate the work and must submit separate applications for simple and complex work.

30. The Order provides that the new attacher can elect to proceed with the necessary simple make-ready work by giving 15 days' prior written notice to the utility and all affected existing attachers. The new attacher may provide the required 15-day notice any time after the utility deems its pole attachment application complete. If the new attacher cannot start make-ready work on the date specified in its 15-day notice, then the new attacher must provide 15 days' advance notice of its revised make-ready date. The new attacher's notice must provide representatives of the utility and existing attachers: (1) the date and time of the make-ready work, (2) a description of the make-ready work involved, (3) a reasonable opportunity to be present when the make-ready work is being performed, and (4) the name of the contractor chosen by the new attacher to perform the make-ready work. Further, the new attacher must notify the existing attacher immediately if the new attacher's contractor damages another company's or the utility's equipment or causes an outage that is reasonably likely to interrupt the provision of service. Finally, the Order requires the new attacher to provide notice to the utility and affected existing attachers within 15 days after OTMR make-ready work is completed on a particular pole. The new attacher may batch in one post-make-ready notice all poles completed in a particular 15-day span. In its post-make-ready notice, the new attacher must provide the utility and existing attachers at least a 30-day period for the inspection of make-ready work performed by the new attacher's contractors. The Order requires the utility and the existing attachers to notify the new attacher of any damage caused to their equipment by the new attacher's make-ready work within 14 days after any post-make ready inspection. The utility or existing attacher can either complete any necessary remedial work and bill the new attacher for reasonable costs to fix the damage, or require the new attacher to fix the damage at its expense within 14 days following notice from the utility or existing attacher.

31. The Order also establishes that new attachers must use a utility-approved contractor to perform OTMR if a utility makes available a list of qualified contractors authorized to perform simple make-ready work in the communications space of its poles and requires new attachers to choose contractors from this list to perform simple make-ready work. New and existing attachers may request that contractors meeting the minimum qualification requirements be added to the utility's list and utilities

may not unreasonably withhold consent to add a new contractor to the list. To be reasonable, a utility's decision to withhold consent must be prompt, set forth in writing that describes the basis for rejection, nondiscriminatory, and based on fair application of commercially reasonable requirements for contractors relating to issues of safety or reliability. If the use of an approved contractor is not required by the utility or no approved contractor is available within a reasonable time period, then the Order allows new attachers to use qualified contractors of their choosing to perform simple make-ready work in the communications space of poles. New attachers must provide the name of their chosen contractor in the three-business-day advance notice for surveys or the 15-day notices sent to utilities and existing attachers in advance of commencing OTMR work. The utility may veto any contractor chosen by the new attacher as long as the veto is based on safety and reliability concerns related to the contractor's failure to meet any of the minimum qualifications or the utility's previously posted safety standards, and the utility identifies at least one qualified contractor available to do the work. The utility must exercise its veto within either the three-business-day notice period for surveys or the 15-day notice period for make-ready. The objection by the utility is determinative and final.

32. The utility or new attacher must certify to the utility, within either the three-business-day notice period for surveys or the 15-day notice period for make-ready, that any contractors perform OTMR meet the following minimum requirements: (1) follow published safety and operational guidelines of the utility, if available, but if unavailable, the contractor agrees to follow NESC guidelines; (2) read and follow licensed-engineered pole designs for make-ready work, if required by the utility; (3) follow all local, state, and federal laws and regulations including, but not limited to, the rules regarding Qualified and Competent Persons under the requirements of the Occupational and Safety Health Administration (OSHA) rules; (4) meet or exceed any uniformly applied and reasonable safety record thresholds set by the utility, if made available, *i.e.*, the contractor does not have an unsafe record of significant safety violations or worksite accidents; and (5) be adequately insured or be able to establish an adequate performance bond for the make-ready work it will perform. The utility may mandate additional commercially reasonable requirements for contractors relating to issues of safety and reliability, but such requirements must be non-discriminatory, in writing, and publicly-available (*i.e.*, on the utility's website).

33. *Existing Pole Attachment Process Reforms.* The Order makes targeted changes to the Commission's existing pole attachment timeline for attachments that are not eligible for the OTMR process and attachers that prefer the existing process. These reforms include revising the definition of a complete pole attachment application and establishing a timeline for a utility's determination whether application is complete; requiring utilities to provide at least three business days' advance notice of any surveys to the new attacher; shortening the existing make-ready deadline by 30 days for attachments above the communications space; establishing a 30-day deadline for all make-ready work in the communications space; streamlining the utility's notice requirements; requiring utilities to provide detailed estimates and final invoices to new attachers regarding make-ready costs; enhancing the new attacher's self-help remedy by making the remedy available for surveys and make-ready work for all attachments anywhere on the pole in the event that the utility or the existing attachers fail to meet the required deadlines; and revising the contractor selection process for a new attacher's self-help work.

34. The Order retains the existing requirement that the pole attachment timeline begins upon utility receipt of a complete application to attach facilities to its poles, but revises the definition of a complete application to an application that provides the utility with the information necessary under its procedures, as specified in a master service agreement or in publicly-released requirements at the time of submission, to begin to survey the affected poles. The Order then adopts the same timeline as set out in the OTMR-process for a utility to determine whether a pole attachment application is complete.

35. The Order also requires a utility to permit the new attacher and any existing attachers potentially affected by the new attachment to be present for any pole surveys. The utility must use commercially reasonable efforts to provide at least three business days' advance notice of any surveys to the new attacher and each existing attacher, including the date, time, location of the survey, and the name of the contractor performing the survey. The Order provides that the utility may meet the survey

requirement of our existing timeline by electing to use surveys previously prepared on the poles in question by new attachers.

36. The Order amends the existing make-ready timeline by (1) reducing the deadlines for both simple and complex make-ready work from 60 to 30 days (and from 105 to 75 for large requests in the communications space); (2) reducing the make-ready deadline from 90 to 60 days (and from 135 to 105 days for large requests) for a make-ready work above the communications space; (3) eliminating the optional 15-day extension for the utility to complete communications space make-ready work. However, for all attachments, the Order retains as a safeguard our existing rule allowing utilities to deviate from the make-ready timelines for good and sufficient cause when it is infeasible for the utility to complete make-ready work within the prescribed timeframe. An existing attacher can provide written notice to the new attacher before the 30-day complex make-ready deadline explaining in detail the need for an extension and providing a new completion date, which cannot extend beyond 60 days from the date of the utility make-ready notice to existing attachers (or 105 days in the case of larger orders). If complex make-ready is not complete within 60 days from the date that the existing attacher sends notice to the new attacher, the new attacher can complete the work using a utility-approved contractor. Existing attachers must act in good faith in obtaining an extension. The Order also provides that when a utility provides the required make-ready notice to existing attachers, then it must provide the new attacher with a copy of the notice, plus the contact information of existing attachers to which the notices were sent, and thereafter the new attacher (rather than the utility) must take responsibility for encouraging and coordinating with existing attachers to ensure completion of make-ready work on a timely basis.

37. Expanding upon the Commission's existing make-ready cost estimate requirement for utilities, the Order requires a utility to provide a new attacher with a detailed, itemized estimate of charges to perform all necessary make-ready work, as well as detailed and itemized post-make-ready work invoices. As part of the detailed estimate, the utility is required to disclose to the new attacher its projected material, labor, and other related costs that form the basis of its estimate, including specifying what, if any costs, the utility is passing through to the new attacher from the utility's use of a third-party contractor. The Order provides that the utility must detail all make-ready cost estimates and final invoices on a per-pole basis. However, if in compiling the estimate (or invoice) the utility determines that make-ready charges will (or did) not vary from pole-to-pole, the utility may aggregate individual charges (i.e., present one charge for labor, one charge for projected materials, etc.) rather than present a pole-by-pole estimate.

38. To increase broadband deployment, the Order modifies our existing pole attachment rules by extending a new attacher's self-help remedy for surveys and make-ready work to all attachments above the communications space, including the installation of wireless 5G small cells, when the utility or existing attachers have not met make-ready work deadlines. To address the safety concerns of utilities with regard to self-help work, the Order requires that new attachers, when invoking the self-help remedy, (1) use a utility-approved contractor to do the make-ready work; (2) provide no less than five days' notice of the impending survey or make-ready work to the utility and existing attachers and give them a reasonable opportunity to be present when new attachers (or their contractors) perform the work; (3) provide notice to the utility and existing attachers no later than 15 days after make-ready is complete on a particular pole so that they have an opportunity to inspect the make-ready work. The advance notice must include the date and time of the work, nature of the work, and the name of the contractor being used by the new attacher.

39. The Order adopts a contractor selection process for self-help that requires a new attacher electing self-help for simple work in the communications space to select a contractor from a utility-maintained list of qualified contractors that meet the same safety and reliability criteria as contractors authorized to perform OTMR work, where such a list is available. New and existing attachers may request the addition to the list of any contractor that meets the minimum qualification requirements and the utility may not unreasonably withhold consent. If no list is available or no approved contractor is available within a reasonable time period, the new attacher must select a contractor that meets the same

safety and reliability criteria as contractors authorized to perform OTMR work and any additional non-discriminatory, written, and publicly-available criteria relating to safety and reliability that the utility specifies. The utility may veto the new attachers' contractor selection so long as such veto is prompt, set forth in writing that describes the basis for rejection, nondiscriminatory, and based on fair application of commercially reasonable requirements for contractors relating to issues of safety and reliability. Additionally, the utility must offer another available, qualified contractor. For complex work and work above the communications space, the Order requires (1) the utility to make available and keep up-to-date reasonably sufficient list of contractors it authorizes to perform complex and non-communications space self-help surveys and make-ready work; and (2) the new attacher to choose a contractor from the utility's list. New and existing attachers may request that qualified contractors be added to the utility's list and that the utility may not unreasonably withhold its consent for such additions. A utility's decision to withhold consent must be prompt, set forth in writing that describes the basis for the rejection, nondiscriminatory, and based on fair application of commercially reasonable requirements for contractors relating to issues of safety.

40. *Additional Pole Attachment Reforms.* The Order codifies the Commission's existing precedent that prohibits a pre-approval requirement for overloading. In addition, the Order adopts a rule on overloading that allows utilities to establish a reasonable 15-day advance notice requirement, and holds overloaders responsible for ensuring that their practices and equipment do not cause safety or engineering issues. If after receiving advance notice, a utility determines that the noticed overload would be inconsistent with generally applicable engineering practices or would compromise the pole's safety or reliability, it may deny access to the pole for the overload within the 15-day advance notice period so long as such denial is accompanied by specific documentation demonstrating that the overload creates a capacity, safety, reliability, or engineering issue. The Order also establishes a presumption that incumbent LECs will receive comparable pole attachment rates, terms, and conditions as a similarly-situated telecommunications carrier or a cable television system providing telecommunications services, unless the utility can rebut the presumption with clear and convincing evidence that the incumbent LEC receives benefits under its pole attachment agreement with the utility, that materially advantage the incumbent LEC over similarly-situated telecommunications attachers. If the presumption is rebutted, the pre-2011 *Pole Attachment Order* telecommunications carrier rate is the maximum rate that the utility and incumbent LEC may negotiate. This revised presumption would not apply to existing joint use agreements between utilities and incumbent LECs, but would apply to new joint use agreements entered into after the effective date of the new rule.

F. Steps Taken to Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

41. In this Order, the Commission modifies its pole attachment rules to improve the efficiency and transparency of the pole attachment process, as well as to increase access to infrastructure for certain types of broadband providers. Overall, we believe the actions in this document will reduce burdens on the affected carriers, including any small entities.

42. The Order also finds that adopting our alternative OTMR process will reduce delays and costs for new attachers, enhance competition, improve public safety and reliability of networks, and accelerate broadband buildout. As detailed in the Order, the Commission rejects alternative proposals, such as "right-touch, make-ready" and NCTA's "ASAP" proposal – which merely modify the current framework. These approaches diffuse responsibility among parties that lack the new attacher's incentive to ensure that the work is done quickly, cost effectively, and properly. Further, these proposals fail to address the existing problems created by sequential make-ready, such as numerous separate climbs and construction stoppages in the public-rights-of-way.

43. As described in the Order, applying targeted changes to the existing pole attachment process, such as a more efficient pole attachment timeline, detailed and itemized estimates and final invoices on a per-pole basis, and an enhanced self-help remedy, will increase broadband deployment by

reducing the number of unreasonable delays, and encouraging transparency and collaboration between all interested parties at an early stage in the pole attachment process. The Order also concluded that codifying the Commission's existing precedent prohibiting a pre-approval requirement for overloading, and adopting a rule allowing utilities to require advance notice of overloading will eliminate the industry uncertainty that currently exists regarding overloading, a practice that is essential to broadband deployment. In addition, by establishing a rebuttable presumption that incumbent LECs receive the Commission-established pole attachment rate for telecommunications carriers, the Order sought to increase incumbent LEC access to infrastructure by addressing the bargaining disparity between utilities and incumbent LECs through modifying the greater pole attachment rates that LECs pay in comparison to their telecommunications competitors.

G. Report to Congress

44. The Commission will send a copy of the *Report and Order*, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.⁹² In addition, the Commission will send a copy of the *Report and Order*, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the Order and FRFA (or summaries thereof) will also be published in the Federal Register.⁹³

⁹² See 5 U.S.C. § 801(a)(1)(A).

⁹³ See 5 U.S.C. § 604(b).



July 25, 2018

VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84; *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Development*, WT Docket No. 17-79

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Commission's rules,¹ Crown Castle hereby submits these *ex parte* comments regarding the FCC's draft *Third Report and Order and Declaratory Ruling* in the above-referenced proceedings, which the Commission released on July 12, 2018 (the "*Draft Order*").

Crown Castle appreciates the Commission's efforts to streamline the process for deploying infrastructure to support advanced broadband networks. The *Draft Order* includes a number of proposals that will advance this objective, and Crown Castle looks forward to their prompt adoption and implementation.

It is Crown Castle's belief that certain paragraphs in the *Draft Order* may be misconstrued by parties to this proceeding and ultimately cause delays or increase the cost of deploying next generation broadband networks. In order to provide clarity on this issue, Crown Castle respectfully requests the below-proposed revisions to the *Draft Order*.

Utility Construction Standards and Requirements.

Crown Castle appreciates the FCC's consideration of its request to prohibit blanket bans by utilities on the attachment of equipment in the unusable space on a pole and, in particular, its express willingness to revisit this matter in the future. *Draft Order* ¶ 125. Given that the *Draft Order* takes strong and decisive action against *de facto* moratoria in the municipal context, Crown Castle posits that it would be appropriate for the Commission to address blanket bans by utilities in the same order, as these issues present largely parallel questions of policy and equity.

¹ 47 C.F.R. § 1.1206.

Crown Castle is concerned that some parties may interpret the Commission's unwillingness to revisit blanket bans at this time as a relaxation of the current requirements with regard to attachments in the unusable space. To avoid this misinterpretation, the agency should clarify that it is preserving the existing process for denying an attachment request that a utility must provide a detailed, written rationale for denial, and that the concerns cited by the utility must be reasonable and legitimate.

Section 1.1403(b) of the Commission rules requires that a utility denying a request for access to its poles must confirm such denial in writing within 45 days, and that such denial must be "specific, shall include all relevant evidence and information supporting its denial, and shall explain how such evidence and information relate to a denial of access for reasons of lack of capacity, safety, reliability or engineering standards."²

In its 2011 Pole Attachment Order, the Commission recognized that the standard in Section 1.1403(b) was "susceptible to abuse" and sought to clarify a utility's obligation when denying an attachment request.³ Specifically, the FCC stated:

It is not sufficient for a utility to dismiss a request with a written description of its blanket concerns about a type of attachment or technology, or a generalized citation to section 224. Instead, we find that a utility must explain in writing its precise concerns--and how they relate to lack of capacity, safety, reliability, or engineering purposes--in a way that is specific with regard to both the particular attachment(s) and the particular pole(s) at issue. Furthermore, such concerns must be reasonable in nature in order to be considered nondiscriminatory. Concerns that appear to be mere pretexts rather than legitimate reasons for denying statutory rights to access will be given serious scrutiny by the Commission, including in any complaint proceeding arising out of a denial of access. We believe that this clarification regarding the specificity of denials will encourage communication and cooperation between utilities and wireless attachers, and thereby promote the deployment of and competition for telecommunications and broadband services.⁴

The inclusion of this language has encouraged utilities to work with Crown Castle to make exceptions to blanket rules or standards prohibiting equipment attachments in the unusable space of the pole on a case-by-case basis.

To ensure that the language of the *Draft Order* does not inadvertently result in a departure from existing practice, Crown Castle proposes that the FCC add the following to Paragraph 125 of the *Draft Order*:

We take this opportunity to reaffirm our comments in the 2011 Pole Attachment Order that: (i) a utility must explain in writing its precise concerns—and how they

² *Id.* § 1.1403(b).

³ *In the Matter of Implementation of Section 224 of the Act A Nat'l Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd. 5240 ¶ 76 (2011).

⁴ *Id.*

relate to lack of capacity, safety, reliability, or engineering purposes—in a way that is specific with regard to both the particular attachment(s) and the particular pole(s) at issue; and (ii) such concerns must be reasonable in nature in order to be considered nondiscriminatory. The Commission expects attachers and utilities to work together to find code-compliant solutions that address any concerns raised by a utility.

This clarification should help prevent disputes regarding the effect of the FCC's most recent action and potentially avoid the need for future Commission intervention.

Pre-Existing Violations

Crown Castle welcomes the FCC's clarification that new attachers are not responsible for pre-existing violations but believes the Commission can do more to ensure that existing violations and safety conditions do not serve as a barrier to broadband deployment.

On occasion, utilities have denied Crown Castle access to existing poles that the utility claims are non-compliant with safety standards – and that the utility has therefore classified “no touch” or “red tagged” poles. Such poles may be placed on replacement schedules spanning many years, or are sometimes simply red tagged for pre-existing violations with no concurrent planned replacement or repair date. In these instances, if a new attacher applies to attach after poles have been marked “no touch,” the new attacher is told that it will bear responsibility for the full replacement cost of the poles prior to being able to attach its fiber to them. Crown Castle is currently facing just this scenario with a large IOU that covers multiple states. In that case, Crown Castle is facing a bill of approximately \$20-40 million for pole replacements in one large small cell project alone. Crown Castle is told that there is no replacement schedule for the underlying poles; it could be many years before the entity is actually required to replace the poles itself. As one might imagine, the addition of a \$20-40 million dollar line item to this project makes it unfeasible. The fee unfairly penalizes the new attacher and functions as an obvious barrier to access. Because the IOU has no plan in place for replacing the poles and because they are taking such a conservative view of the NESC loading guidelines, this ban could be in place for over a decade if the IOU doesn't put this plant into its replacement schedule soon.

The *Draft Order* represents a good start toward addressing issues like the one detailed above. Clarifying that “utilities may not deny new attachers access to the pole based on safety concerns from a pre-existing violation” will ensure that a utility cannot use a pre-existing violation as a basis for a *de facto* denial of access.⁵ However, the Commission should go one step further and add: “Nor may utilities require new attachers to pay for repairs or pole replacements necessitated by pre-existing safety violations, which would amount to an effective denial based on safety issues.”

A related concern is the time that it may take for a utility to make any required repairs or pole replacements. For example, when certain utilities red tag a pole, they do not provide a timeline for when the pole will be replaced, leaving potential attachers in limbo. Thus, while the *Draft Order* provides some relief by declaring that “a utility cannot delay completion of make-ready

⁵ *Draft Order* ¶ 113.

while the utility attempts to identify or collect from the party who should pay for correction of the preexisting violation,”⁶ it should also clarify that a utility must replace in an expedited timeframe any pole on which it would otherwise deny an attachment request due to safety concerns. Utilities should also be required to provide attachers with a schedule in which the poles will be remedied. Because the *Draft Order* considers make-ready involving pole replacements complex, the appropriate timeframe is thirty (30) days for poles involving only wireline attachments, and sixty (60) days for those involving wireless attachments.

Applicability of Rules to Bargained Solutions

Crown Castle understands and appreciates the Commission’s desire to provide flexibility in its rules to allow parties to negotiate agreements that will result in more efficient solutions. At the same time, Crown Castle is concerned that the flexible language in Paragraph 13 of the *Draft Order* may encourage parties to refuse to incorporate the rules into a negotiated agreement and result in more complicated and drawn-out negotiations. To resolve this concern, the Commission should clarify that its rules serve as a floor, and that just as state requirements must not conflict with the new rules, negotiated agreements must incorporate the new rules as a baseline and build upon, rather than replace, them.

Relatedly, the Commission should clarify that a party cannot delay the filing of a “complete application” by seeking to negotiate rates, terms, and conditions that unreasonably deviate from those assured by the rules.⁷ Using negotiations to impose lengthy delays prior to the submission of applications to attach is a behavior similar to the *de facto* moratoria that the FCC is seeking to eliminate in the Declaratory Ruling portion of the *Draft Order*. As such, the Commission should clarify that this is an impermissible practice.

“Simple” vs. “Complex” Make-Ready

While the one-touch make-ready framework proposed in the *Draft Order* will greatly expedite deployment of broadband infrastructure, Crown Castle is concerned that the definition of “complex” make-ready may be so broad as to allow the exception to swallow the rule.

The *Draft Order* defines “complex” make-ready as “transfers and work within the communications space that would be reasonably likely to cause a service outage(s) or facility damage, including work such as splicing of any communication attachment or relocation of existing wireless attachments. Any and all wireless activities, including those involving mobile, fixed, and point-to-point wireless communications and wireless internet service providers, are to be considered complex.”⁸

As an initial matter, defining all wireless activity within the communications space as “complex” is an overly conservative approach that will put wireless providers at a competitive disadvantage compared to other communications providers. There is nothing inherent in wireless make-ready

⁶ *Id.*

⁷ See *Draft Order* Appx. A (amendment to Sections 1.1412(c)(1), (j)(1)(ii)) & ¶ 28.

⁸ *Draft Order* at App’x A (amendment to Section 1.1402(p)) & ¶ 18.

work that leads to the conclusion it is “reasonably likely to cause a service outage or facility damage,” so long as the work is confined to the communications space. Any wireless facilities small enough to reside within the comm space are no more likely to cause disruptions than wired facilities. As a result, the Commission should revisit this conclusion, and determine that placement of wireless facilities wholly within the communcations space is not a “complex” operation.

Even if the Commission elects to retain this determination, neither the proposed rule nor the BDAC recommendations on which it is based defines the term “wireless activities.” This raises the concern that, notwithstanding the very clear language that “utilities may not require an attacher to obtain its approval for overlashing,” some parties may take the position that deploying strand-mounted wireless facilities on existing wires is a “wireless activity” subject to the more time-consuming “complex” make ready procedures.

To resolve this concern, the FCC should either adopt a definition of “wireless activity” that makes clear that it does not apply to strand mounted wireless facilities and/or modify proposed Section 1.1416(a) to read “ A utility shall not require prior approval for an existing attacher that overlashes its existing wires (including strand mounted wireless facilities) on a pole.”

Timelines When Using Attacher’s Surveys

Paragraph 77 of the *Draft Order* sensibly allows a utility to use a new attacher’s previously performed survey rather than performing a potentially duplicative survey. However, in addition to the cost savings that come from not duplicating the survey process, the utility will also reduce the time required for its review. Accordingly, the Commission should clarify that in the event a utility elects to use survey results from the attacher’s pre-application survey, the 45-day period for survey and engineering would not apply, but would be supplanted by a 15-day review period (same as the period for review under the one-touch make ready process). This will have the effect of further expediting deployment efforts.

Scope of Section 253(a) – Declaratory Ruling

Crown Castle appreciates the Commission’s effort in the Declaratory Ruling portion of the *Draft Order* to make clear that both actual and *de facto* moratoria violate Section 253(a). The Agency correctly concludes that because *de facto* moratoria “by their operation, prohibit deployment of telecommunications services and/or telecommunications facilities,” they cannot be reconciled with Section 253(a).⁹

Crown Castle is concerned, however, that while the analysis in the Declaratory Ruling is narrowly focused on *de facto* moratoria and does not purport to consider whether other actions by states and localities constitute an “effective prohibition,” parties may attempt to read the Declaratory Ruling as suggesting that *de facto* moratoria represent the outside scope of an effective prohibition.¹⁰

⁹ *Id.* ¶ 139.

¹⁰ *See id.* ¶ 140-42.

That would be erroneous. Section 253(a)'s bar on those state and local laws that would have the effect of prohibiting telecommunications service reaches well beyond the *de facto* moratoria that are discussed in the draft Declaratory Ruling. As Crown Castle recently explained, the Commission's precedent on this point is clear: Any law, regulation, or legal requirement that materially inhibits or limits the ability of a competitor or potential competitor to compete in a fair and balanced legal and regulatory environment constitutes an effective prohibition.¹¹ Unreasonable or discriminatory fees and other requirements can constitute an effective prohibition even if they do not result in an "unreasonably long or indefinite" delay.

To avoid any confusion, the Commission should clarify in the final Declaratory Ruling that the discussion in Paragraphs 140-142 is limited to when a delay constitutes a *de facto* moratorium, and that the Declaratory Ruling does not purport to define the outer limits of what constitutes an effective prohibition under Section 253(a).

In particular, the agency should consider adding the following to the last sentence of Paragraph 130, which would allow the deletion of footnote 471:

We emphasize that this Declaratory Ruling deals only with the question of whether express and *de facto* moratoria are barred by Section 253. We do not have occasion in this order to determine what other state or local laws, regulations, or legal requirements might rise to the level of an effective prohibition and be covered by the statute.

The Commission should also consider adding a new footnote to Paragraph 141 to underline this point. The Draft Order states:

Indeed, we view the formulation that Congress used in section 253(a)—“prohibit or have the effect of prohibiting”—as anticipating the distinction we draw today between express and *de facto* moratoria, and recognizing that not all barriers to the provision of service will come expressly labeled as such.

In order to ensure that there is no doubt about the scope of the agency's holding here, it would be helpful to add a footnote to this sentence which reads:

We note that Congress used this broad language in Section 253(a) to ensure that *all* state or local laws, regulations, or legal requirements that have the effect of prohibiting service are preempted, regardless of what they are called. Not all effective prohibitions under the statute will rise to the level of *de facto* moratoria.

* * *

Crown Castle appreciates the work the Commission has done to date to streamline the deployment of infrastructure to support broadband networks and believes the changes identified above will help fulfill the FCC's vision of removing barriers to rapid broadband deployment.

¹¹ See Crown Castle Ex Parte Letter, WT Docket No. 17-79, WT Docket No. 16-421 (July 7, 2018), at 12-13.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I, James M. Carr, hereby certify that on August 22, 2019, I filed the foregoing Respondents' Excerpts of Record with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit using the electronic CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and will be served electronically by the CM/ECF system.

/s/ James M. Carr

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