ORAL ARGUMENT NOT YET SCHEDULED
No. 11-1146

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

BRIEF FOR NON-ILEC INTERVENORS IN SUPPORT OF RESPONDENTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), counsel submits the following certificate as to parties and amici, rulings under review, and related cases:

(A) Parties and Amici.

All relevant parties, intervenors, and amici to this proceeding are listed in the Brief of Petitioners at i-ii.

(B) Ruling under Review.

References to the rulings under review appear in the Brief of Petitioners at iii.

(C) Related Cases.

The order on review has not previously been before this Court or any other court. We are not aware of any related cases pending in this Court or in any other court.

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Federal Rule of Appellate Procedure 26.1 and Rule 26.1 of the Circuit Rules of this Court, the Non-ILEC Intervenors respectfully make the following disclosures:

Bright House Networks, LLC ("BHN") is not a publicly held corporation or other publicly held entity. BHN is owned 100% by Time Warner Entertainment – Advance/Newhouse Partnership ("TWEAN"). The general partners of TWEAN are Time Warner Entertainment Company, L.P., Time Warner NY Cable LLC and Advance/Newhouse Partnership. There is no publicly held corporation that owns 10% or more of BHN's stock.

Charter Communications, Inc. ("Charter") is publicly traded. No publicly held corporation holds 10% or more of the stock of Charter.

Comcast Corporation ("Comcast") is a publicly held corporation. Comcast has no parent corporation and no publicly held corporation holds 10% or more of the stock of Comcast.

CTIA – The Wireless Association® ("CTIA") is a section 501(c)(6) not-for-profit corporation organized under the laws of the District of Columbia. CTIA has not issued any shares or debt securities to the public, and CTIA has no parent companies, subsidiaries, or affiliates that have issued any shares or debt securities to the public. No publicly held companies own any stock in CTIA.

Mediacom Communications Corporation ("Mediacom") is a wholly owned subsidiary of JMCC Corporation. JMCC is a privately held corporation. JMCC has no parent corporation and no publicly held corporation holds 10% or more of the stock of Mediacom or JMCC.

The National Cable & Telecommunications Association ("NCTA") is the principal trade association of the cable television industry in the United States. Its members include owners and operators of cable television systems serving 90 percent of the nation's cable television customers as well as more than 200 cable program networks. NCTA also represents equipment suppliers and others interested in or affiliated with the cable television industry. NCTA has no parent companies, subsidiaries or affiliates whose listing is required by Rule 26.1.

NextG Networks, Inc. ("NextG") is a non-public company whose shares are not listed or traded on any stock exchange. There is no publicly held company that has a 10% or greater ownership interest in NextG.

PCIA – The Wireless Infrastructure Association ("PCIA") is the trade association representing the wireless telecommunications infrastructure industry. The DAS Forum, a membership section of PCIA, represents providers of distributed antenna systems. PCIA has no parent companies and no publicly held company has a 10% or greater ownership interest in PCIA.

Sunesys, LLC ("Sunesys") is principally engaged in the business of providing telecommunications services and non-switched, digital fiber-optic communications networks capable of providing high-speed dedicated access and multiplexing services. Sunesys' parent company is Quanta Services, Inc., a publicly held company. Sunesys has no other affiliates or subsidiaries which are publicly held, and no publicly held company owns 10% or more of Quanta Services, Inc.

Time Warner Cable Inc. ("TWC") is a leading cable operator in the United States. It is a publicly held corporation with no parent companies. No publicly held corporation owns 10% or more of Time Warner Cable Inc.'s stock.

tw telecom inc., formerly Time Warner Telecom Inc., through its operating subsidiaries, is a leading provider of managed network solutions to a wide range of business customers throughout the United States. tw telecom is a publicly traded company. tw telecom has no parent entity and no publicly held company has a 10% or greater ownership interest in tw telecom.

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GLOSSARY

1978 Order	First Report and Order, *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 68 F.C.C.2d 1585 (1978)
1996 Act	Telecommunications Act of 1996
ILEC	Incumbent local exchange carrier
Order	Report and Order and Order on Reconsideration, *Implementation of Section 224 of the Act*, 26 FCC Rcd 5240 (2011)

STATUTES AND REGULATIONS

All applicable statutes and regulations are attached to the briefs for petitioners and respondents.

SUMMARY OF ARGUMENT

Non-ILEC Intervenors represent a broad cross-section of the communications industry, including cable companies, mobile wireless providers, and non-incumbent fixed-line telecommunications providers.[1] They are filing this brief to support the FCC's decisions in the underlying *Order*[2] (1) to reduce the wide and economically untenable discrepancy between the "cable rate" and the "telecom rate" for pole attachments and (2) to broaden the remedy period for unlawful practices to reflect the approach used in ordinary civil litigation.

1. The first issue concerns the annual lease rates that communications service providers must pay to hang wires and other attachments from ordinary utility poles owned by electric power monopolies and other utilities. Under the FCC's prior rules, those rates have varied widely with the formal legal

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[1] The intervenors filing this brief are Bright House Networks, LLC; Charter Communications, Inc.; Comcast Corporation; CTIA—The Wireless Association; Mediacom Communications Corp.; NextG Networks, Inc.; PCIA—The Wireless Infrastructure Association; The DAS Forum; Sunesys, LLC; tw telecom inc.; Time Warner Cable; and the National Cable & Telecommunications Association ("NCTA"). The other pro-FCC intervenors, consisting of incumbent local exchange carriers ("ILECs"), are filing separately.

[2] Report and Order and Order on Reconsideration, *Implementation of Section 224 of the Act*, 26 FCC Rcd 5240 (2011) ("*Order*"). The *Order* is attached as Appendix B to the Opposition of FCC to Motion for Stay (filed June 20, 2011).

classification of the services offered by particular providers. One set of rates is triggered by pole attachments used for "cable services," alone or in combination with broadband Internet access, which the Commission classifies as an "information service" rather than a "telecommunications service."[3] But much higher rates apply to pole attachments used for services saddled with the "telecommunications services" label, even though these attachments impose no greater costs on utilities and might indeed be the exact same attachments previously used to provide only "cable services." Significantly, both the cable rate and the telecom rate make utilities much more than whole; communications companies must pay these recurring lease rates *on top of* the substantial non-recurring ("make-ready") charges they independently pay to cover any costs the utilities incur to accommodate new attachments on their poles.

As the FCC concluded below, it has become untenable to assign radically different lease rates to the same pole attachments depending on the legal classification of whatever signals happen to be crossing through them. The formal classification of many services in the Internet age can be unpredictable, fiercely contested, and disconnected from the commercial realities of today's marketplace. As the Commission further found, the traditionally wide discrepancy between the

[3] *See National Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327 (2002); *see also National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 986-988 (2005).

cable and telecom rates has given cable companies perverse incentives to withhold attractive new consumer services, lest those services later be deemed "telecommunications services" and thus trigger large rate hikes for all affected pole attachments.

In the *Order*, the FCC alleviated these market distortions by generally lowering the telecom rate for pole attachments closer to the cable rate. The question on appeal is whether the language of section 224 enables the FCC, in the exercise of its administrative discretion, to reduce what had become an irrational divergence between the two rates in the manner that it did. The answer is yes.

Petitioners mainly argue that section 224(e), which governs the telecom rate, requires a "fully allocated cost" methodology. The FCC reasonably concluded otherwise. Section 224(e) does not define the term "cost" at all; it merely prescribes an apportionment methodology to allocate costs associated with pole attachments. Indeed, unlike section 224(d), which specifies two alternative definitions of "cost" as the lower and upper bounds for the cable rate, section 224(e) is silent on the issue. That silence represents a congressional delegation of authority to implement the term "cost"—which the Supreme Court has called a "chameleon," *Verizon Commc'ns Inc. v. FCC*, 535 U.S. 467, 501 (2002)—in the service of the Commission's multiple statutory objectives. Here, the FCC found that, because the wide disparity between the "cable" and "telecom" rates created

perverse disincentives to invest and innovate, it subverted Congress's directive to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans." 47 U.S.C. § 1302(a) (codifying section 706 of the Telecommunications Act of 1996).

Particularly given that concern, the Commission was not required to focus myopically on accounting issues in defining "cost" under section 224(e). Instead, the Commission appropriately identified and balanced a number of statutory objectives while implementing section 224(e), including the need to remove barriers to broadband deployment. Petitioners also miss the mark when they attack the FCC's rate formulae as "results-oriented" (Pet. Br. 16). The FCC may pursue congressional policy directives—such as promoting broadband deployment—where, as here, Congress specified no cost methodology, the Commission's rates are more than compensatory, and they fall well "within a zone of reasonableness." *WorldCom, Inc. v. FCC*, 238 F.3d 449, 461-462 (D.C. Cir. 2001). Indeed, in *Gulf Power*, the Supreme Court affirmed as "sensible" a similar effort by the Commission to resolve ambiguities in section 224 so as to avoid "defeat[ing] Congress' general instruction to the FCC to 'encourage the deployment' of broadband Internet capability." 534 U.S. at 339.

2. The Commission likewise acted reasonably in expanding the refund period by allowing an aggrieved attacher to obtain a refund back to the date

determined by the applicable statute of limitations. The Commission has substantial authority to take actions "appropriate and necessary" to enforce section 224. 47 U.S.C. § 224(b). Based on its decades of experience in administering pole attachment rules, the Commission reasonably concluded that its initial goal of encouraging early filing was creating inefficient disincentives against negotiated dispute resolution. The Commission thus aligned its remedy period with general principles of civil litigation. Petitioners have no plausible basis for challenging that unremarkable exercise of administrative discretion.

ARGUMENT

I. THE COMMISSION'S REVISED TELECOM RATE REFLECTS A PERMISSIBLE INTERPRETATION OF SECTION 224(e)

In the *Order*, the FCC revisited its prior decision to adopt a telecom rate that (typically) exceeded the cable rate in light of the documented "marketplace distortions and barriers to the availability of new broadband facilities and services that arose from [those] disparate rates." *Order* ¶ 151. The Commission revised its interpretation of section 224(e) and, consistent with the statutory directive to encourage broadband deployment, adopted new "cost" formulae aimed at minimizing that rate disparity, while also protecting the interests of utilities and utility ratepayers. *See id.* ¶¶ 8, 146-149. That decision, as the Commission ably explains in its brief, was both reasonable and lawful. *See* FCC Br. 26-41.

A. The *Order* Reflects A Permissible Interpretation Of Section 224(e)

There can be no serious question that the term "cost," undefined, is ambiguous. The Supreme Court has held that "the word 'cost'"—as an "unadorned [statutory] term … as in accounting generally"—is a "chameleon" and a "'virtually meaningless' term." *Verizon*, 535 U.S. at 501. This Court, moreover, has held that the term "economic costs" is "ambiguous" and permits a wide range of reasonable outcomes. *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 704 (D.C. Cir. 2000) (per curiam), *aff'd*, 535 U.S. 1 (2002).[4] Here, Congress did not define the term "cost" in section 224(e), nor did it specify any formula or methodology for calculating "cost." Section 224(e) "specifies how … pole space costs are to be allocated between the owner and the attacher," *Order* ¶ 156, but it is silent about the antecedent issue of what counts as a cost. That "silen[ce]" provides the Commission with broad "authority to fill [the statutory] gap[]." *Gulf Power*, 534 U.S. at 339.

Significantly, in addressing the *cable* rate under section 224(d), Congress did define costs: the lower-bound cable rate is measured by "the additional cost of providing pole attachments," while the upper-bound rate is calculated using "the sum of the operating expenses and actual capital costs of the utility attributable to

[4] *See WorldCom*, 238 F.3d at 461-464; *Appalachian Power Co. v. EPA*, 135 F.3d 791, 809 (D.C. Cir. 1998) (per curiam) (noting the "essential ambiguity of the word" "'costs'").

the entire pole." The contrast between those definitions in section 224(d) and the absence of any corresponding definition in section 224(e) is further evidence Congress did not intend to require the Commission to calculate cost in any particular manner for purposes of section 224(e).[5] The Commission thus reasonably concluded, as it has in analogous contexts (with this Court's approval), that the "cost" concept supports "not a single rate," but "a rather broad range of rates." *WorldCom, Inc. v. FCC*, 308 F.3d 1, 7 (D.C. Cir. 2002).[6] Any rate within that range would satisfy section 224(e), and the Commission was free to prescribe a reasonable methodology that would produce rates falling within that range while serving relevant statutory objectives.

The Commission did just that in the *Order*. The Commission adopted a new "just and reasonable" telecom rate formula that incorporates fully allocated costs but reduces them by specified percentages (44 and 66 percent), and is further back-

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[5] *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("Congress acts intentionally and purposely in the disparate inclusion or exclusion" of statutory language); *U.S. Telecom Ass'n v. FCC*, 227 F.3d 450, 458 (D.C. Cir. 2000) (applying this principle in concluding CALEA was ambiguous); *Georgia Power Co. v. Teleport Commc'ns Atlanta, Inc.*, 346 F.3d 1033, 1045 (11th Cir. 2003) (applying this principle in interpreting section 224(e)).

[6] *WorldCom* involved provisions of the 1996 Act requiring that rates for an unbundled network element be set at the "cost … of providing … the … network element." 47 U.S.C. § 252(d)(1). As this Court held, the Commission's rules implementing that provision permissibly specified "not a single rate but a ratemaking methodology that may yield a rather broad range of rates," and any rate within that range would satisfy the statutory mandate. *WorldCom*, 308 F.3d at 7; *see AT&T Corp. v. FCC*, 220 F.3d 607, 615-616 (D.C. Cir. 2000).

stopped by a "lower-bound" alternative rate (which will apply in the unusual circumstances where it exceeds the just and reasonable rate). *See Order* ¶¶ 135-152. The Commission designed this new just and reasonable rate formula by balancing several different objectives: reducing the economically irrational disparity between the cable and telecom rates, promoting broadband deployment as directed in 47 U.S.C. § 1302, and protecting the legitimate interests of utilities and their ratepayers. *See Order* ¶¶ 146-149, 172-181.

This approach was appropriate and lawful. "Congress," this Court has said, "has directed the FCC … to facilitate broadband deployment." *Ad Hoc Telecomms. Users Comm. v. FCC*, 572 F.3d 903, 908 (D.C. Cir. 2009); *see* 47 U.S.C. §§ 1305(k)(2), 1302(a), 230(b); *see also* FCC Br. 29-30. The Commission's decision to take account of those broadband objectives in fashioning a new rate is the type of "difficult policy choice" Congress expects agencies to make when "[f]illing [statutory] gaps." *Brand X*, 545 U.S. at 980. Indeed, the Supreme Court has upheld, as "sensible," past Commission decisions to interpret ambiguity in section 224 in light of broadband objectives. *Gulf Power*, 534 U.S. at 339; *see Southern Company Servs., Inc. v. FCC*, 313 F.3d 574, 581 (D.C. Cir. 2002) (Commission was "justified" in interpreting "attaching entities" in section 224 broadly so as to "limit[] the financial burden on telecommunications providers and therefore encourage[] growth and competition").

B. Petitioners' Contrary Statutory Arguments Are Unconvincing

Petitioners argue that Congress unambiguously required "cost" in section 224(e) to be determined based on "fully allocated cost formula" (Pet. Br. 39), and that section 224(e) "require[s]" the use of "[t]he 'fully allocated' cost formula" (*id.* at 42). But petitioners read words into the statute that are not there. The term cost is a "chameleon," *Verizon*, 535 U.S. at 501, and nothing in section 224(e) requires or even suggests that "cost" means "fully allocated cost." Petitioners argue that the statutory phrase "cost of providing space" somehow suggests that Congress must have wished to define "cost" by a fully allocated cost methodology. *See* Pet. Br. 40. This argument is illogical. The relevant ambiguity inheres in the term "cost." The additional words "of providing space" do not dispel that ambiguity. Indeed, if anything, the reference to "*providing* space" might support implementing section 224(e) by using an incremental cost approach (producing a far lower rate), which the Commission elected not to do. *See Order* ¶ 165.

Petitioners next suggest that Congress did not identify "'cost' components … in § 224(e) … because its meaning was clear from § 224(d)." Pet. Br. 43. But petitioners' speculation that "Congress had no reason to doubt that the FCC would read subsection (e)" as incorporating section 224(d)'s definition of "cost" is doubly flawed. *Id.*; *see* Amicus Br. 23-24. First, Congress's decision *not* to define "cost" in section 224(e), while defining "cost" in section 224(d), supports the opposite

conclusion: "a congressional mandate in one section and silence in another often suggests … a decision *not to mandate* any solution in the second context, i.e., to leave the question to agency discretion." *Catawba Cnty., N.C. v. EPA*, 571 F.3d 20, 36 (D.C. Cir. 2009) (per curiam) (internal quotation marks omitted). In any event, petitioners' argument cannot be correct because "cost" means *different things* in section 224(d): the upper-bound cable rate reflects a fully allocated methodology, while the lower-bound rate reflects an incremental cost methodology. It is implausible to suggest that Congress intended the unadorned term "cost" in section 224(e) to be defined by reference to the upper-bound rate detailed in section 224(d) when there are two, mutually exclusive definitions in that section.

Petitioners also maintain that section 224 mandates a substantially "different rate for telecommunications carriers" from the cable rate. Pet. Br. 36. That is also incorrect. Section 224(e) does not mandate any *rate*. It prescribes allocation methodologies, and leaves the term "cost" undefined. Section 224(e) accordingly grants the Commission broad authority to define "cost" and to determine just and reasonable rates under section 224(e). *See* FCC Br. 27-28. The Commission's approach, moreover, hardly makes section 224(d)(3) "superfluous" in instructing the Commission to use the cable rate as an interim rate. Pet. Br. 36; *see* Amicus Br. 26. By authorizing the Commission to define "cost" for the purpose of

section 224(e), Congress gave the Commission broad discretion to set a telecom rate that is *either* similar to the cable rate *or* substantially different. Congress was addressing the latter possibility when it provided an interim rate to precede "[a]ny increase" in rates for attachers. At most, that provision "suggest[s] that the telecom rate and cable rate could be different, but not that they must always be different or that the telecom rate necessarily must be higher." *Order* ¶ 168. Indeed, the reference to "any increase" is compelling evidence that Congress understood it was granting the FCC broad discretion to minimize any difference between the telecom rate and the cable rate. *See id.*

Petitioners further object that the Commission did not "directly redefine 'cost' at all," but that argument, too, is unconvincing. Pet. Br. 40; *see id.* at 41. The Commission elected to abandon rote application of a fully allocated cost methodology because the high telecom rate it produced was at odds with the congressional directive to promote broadband deployment. *See Order* ¶ 147. The Commission defined "cost" for the purpose of the lower-bound rate to exclude capital costs, but to include maintenance and administrative costs. The Commissioned defined "cost" for the purpose of the just and reasonable rate—which will normally be used because it will usually exceed the lower-bound rate—by assigning percentages of utilities' fully allocated costs. In choosing the specific allocation percentages (66 percent and 44 percent), the Commission forthrightly

sought to eliminate the disparity between the cable and telecom rates, *id.* ¶¶ 149-150 & n.453; to allow some capital cost recovery for utilities, *see id.*; and to heed Congress's instruction to adopt attachment rates that are "simple and expeditious to implement," *id.* ¶ 149 (internal quotation marks omitted). This type of line-drawing and balancing deserves great deference. *See Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148, 162 (D.C. Cir. 2002) (setting number of station owners in market to balance "efficiencies of television duopolies" and "robust level of diversity" is "quintessentially [a] matter[ ] of line drawing invoking the Commission's expertise").

There is similarly no merit to petitioners' claim that, by excluding capital costs, the lower-bound telecom rate somehow "disregard[s] the statutory command that attachers be apportioned costs of both 'other than usable space' … and the 'usable space.'" Pet. Br. 45.[7] To begin with, while section 224(e) "sets forth fairly general rules regarding *allocations* of the cost of usable and unusable space for attachments," *Southern Company Servs.*, 313 F.3d at 580 (emphasis added), it

[7] Although petitioners imply that, by statutory design, the *cable* rate excludes all costs for the unusable part of the pole, that is simply wrong, as the FCC has explained. *See, e.g.*, Order, *Alabama Cable Telecomms. Ass'n v. Alabama Power Co.*, 16 FCC Rcd 12209, ¶ 60 (2001) ("Respondent's repeated claims that cable attachers do not pay for any costs of unusable space is a complete mischaracterization of the Pole Attachment Act and the Commission's rules. Cable attachers pay all of the costs associated with the pole attachment, which are allocated based on the portion of usable space occupied by the attachment. The costs associated with the entire pole are included in that calculation."); FCC Br. 9-10.

does not address the antecedent question of how "cost" is defined. Petitioners' incantation that "[t]he costs are what they are" (Pet. Br. 45) simply begs that question. In any event, utilities do recover costs with respect to the *entire* pole even under the lower-bound telecom rate (and not just under the usually applicable "just and reasonable" telecom rate). As the Commission explained, "[t]he lower-bound rate includes a share of the fully allocated amount of [maintenance and administrative] costs, based on both the usable and the unusable space allocators in section 224(e)(2) and (3)." *Order* ¶ 191; *see also id.* ¶ 145. In short, in determining a new lower-bound rate, the FCC fulfilled its sole statutory duty under section 224(e)(2)-(3): to apportion costs (however defined) in the manner that those provisions prescribe. In fact, the Commission did not change its cost apportionment methodology at all; it merely applied a new definition of "cost."

Finally, intervenors, but not petitioners, resort to legislative history, pointing to a single sentence in the conference committee report that, they argue, "tacitly acknowledge[s] that the costs used for both formulas in Sections 224(d) and 224(e) were identical." Util. Int. Br. 19. This legislative history proves nothing. The report reflects only that section 224(e)(2) would set forth an allocation methodology with respect to the "non-useable [sic] space of each pole." S. Conf. Rep. No. 104-230, at 183 (1996). As discussed, it does not speak to the issue here—namely, *which* costs should be recovered with respect to the non-usable

portion of the pole. In any event, there is a wide gulf between "tacit[] acknowledge[ment]" in a conference report and *Chevron*'s requirement that Congress have "directly spoken to the precise question at issue." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984). It is doubtful that inferences drawn from a single sentence in a committee report could ever establish that Congress "unambiguously foreclosed the agency's statutory interpretation" when the text itself preserves the agency's discretion through silence on the issue. *Intermountain Ins. Serv. of Vail v. CIR*, 650 F.3d 691, 701 (D.C. Cir. 2011) (internal quotation marks omitted).[8]

C. Petitioners' *Chevron* Step Two And APA Arguments Are Without Merit

Petitioners' remaining challenges to the FCC's interpretation of section 224(e) under *Chevron*'s second step and the APA are equally unconvincing, as the FCC has explained. *See* FCC Br. 32-37. We add only the following few points.

Petitioners' lead argument is that that the *Order* "represent[s] an unjustified departure from its past practices." Pet. Br. 47. They acknowledge that "an agency is permitted to revisit its prior determinations" but insist that "[t]he FCC has not

[8] In addition, as the Commission explained in the *Order*, Congress's rejection of an earlier House version of the bill (which had been understood as implementing a fully allocated cost methodology) adds to the conclusion that Congress did not intend to tie the Commission's hands in defining "cost" under section 224(e). *See Order* ¶ 165; *cf. Russello*, 464 U.S. at 23-24 ("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended.").

justified its sudden about-face." *Id.* at 48. This argument is easily rejected. As the Supreme Court has explained, "[an] agency must show there are good reasons for the new policy," "[b]ut it need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better." *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009); *see Air Transport Ass'n of Am. v. National Mediation Bd.*, 663 F.3d 476, 484 (D.C. Cir. 2011) ("for purposes of APA review, the fact that the new rule reflects a change in policy matters not at all").

That standard is readily satisfied here. The FCC determined that the telecom rate was "sufficiently high" that it was hindering broadband deployment, and that the disparity between the telecom and cable rates was impeding efficient competition and investment. *Order* ¶ 147. In redefining "cost" for the purpose of section 224(e), the FCC reconciled competing statutory objectives, adopting a definition that would advance broadband deployment while also protecting utilities and utility ratepayers. *See id.* ¶¶ 8, 126-154, 172-198. In arguing the FCC did not explain adequately *why* it was changing course, petitioners essentially ignore the whole *Order*.

Petitioners fare no better in arguing that the FCC "presented no actual evidence meaningfully linking the distinction between the Cable Rate and Telecom

Rate with broadband deployment decisions." Pet. Br. 48. The FCC cited abundant record evidence demonstrating "the documented reluctance on the part of cable providers to expand their networks and to provide high-capacity services to customers … because of the risk that some of those services could potentially be classified as 'telecommunications services,'" thereby subjecting them to the higher telecom rate. *Order* ¶ 178; *see id.* ¶ 174 n.540 (collecting record evidence on this point). Beyond that, the FCC relied on the findings of "[t]he National Broadband Plan," which concluded, after an extensive factual investigation, "that the cost of deploying a broadband network depends significantly on the costs that service providers incur to access poles and other infrastructure." *Id.* ¶ 5 & n.9; *see id.* ¶¶ 178-179.[9] The FCC also credited similar record evidence the parties submitted in this proceeding.[10]

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[9] The FCC also adopted other rules to encourage broadband deployment, such as rules affirming that wireless carriers are entitled to the protections and benefits of section 224, including the telecom rate, *Order* ¶ 57, and clarifying that wireless attachers have clear rights to attach to pole tops, *see id.* ¶¶ 12, 77.

[10] *See id.* ¶ 6 n.13 (citing record evidence demonstrating that "[o]btaining access to poles and other infrastructure is critical to deployment of telecommunications and broadband services" and that more expensive poles would be a "significant obstacle" to such deployment); NCTA Reply Comments, WC Docket No. 07-245, 4 n.8 (Oct. 4, 2010) (collecting record evidence on this point); Comcast Reply Comments, WC Docket No. 07-245, 14-16 (Oct. 4, 2010) (same); *see also* FCC Br. 36 (citing record evidence from NCTA on the substantial costs of rate differences).

But even if the FCC had lacked record evidence on point, its "predictive judgments about areas that are within [its] field of discretion and expertise" would still be entitled to deference "[so] long as they are reasonable." *EarthLink, Inc. v. FCC*, 462 F.3d 1, 12 (D.C. Cir. 2006). Although predictive judgments may often require record evidence to be "reasonable," here the FCC hardly needed exhaustive empirical studies to confirm the unremarkable economic proposition that lowering the input *costs* of broadband deployment will encourage *more* broadband deployment, all else held equal. *See Fox Television Stations*, 129 S. Ct. at 1814 (upholding a "predictive judgment" where the judgment "makes entire sense").

Finally, petitioners quarrel with the FCC's policy decision to define "cost" differently in rural and urban areas in order to reflect differences in network costs. *See* Pet. Br. 49-51. But the FCC reasonably explained that, in light of the differing presumptions used under the rules regarding the number of attachers in different areas, using the same percentage in rural areas as urban areas would "increase the burden pole attachment rates pose for providers of broadband and other communications services in non-urban areas." *Order* ¶ 150. That outcome, the FCC explained, "would be problematic given the increased challenges already faced in non-urban areas" with respect to broadband deployment. *Id.*; *see* NCTA Comments, WC Docket No. 07-245, 8-9 (Aug. 16, 2010) (discussing the unique challenges for broadband deployment in rural areas). The FCC was on firm

ground in taking into account those broadband objectives in defining "cost" under section 224(e). *See supra* p. 8.

II. THE FCC REASONABLY DECIDED TO EXTEND THE REFUND PERIOD

Section 224(b) directs the FCC to ensure that "the rates, terms, and conditions for pole attachments … are just and reasonable." The statute does not define procedures for enforcing that mandate, but provides that, "for purposes of enforcing any determinations resulting from complaint procedures," the FCC "shall take such actions as it deems appropriate and necessary." Section 224(e) similarly instructs the FCC to adopt rules to ensure that utilities charge "just, reasonable, and nondiscriminatory rates for pole attachments." Section 224 therefore equips the FCC with broad authority to promulgate rules "appropriate and necessary" to ensure "just and reasonable rates," and it is silent regarding the particular remedies and procedures the FCC should use to accomplish that goal.

Consistent with that broad statutory mandate, the FCC, when first promulgating pole attachment rules, allowed for refunds from the date a complaint was filed, based on a prediction that allowing recovery from the date a dispute began would discourage "early filing." *1978 Order* ¶ 45.[11] That rule specified, however, only that the FCC would "normally" issue a refund from the date a complaint was filed, not that it must always do so. At the same time, the FCC

[11] First Report and Order, *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 68 F.C.C.2d 1585 (1978) ("*1978 Order*").

promulgated a catch-all provision stating it "may issue such other orders … as will best conduce to the proper dispatch of business and the ends of justice." *See 1978 Order*, appx. (47 C.F.R. § 1.1415). Exercising its broad remedial authority under section 224 and 47 C.F.R. § 1.1415, the FCC historically has issued refunds predating a complaint, explaining that it has "broad authority to fashion remedies in pole attachment complaint proceedings" and could "depart from [the] general rule that the filing of a complaint marks the beginning of the refund period." Memorandum Opinion and Order, *Knology, Inc. v. Georgia Power Co.*, 18 FCC Rcd 24615, ¶ 57 (2003); *see* Order, *Cable Texas, Inc. v. Entergy Servs., Inc.*, 14 FCC Rcd 6647, ¶ 19 (CSB 1999).

In the *Order*, the FCC amended its rule to allow for "monetary recovery … to extend as far back … as the applicable statute of limitation allows." *Order* ¶ 112. The FCC explained that, "[i]n the more than 30 years since that order issued, we have had the opportunity to weigh th[e] concern[s] [expressed in the *1978 Order*] about potential abuse against our experience that the rule, as currently written, creates a disincentive to engage in pre-complaint negotiations. We find that the benefits of encouraging negotiated resolution of disputes outweighs any concern that attachers will 'abuse' the process by unduly delaying the fling of overcharge complaints." *Id.* ¶ 111 n.345.

That decision reflects a reasonable interpretation of statutory silence, especially given the "long-standing principle that the breadth of agency discretion is … at zenith when the action relates primarily to … the fashioning of remedies and sanctions." *AT&T Co. v. FCC*, 454 F.3d 329, 334 (D.C. Cir. 2006) (internal quotation mark omitted); *accord Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520, 541 (D.C. Cir. 2010) (per curiam).

Petitioners' threadbare challenges to the new rule are both waived and unpersuasive, as the FCC has explained. *See* FCC Br. 57-60. Petitioners' principal contention is that "[t]he FCC … failed to identify any examples or basis for its perception of a 'disincentive to engage in pre-complaint negotiations.'" Pet. Br. 55. But the FCC's reasoning is entirely sensible: a time-of-complaint refund rule would encourage any economically rational attacher to file a complaint as expeditiously as possible to maximize recovery. Under the old rule, every day of negotiation was a day of a potential lost refund. Indeed, the avowed purpose of the old rule was to promote "early filing." *1978 Order* ¶ 45. The new rule, in contrast, will create incentives for attachers to engage in settlement discussions before filing suit by holding open the possibility of recovering refunds that cover that time period. The FCC thus did not change its understanding of the relationship between a refund rule and incentives to file at all: it instead decided, based on its experience with pole attachment complaints, that negotiated resolution was more

important than early filing. Petitioners offer no sound reason to question the reasonableness of that determination.[12]

CONCLUSION

The petition for review should be denied.

Respectfully submitted,

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[12] Petitioners' reliance on the "sign-and-sue rule" is both waived and meritless for the reasons discussed in the FCC's brief (at 59-60).

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(a)(7)(B), the brief contains 4,998 words.

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March 5, 2012

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of March, 2012 I electronically filed the foregoing Brief for Non-ILEC Intervenors in Support of Respondents with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system.

I further certify that on this 5th day of March, 2012, a copy of the foregoing document was furnished through (ECF) electronic service to each counsel in this matter that had consented to electronic service, as indicated below.

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