ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

No. 11-1146

In the
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.

BRIEF OF PETITIONERS

On Petition for Review from the Federal Communications Commission FCC 11-50 (Apr. 7, 2011), 76 Fed. Reg. 26620 (May 9, 2011)

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Initial Brief: January 3, 2012

CERTIFICATE OF PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES

Petitioners American Electric Power Service Corporation, Duke Energy Corporation, Entergy Services, Inc., Florida Power & Light Company, Florida Public Utilities Company, Oncor Electric Delivery Company, Progress Energy, Inc., Southern Company, and Tampa Electric Company, respectfully file this Certificate as to Parties, Rulings, and Related Cases, as required by the Court's Order of June 3, 2011, and pursuant to Fed. R. App. P. 28(a)(1) and D.C. Cir. R. 28(a)(1).

I. PARTIES AND AMICI

This case is before the Court on a petition for review from a final order in a Federal Communications Commission ("FCC") rulemaking proceeding to which there were no formal parties. The following are parties or *amicus curiae* to the proceeding in this Court:

Petitioners:	American Electric Power Service Corporation Duke Energy Corporation Entergy Services, Inc. Florida Power & Light Company Florida Public Utilities Company Oncor Electric Delivery Company Progress Energy, Inc. Southern Company Tampa Electric Company
Respondents:	FCC United States of America

Intervenors:	National Cable & Telecommunications Association Time Warner Cable, Inc. Bright House Networks, LLC Comcast Corporation Charter Communications, Inc. Mediacom Communications Corporation tw telecom inc. Sunesys, LLC PCIA - The Wireless Infrastructure Association The DAS Forum NextG Networks, Inc. CTIA - The Wireless Association CenturyLink Local Operating Companies[1] Verizon[2] United States Telecom Association AT&T, Inc. Consumers Energy Company The Detroit Edison Company FirstEnergy Corp. Hawaiian Electric Company, Inc. Northern States Power Company (a Wisconsin corporation) Northern States Power Company (a Minnesota corporation) NSTAR Electric Company Pepco Holdings, Inc. Public Service Company of Colorado Southwestern Public Service Company
Amicus Curiae:	Edison Electric Institute

[1] According to its Motion for Leave to Intervene, "CenturyLink Local Operating Companies" is comprised of unidentified "regulated, wholly-owned subsidiaries of CenturyLink, Inc."

[2] According to its Motion for Leave to Intervene, "Verizon" is comprised of unidentified "regulated, wholly-owned subsidiaries of Verizon Communications Inc."

II. RULINGS UNDER REVIEW

Under review in this proceeding is the following final order of the FCC revising its access, rates and enforcement rules for utility pole attachments:

> *Report and Order and Order on Reconsideration*, FCC 11-50; Implementation of Section 224 of the Act (WC Docket No. 07-245); A National Broadband Plan for Our Future (GN Docket No. 09-51) ("Order").

The Order was adopted and released by the FCC on April 7, 2011, and entered on May 9, 2011 (via publication in the Federal Register). 76 Fed. Reg. 26,620 (May 9, 2011).[3]

III. RELATED CASES

The Order under review has not previously been before this Court or any other court, and counsel is not aware of any other related case pending before this or any other court.

/s/ Eric B. Langley
Counsel for Petitioners

[3] It is not yet known where the Order will be reproduced in the appendix. Petitioners intend to utilize a deferred joint appendix, as indicated in Petitioners' Statement of Intent to Utilize Deferred Joint Appendix, filed on July 1, 2011.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of both the Fed. R. App. P. and the D. C. Cir. R., the undersigned counsel for Petitioners discloses the following:

American Electric Power Service Corporation ("AEP Service Corp.") is a wholly owned subsidiary of American Electric Power Company, Inc. ("AEP"). AEP Service Corp. supplies administrative and technical support services to AEP and its subsidiaries. AEP, through its operating company subsidiaries, owns electric distribution infrastructure, including a substantial number of utility poles, in Arkansas, Indiana, Kentucky, Louisiana, Michigan, Ohio, Oklahoma, Tennessee, Texas, Virginia, and West Virginia, many of which are affected either directly or indirectly by the FCC's pole attachment rules.

Duke Energy Corporation ("Duke Energy") has no parent company and there are no publicly held companies that have a 10% or greater ownership interest in Duke Energy. Duke Energy is an electric power holding company. Through its operating company subsidiaries, Duke Energy owns electric distribution infrastructure, including a substantial number of utility poles, in Indiana, Kentucky, North Carolina, Ohio, and South Carolina, many of which are affected either directly or indirectly by the FCC's pole attachment rules.

Entergy Services, Inc. ("Entergy Services") is a wholly owned subsidiary of Entergy Corporation ("Entergy"). Entergy Services supplies administrative and

technical support services to Entergy and its subsidiaries. Entergy, through its operating company subsidiaries, owns electric distribution infrastructure, including a substantial number of utility poles, in Arkansas, Louisiana, Mississippi, and Texas, many of which are affected either directly or indirectly by the FCC's pole attachment rules.

Florida Power & Light Company ("FPL") is a wholly owned subsidiary of NextEra Energy, Inc. FPL is an integrated electric utility primarily engaged in the production, transmission and distribution of electric power in Florida. FPL owns a substantial number of electric distribution utility poles, all of which are affected either directly or indirectly by the FCC's pole attachment rules.

Florida Public Utilities Company ("FPU") is a wholly owned subsidiary of Chesapeake Utilities Corporation. FPU is an electric and natural gas utility in Florida. FPU owns approximately 28,000 distribution utility poles, all of which are affected either directly or indirectly by the FCC's pole attachment rules.

Oncor Electric Delivery Company ("Oncor") is majority-owned by Oncor Electric Delivery Holdings Company LLC, which is wholly owned by Energy Future Intermediate Holding Company LLC. Energy Future Intermediate Holding Company LLC is owned by Energy Future Holdings Corp. There are no publicly held companies that have a 10% or greater ownership interest in Oncor. Oncor is an electric distribution company that owns a substantial number of utility poles in

Texas, all of which are affected either directly or indirectly by the FCC's pole attachment rules.

Progress Energy, Inc. ("Progress Energy") has no parent company, and there are no publicly held companies that have a 10% or greater ownership interest in Progress Energy. Progress Energy is an electric utility holding company. Through its operating company subsidiaries, Progress Energy owns electric distribution infrastructure, including a substantial number of utility poles, in Florida, North Carolina, and South Carolina, all of which are affected either directly or indirectly by the FCC's pole attachment rules.

Southern Company ("Southern") has no parent company, and there are no publicly held companies that have a 10% or greater ownership interest in Southern. Southern is an electric utility holding company. Through its operating company subsidiaries, Southern owns electric distribution infrastructure, including a substantial number of utility poles, in Alabama, Florida, Georgia, and Mississippi, all of which are affected either directly or indirectly by the FCC's pole attachment rules.

Tampa Electric Company ("Tampa Electric"), a wholly owned subsidiary of TECO Energy, Inc., is an electric utility primarily engaged in the generation, transmission and distribution of electric power in Florida. Tampa Electric owns a

substantial number of electric distribution utility poles, all of which are affected either directly or indirectly by the FCC's pole attachment rules.

/s/ Eric B. Langley
Counsel for Petitioners

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GLOSSARY

Act	The Pole Attachments Act, 47 U.S.C. §224 (§224 of the Communications Act).
ARRA	The American Recovery and Reinvestment Act of 2009, Pub. L. 111-5.
Cable Rate	The annual pole attachment rate yielded by the FCC's cable formula developed pursuant to 47 U.S.C. §224(d), which typically results in 7.4% of the annual pole cost.
CLEC	Competitive Local Exchange Carrier (as distinguished from an incumbent local exchange carrier, or "ILEC").
Communications Act	The Communications Act of 1934, as amended, 47 U.S.C. §151, *et seq.*
FCC	Federal Communications Commission.
ILEC	An incumbent local exchange carrier as defined by 47 U.S.C. §153(44); telephone companies like AT&T and Verizon are ILECs within their ILEC service territories.
National Broadband Plan	*Connecting America: The National Broadband Plan*, 2010 WL 972375 (F.C.C.) (Mar. 16, 2010), *available at* http://www.broadband.gov.
NOI	*In the Matter of a National Broadband Plan for Our Future*, Notice of Inquiry, 24 FCC Rcd. 4342 (Apr. 8, 2009).
NPRM	*In the Matter of Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Notice of Proposed Rulemaking, 22 FCC Rcd. 20195 (Nov. 20, 2007).
Order	*In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd.

	5240, as adopted and released on April 7, 2011; the Order was subsequently published in the Federal Register at 76 Fed. Reg. 26620 (May 9, 2011).[4]
Order and FNPRM	*In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Order and Further Notice of Proposed Rulemaking (25 FCC Rcd. 11864); the FNPRM (75 Fed. Reg. 41338 (July 15, 2010), as corrected 75 Fed. Reg. 45590 (Aug. 3, 2010)) was published separately from the Order (75 Fed. Reg. 45494 (Aug. 3, 2010)) in the Federal Register.
Telecom Rate	The annual pole attachment rate yielded by the FCC's telecommunications formula pursuant to 47 U.S.C. §224(e); prior to the Order, the telecommunications formula typically yielded a rate between 11.2% and 16.9% of the annual pole cost; the new formula created by the Order results in approximately 7.4% of the annual pole cost (i.e., roughly the same as the Cable Rate).
1978 Order	*In the Matter of Adoption of Rules for the Regulation of Cable Television Pole Attachments*, First Report and Order, 68 FCC 2d 1585 (Aug. 11, 1978).
1996 Order	*In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*; Amendments and Additions of the Commission's Rules Governing Pole Attachments, 11 FCC Rcd. 9541 (Aug. 6, 1996).
1998 Report and Order	*In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*; Amendment of the Commission's Rules and Policies Governing Pole Attachments, 13 FCC Rcd. 6777 (Feb. 6, 1998).

[4] All citations made herein to the "Order" refer to the version of the Order released and adopted on April 7, 2011.

2001 Order on Reconsideration	*In the Matter of Amendment of Commission's Rules and Policies Governing Pole Attachments; In the Matter of Implementation of Section 703(e) of the Communications Act*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd. 12103 (May 25, 2001).

JURISDICTION

This Court has jurisdiction to review the Order under 47 U.S.C. §402(a) and 28 U.S.C. §2342(1). The Order was published in the Federal Register on May 9, 2011. Petitioners timely petitioned this Court for review on May 18, 2011. *See* 28 U.S.C. §2344a.

ISSUES PRESENTED FOR REVIEW

I. Is the FCC's extension of pole attachment rights to ILECs contrary to the Act or otherwise unlawful where the Act expressly excludes ILECs from its definition of "telecommunications carriers" that are entitled to such rights?[5]

II. Is the FCC's "reinterpretation" of §224(e) so that the Telecom Rate will "approximate" the more favorable Cable Rate contrary to the Act or otherwise unlawful?[6]

III. Is the FCC's extension of the "refund" period back to an undefined starting point prior to the filing of a pole attachment complaint contrary to the Act or otherwise unlawful?[7]

STATEMENT REGARDING ADDENDUM

Pertinent statutes and regulations are set forth in the addendum bound hereto in accordance with D.C. Cir. R. 28(a)(5).

[5] *See* revised Rules 1.1401, 1.1402(d)&(e), new Rule 1.1424, and ¶¶ 199-220 of the Order [JA____].

[6] *See* revised Rule 1.1409(e)(2) and ¶¶ 135-198 of the Order [JA____].

[7] *See* revised Rule 1.1410 and ¶¶ 110-112 of the Order [JA____].

STATEMENT OF THE CASE

This is a petition for review of the FCC's most recent pole attachment rulemaking. The procedural history begins with the FCC's NPRM in November 2007 and ends with the FCC's adoption of the final Order in April 2011.

November 2007 NPRM

In November 2007, partially in response to petitions for rulemaking filed by United States Telecom Association ("USTA") (the ILEC trade association) and Fibertech Networks LLC (a CLEC), the FCC released an NPRM seeking comment on numerous pole attachment issues, initiating WC Docket No. 07-245. In substance, the NPRM was closer to a notice of inquiry. It proposed no actual rules or revised rules for consideration by affected stakeholders; instead, it reached a single "tentative conclusion"—that all attachments used for broadband Internet access service should be subject to a single rate…greater than the current cable rate, yet no greater than the telecommunications rate." NPRM ¶3 [JA____].

National Broadband Plan

In February 2009, before the FCC had taken further action on the NPRM, Congress passed the ARRA, which, among other things, directed the FCC to develop a national broadband plan. Pub. L. No. 111-5, 123 Stat. 115, *128 (2009). In April 2009, the FCC initiated GN Docket No. 09-51 with the release of the National Broadband Plan NOI, which asked, among many other things, to what

extent pole attachments "stand as impediments to further broadband deployments." NOI, ¶50 [JA____]. The FCC released its National Broadband Plan (sometimes also referred to herein as "Plan") in March 2010. The Plan included a recommendation that the FCC "establish rental rates for pole attachments that are as low and close to uniform as possible, consistent with Section 224 of the Communications Act of 1934, as amended, to promote broadband deployment." *See* National Broadband Plan, *96 [JA____]. But the Plan admitted that "without statutory change, the convoluted rate structure for cable and telecommunications providers will persist" and recommended that "Congress should consider amending Section 224 of the Act to establish a harmonized access policy for all poles, ducts conduits and rights-of-way." *Id.* at *101 [JA____].[8] The Plan also recommended that "Congress should consider amending Section 224 of the Act to establish a harmonized access policy for all poles, ducts conduits and rights-of-way." *Id.* at *101 [JA____]. Congress has not made any changes to the statute since that time. Rather, as discussed below, the FCC "reinterpreted" the Act in this rulemaking to achieve the same result that the Plan suggested would require Congressional intervention.

[8] *See also* National Broadband Plan, *97 [JA____] ("Different rates for virtually the same resource (space on a pole), based solely on the regulatory classification of the attaching provider, largely result from rate formulas established by Congress and the FCC under Section 224 of the Communications Act of 1934, as amended.").

May 2010 Order and FNPRM

In May 2010, the FCC released a comprehensive Order and FNPRM in WC Docket No. 07-245 and GN Docket No. 09-51. The "Order" portion addressed limited access-related questions not at issue here. The "FNPRM" portion, though, proposed sweeping changes to the FCC's pole attachment access, enforcement and rate rules, including, as relevant here:

- A revision to Rule 1.1409(e)(2) that would reduce the Telecom Rate to the higher of either (a) the Cable Rate, or (b) a revised Telecom Rate that excluded taxes, depreciation, and rate of return (what the FCC categorized as "capital costs") from the carrying charge rate, but otherwise remained the same as the existing Telecom Rate (FNPRM ¶128 [JA____]); and

- A revision to Rule 1.1410 that would remove language establishing the commencement of any refund period "from the date that the complaint, as acceptable, was filed" and instead extend the refund period "consistent with the applicable statute of limitations." *Id.* at ¶88 [JA____].

Though the FNPRM generally sought comment on the "issue of regulation of rates paid by [ILEC] attachers" and asked commenters to "refresh the record" regarding questions raised in the original NPRM, the FNPRM specifically stated: "In contrast to the rate regulation proposals discussed above, we do not propose specific rules in this Further Notice that would alter the Commission's current approach to the regulation of pole attachments by [ILECs]." FNPRM ¶143 [JA____].

April 2011 Order

The April 2011 Order addressed numerous access-related, enforcement, and rate issues that are not directly relevant here. As it relates to the specific issues in this appeal, the Order took the following actions:

- Reversed course on nearly fifteen years of regulatory precedent (interpreting §224 as excluding ILECs from its protections) by adopting new Rule 1.1424 applicable to "complaints by an [ILEC]" (not previously noticed in the NPRM, the NOI, the National Broadband Plan, or the FNPRM), and by adopting revisions to Rules 1.1401 and 1.1402(d)&(e) to allow ILEC pole owners to file FCC complaints against electric utility pole owners;

- Reversed course on more than thirty years of regulatory precedent (treating the "costs" allocated through §224 as fully allocated operating expenses and capital costs) by adopting revisions to Rule 1.1409(e)(2) to establish the Telecom Rate as the higher of either (a) the pre-existing Telecom Rate multiplied by 66% or 44%, depending on whether the pole attachment is in an urbanized or non-urbanized areas, or (b) the revised Telecom Rate proposed in the FNPRM; and

- Reversed course on more than thirty years of regulatory precedent (establishing the beginning of any refund period as the date the complaint was filed) by adopting revisions to Rule 1.1410 that extend the refund period to a period of time "consistent with the applicable statute of limitations." Order ¶109 [JA____].

Petitioners timely filed this petition for review on May 18, 2011.

STATEMENT OF THE FACTS

The facts related to each of the issues under review are set forth below:

ILEC Issue

The term "ILEC"—*incumbent* local exchange carrier—was first used as a statutory term in the 1996 Telecommunications Act. Congress used the term to

denote the traditional telephone companies (i.e., the Bell operating company successors to the AT&T monopoly), and defined it as any local exchange carrier that "on the date of enactment of the Telecommunications Act of 1996, provided telephone exchange service" in a given locality. 47 U.S.C. §251(h).

Since the advent of their respective services, telephone and electric utilities have shared pole networks for the deployment of those services. These arrangements between telephone and electric utilities historically have been—and, for the most part, remain today—embodied in privately negotiated "joint use agreements." Under these joint use agreements, the telephone and electric utilities have access to each other's poles in their overlapping service areas. Each party agrees to share the capital costs necessary to build the pole network and the ongoing operating costs of the network. Joint use agreements eliminated the need for each party to build its own redundant pole network, saving each party (and their customers) money and saving the public from an aesthetic nuisance.

Joint use agreements typically are structured so that neither party pays any money to the other party so long as each party owns and bears the cost of its negotiated share of the joint use network. *See, e.g.*, Alabama Power, Georgia Power, Gulf Power, and Mississippi Power NPRM Comments, 8-11 (Mar. 7, 2008) [JA____] (citing David Simmons Decl., ¶4 [JA____]; Donald Boyd Decl. ¶4 [JA____]). If one party owns less than its negotiated share of the network, it

typically pays an "adjustment" rate to offset the other party's additional ownership costs. *Id.* Under joint use agreements of this nature, electric and telephone utilities built their vast, robust and shared pole networks.

By the mid-1970s, cable television companies had emerged. At that time, cable companies did not provide telephone service and were therefore not in competition with telephone companies. But cable companies had no pole networks, making them dependent upon the joint use networks created by telephone and electric utilities. In 1978, Congress first enacted the Pole Attachments Act, which gave the FCC limited authority to regulate pole attachment rates, terms, and conditions. Almost twenty years later, by the mid-1990s, a new breed of communications providers had emerged—CLECs—as direct competitors to incumbent telephone utilities. Like the cable companies before them, CLECs were dependent on the existing pole networks and, where poles were owned by the incumbent telephone utilities, had to negotiate with their direct competitors.

In 1996, Congress amended the Act in two important ways. First, Congress added a new classification of communications attacher entitled to specific regulatory protections—the "telecommunications carrier" (which, for purposes of the Act, specifically excludes "any incumbent local exchange carrier as defined in section 251(h) of this title"). 47 U.S.C. §224(a)(5). Second, Congress gave cable

operators and telecommunications carriers a mandatory right of access to utility poles. *See id.* at §224(f)(1).[9]

The purpose of the amendments was to allow the ILECs' competitors access to utility poles at regulated rates. *See* S. Rep. No. 103-367, 22 (1995) (stating that the bill that formed the basis for the Telecommunications Act of 1996 "includes revisions to section 224 of the 1934 Act to allow competitors to the telephone companies to obtain access to poles owned by utilities and telephone companies at rates that give owners of the poles a fair return on their investment"). In an early rulemaking implementing the 1996 Act, the FCC noted: "Because, for purposes of Section 224, an ILEC is a utility but is not a telecommunications carrier, an ILEC must grant other telecommunications carriers and cable operators access to its poles, even though the ILEC has no rights under Section 224 with respect to the poles of other utilities." 1998 Report and Order ¶5 [JA____]. The FCC never even considered expansion of its jurisdiction to reach ILEC attachments on electric utility poles until USTA filed its December 2005 petition for rulemaking.

[9] Congress also redefined the term "pole attachment" to include (in addition to cable attachments) "any attachment by a…provider of telecommunications services." 47 U.S.C. §224(a)(4). The 1996 Act defines "telecommunications carrier" (from which ILECs are excluded for purposes of §224) in relevant part as "any provider of telecommunications services." 47 U.S.C. §153(44).

Telecom Rate Issue

The 1978 Act contained a single rate formula applicable to cable operators' attachments: "not less than the additional cost of providing pole attachments, nor more than an amount determined by multiplying the percentage of total usable space…occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole. . . ." 47 U.S.C. §224(d)(1). As expressed in the FCC's regulations, the basic Cable Rate formula is as follows:

Maximum Rate = Space Factor x Net Cost of Bare Pole x Carrying Charge Rate.

47 C.F.R. 1.1409(e)(1).

Through various rulemakings, the FCC implemented these statutory parameters using specific regulatory capital and expense accounts, as well as specific space presumptions. The "Carrying Charge Rate" included allowances for administrative, maintenance, tax, and depreciation expenses, plus a rate of return. *See, e.g., In re Amendment of Rules and Policies Governing Pole Attachments* (Notice of Proposed Rulemaking), 12 FCC Rcd. 7449 (1997) ("The carrying charges include the utility's administrative, maintenance, and depreciation expenses, a return on investment, and taxes."). The product of the "Net Cost of Bare Pole" and the "Carrying Charge Rate" is called the "Annual Pole Cost" (often referred to as "fully allocated costs" of the pole). *See, e.g.*, Order ¶156 [JA____]

("'[T]he sum of the operating expenses and capital costs of the utility attributable to the entire pole,' known as fully allocated costs.") (quoting 47 U.S.C. §224 (d)(1)). Based on the FCC's space presumptions, the Space Allocation Factor for the Cable Rate formula is 7.4%.[10]

Against this backdrop, the 1996 Act added a new statutory formula (the Telecom Rate) applicable to the new category of "telecommunications carriers" and for cable operators that choose to provide telecommunications services. *See* 47 U.S.C. §224(e)(1). The new statutory formula, expressed in §224(e)(2)&(3), allocates the cost of "other than usable space" (i.e., the portion of the pole in the ground and below minimum ground clearance) and "usable space" (i.e., attachment space) differently:

> (2) A utility shall apportion the cost of providing space on a pole … other than usable space among entities so that such apportionment equals two-thirds of the costs of providing space other than usable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities.
>
> (3) A utility shall apportion the cost of providing usable space among all entities according to the percentage of usable space required for each entity.

[10] One foot of presumed usable space occupied divided by 13.5 feet of presumed usable space = 7.4%. As a result, the cable formula yields recovery of 7.4% of the Annual Pole Cost. If, for example, the Annual Pole Cost is $100, the per attachment rate under the cable formula is $7.40.

Following Congress's direction, the FCC concluded that the "cost" to be allocated through the Telecom Rate was the same "cost" allocated through the Cable Rate:

> The 1996 Act also created a distinction between pole attachments used by cable operators solely to provide cable service and pole attachments used by cable operators or by any telecommunications carrier to provide any telecommunications service. The Act prescribed a methodology for determining pole attachment rates for the latter group. The new formulas will require that, in addition to paying their share of a pole's usable space, these telecommunications service providers also must pay their share of the fully allocated costs associated with the unusable space of the pole. . .

1996 Order ¶6 [JA____].

Congress expected the Telecom Rate to be higher than the Cable Rate. 47 U.S.C. §224(e)(4) ("Any *increase* in the rates for pole attachments that result from the adoption of the regulations required by this subsection [(e)] shall be phased in equal increments over a period of five years…") (emphasis added). The FCC likewise acknowledged that Congress intended—and that the statute required—a *higher* rate under §224(e): "We note that in the one case where Congress affirmatively wanted a higher rate for a particular service offered by a cable system, it provided for one in section 224(e)." 1998 Report and Order ¶34 [JA____] (also noting that the FCC is "statutorily required to apply the higher Section 224(e) rate").

The FCC's original implementation of the §224(e) Telecom Rate formula departed from the §224(d) Cable Rate formula in only one way: the calculation of

the "Space Allocation Factor." Though relying on presumptions consistent with those used to implement the Cable Rate formula, the FCC also developed new presumptions regarding the number of "attaching entities" for purposes of §224(e)(2). *See* 2001 Order on Reconsideration [JA____]. For urbanized areas, the FCC adopted a presumption of 5 attaching entities. *Id.* at ¶72. For non-urbanized areas, the FCC adopted a presumption of 3 attaching entities. *Id.* at ¶71. These presumptions, in conjunction with the FCC's other space presumptions and §224(e)(2)'s required "two-thirds" apportionment, yielded Space Allocation Factors of 11.2% (urbanized areas) and 16.9% (non-urbanized areas). These Space Allocation Factors, when applied to the Annual Pole Cost, yielded a Telecom Rate of either 151% or 228% of the Cable Rate, depending on whether the attachment was in an urbanized or non-urbanized area.[11]

In contrast, the Order's revisions to the Telecom Rate are designed to "in general, approximate the cable rate"—in other words, to override the distinctions between the separate statutory formulae in §§224(d)&(e). Order ¶149 [JA____]. To accomplish its policy goal, the FCC simply multiplied the Annual Pole Cost by the percentages necessary to make the Telecom Rate equal to the Cable Rate—66% for urbanized areas and 44% for non-urbanized areas. Other than enabling

[11] For example, if Annual Pole Cost is $100, the original telecom formula would yield $11.20 in urbanized areas and $16.90 in non-urbanized areas.

the FCC to reach its intended result, the FCC offers no explanation for the 66% and 44% figures.[12]

Refund Rule Issue

The Act does not expressly provide for refunds at all, but it does contemplate complaint-based regulation: "the Commission shall…adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions." 47 U.S.C. §224(b)(1). In its earliest rulemakings implementing the 1978 Act, the FCC rejected a proposal to calculate refunds from the date the unjust or unreasonable rate was first paid: "refunds from the date of the complaint are entirely appropriate in a complainant form of regulation…[i]n order to avoid abuse and encourage early filing when rates are considered objectionable by CATV operators." 1978 Order ¶45 [JA____]. For more than thirty years, the FCC's refund rule endured unchanged. The new rule abandons commencement of refunds from the date of the complaint and instead extends the refund period back "consistent with the applicable statute of limitations."

[12] The 66% and 44% "cost" discounts offset the 11.2% and 16.9% Space Allocation Factors almost precisely, such that they yield recovery of 7.4% of the Annual Pole Cost—the same as the cable formula.

SUMMARY OF ARGUMENT

Each of the rules challenged in this appeal—creating ILEC attachment rights, discounting the statutory Telecom Rate, and extending the refund period—is inconsistent with the Act's plain language and its legislative history. The FCC has "reinterpreted" the Act because, in its view, certain policy goals of the Act are no longer being fulfilled due to changed circumstances. The extent to which circumstances have actually changed, as well as the extent to which any such changes justify reversing course on significant aspects of the FCC's regulatory approach to pole attachments, is debatable but ultimately irrelevant. The FCC cannot alter the statute in pursuit of policy goals.

First, Congress left no doubt that ILECs were excluded from the protections afforded pole attachers under §224. For fifteen years, the FCC agreed. But, according to the FCC, times have changed: ILECs own fewer poles than they did in the past. The FCC relies upon insufficient data and no discernable baseline to establish its foundational premise, but even if true, the FCC fails to demonstrate that diminished pole ownership has had any detrimental effect on ILECs or broadband deployment. In the end, though, the policy discussion about the impact of pole ownership on broadband is irrelevant because the Act itself excludes ILECs. As such, the FCC concocts a gap between the terms "telecommunications carrier" and "provider of telecommunications service" in an effort to support its

about-face. Though the FCC concedes ILECs are expressly excluded from the former, the FCC contends they nevertheless fall within the latter. The FCC's distinction is not reflected in the statutory text; in fact, the text demonstrates that Congress used the terms synonymously.

Second, the FCC's so-called "reinterpretation" of §224(e)'s Telecom Rate is nothing more than an algebraic sleight of hand designed to conflate the separate rate for telecommunications carriers with the rate applicable to cable operators. Congress expressly chose *not* to use the existing Cable Rate for telecommunications carriers. It instead enacted §224(e), which by its plain language requires not only a different rate, but also a higher rate, for telecommunications carriers. And for fifteen years, the FCC agreed that this result was mandated by the statute. Congress has not changed the Act since 1996. The FCC's new "discovery" of a purported ambiguity is simply a rationalization for its results-oriented rulemaking, which it claims is necessary because the Telecom Rate no longer serves certain policy objectives.

Third, the FCC's extension of the refund period in complaint proceedings back to an undefined starting point "consistent with the applicable statute of limitations" (rather than the long-standing rule that the refund period commenced with the filing of a complaint) is contrary to the Act. The Act plainly reflects that the filing of the complaint is the trigger for the FCC's jurisdiction over rates, terms

or conditions of pole attachments, so any refund period that extends beyond this trigger point is statutorily unfaithful. Further, the FCC's failure to explain the basis for its reversal of more than thirty years of regulatory precedent is arbitrary and capricious.

Far from "reinterpretations," the FCC's new rules are attempts to circumvent unambiguous provisions (and settled applications) of the statute. In each rule, the FCC has both exceeded its statutory authority and ignored plain statutory language, all in an ill-explained rejection of decades of regulatory precedent. If the FCC believes certain policy goals are not being fulfilled by the statute as written, it should pursue the statutory amendments its own National Broadband Plan insisted would be necessary to achieve those policy goals.

STANDING

"When the suit is one challenging the legality of government action or inaction,…establish[ing] standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). As set forth in the Corporate Disclosure Statement, *supra*, each of the Petitioners owns a substantial number of utility poles affected by the Order.

STANDARD OF REVIEW

Under the Administrative Procedure Act ("APA"), final agency action must be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or if it is in excess of statutory jurisdiction, authority, or limitations . . . ." 5 U.S.C. §§706(2)(A)&(C).

The Court's review of the FCC's interpretation of the Act is governed by the two-step analysis in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-45 (1984). First, the Court must determine "whether Congress has directly spoken to the precise question at issue," and if so "give effect to the unambiguously expressed intent of Congress" and "reject administrative constructions which are contrary to clear congressional intent." *Id.* at 842-43. In undertaking this step, the Court must "employ the traditional tools of statutory construction...including examination of the statute's text, legislative history, and structure[,] as well as its purpose." *Shays v. Fed. Election Comm'n*, 414 F.3d 76, 84 (D.C. Cir. 2005) (citations and quotations omitted).

Second, if the statute is silent or ambiguous, the Court must decide whether the FCC's interpretation is a "permissible construction of the statute." *Chevron*, 467 U.S. at 843. "A 'reasonable' explanation of how an agency's interpretation serves the statute's objectives is the stuff of which a 'permissible' construction is made; an explanation that is 'arbitrary, capricious, or manifestly contrary to the

statute,' however, is not." *Northpoint Tech., Ltd. v. FCC*, 412 F.3d 145, 151 (D.C. Cir. 2005) (internal citations omitted). Agency action is arbitrary and capricious if the agency has:

> …relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Manuf. Assoc. of the U.S. v. State Farm Mutual Auto. Ins., 463 U.S. 29, 43 (1983). An "agency acts arbitrarily and capriciously when it abruptly departs from a position it previously held without satisfactorily explaining its reason for doing so." *Verizon Tel. Companies v. FCC*, 570 F.3d 294, 301 (D.C. Cir. 2009); *see id.* ("[T]he FCC must examine and consider the relevant data and factors and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.") (internal citations and quotations omitted).

For the reasons discussed below, the FCC has failed this test with respect to each of the three issues presented for review.

ARGUMENT

I. The FCC's decision to treat ILECs as "attachers" with pole attachment rights under §224 directly conflicts with §224 and is an arbitrary and capricious departure from long-standing agency precedent.

Since 1978, when Congress first passed the Pole Attachments Act, ILECs (traditional telephone companies) have been treated like electric utilities, not as

attachers. In 1996, when Congress added a new category of entities protected under the Act—"telecommunications carriers"—it specifically excluded ILECs from that category and therefore ILECs remained outside the Act's the protections. *See* 47 U.S.C. §224(a)(5). Although an agency has discretion to interpret statutory terms where there is a "gap" in the statutory language, where Congress has "directly addressed the precise question at issue," there is no room for interpretation. *Chevron*, 467 U.S. at 843-44. Here, there is no gap and therefore no room for interpretation.

A. Congress expressly excluded ILECs from the protections of the Act.

Under the Act, ILECs are "utilities" subject to the duties of pole owners. 47 U.S.C. §224(a)(1). The Act expressly excludes ILECs from the statutory protections afforded to cable and CLEC attachers: "For purposes of this section, the term 'telecommunications carrier' (as defined in section 3 of this Act) does not include any [ILEC] as defined in section 251(h) of this title." The FCC itself stated the matter clearly in 1998: "Because, for purposes of Section 224, an ILEC is a utility but is not a telecommunications carrier … *the ILEC has no rights under Section 224 with respect to the poles of other utilities.*" 1998 Report and Order ¶5 [JA____] (emphasis added). With that statement, the FCC was correct.

1. Because "telecommunications carrier" and "any provider of telecommunications services" are synonymous, ILECs are excluded from the protections of §224.

Section 224's definition of "telecommunications carrier," which expressly excludes ILECs, cross-references the definition of "telecommunications carrier" in §3 of the Communications Act.[13] That section, in turn, provides that "telecommunications carrier means any provider of telecommunications services except that such term does not include aggregators of telecommunications services (as defined in section 226)." 47 U.S.C. §153(44).[14] By expressly excluding ILECs from the definition of "telecommunications carrier," Congress expressly provided that ILECs were excluded from the protections afforded to "pole attachments" under §224 even if ILECs were, for purposes outside §224, "providers of telecommunications services."

Congress did not separately define "provider of telecommunications services," because the term is synonymous with "telecommunications carrier" as

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[13] Section 3 of the Communications Act is codified at 47 U.S.C. §153.

[14] Within §153(44), the term "provider of telecommunications service" is broader than "telecommunications carrier" in only one respect—an "aggregator" is a provider of telecommunications services but not a telecommunications carrier. *See Virgin Island Telephone Corp. v. FCC*, 198 F.3d 921, 923 (D.C. Cir. 1999) ("'any provider of telecommunications services,' except for 'aggregators' of such services, is designated a 'telecommunications carrier.'") (citing 47 U.S.C. §153(44)). Aggregators (e.g., restaurants that operate banks of pay telephones) are not pole attachers, and the term "aggregator" has no relevance to §224 or this appeal.

numerous court decisions confirm. The Supreme Court noted in *NCTA v. Brand X*, 545 U.S. 967, 977 (2005), that "'[t]elecommunications carrier[s]'—those subjected to mandatory Title II common-carrier regulation—are defined as 'provider[s] of telecommunications services.'" (Quoting 47 U.S.C. §153(44)); *see also AT&T Corporation v. City of Portland*, 216 F.3d 871, 877 (9th Cir. 2000) ("[a] provider of telecommunications services is a 'telecommunications carrier' ….") (citing 47 U.S.C. § 153(44)). Specifically in the pole attachment context, courts have used the two terms interchangeably. *See, e.g., Southern Co. v. FCC*, 293 F.3d 1338, 1342 n.1 (11th Cir. 2002) (noting that the 1996 Act "added telecommunications carriers to the class of entities entitled to regulated rates for pole attachments and granted them the same access rights given cable companies.").

Because the language of §153(44)—"telecommunications carrier means any provider of telecommunications services"—is expressly incorporated into §224, ILECs are excluded from both terms for purposes of §224. Comcast (one of the Intervenors supporting Respondents) put it well in its comments on the NPRM:

> Connected by the word 'means,' the two terms are equivalent, such that one can replace the other. Because the terms are interchangeable, the use of 'provider of telecommunications services' rather than telecommunications carrier in Section 224(a)(1)[15] is irrelevant: it is a

[15] The context makes clear that this is a typographical error and that Comcast meant "224(a)(4)."

> distinction without a difference. Accordingly, 'providers of telecommunications services' that are also [ILECs] under Section 251(h) are excluded from protection as pole attachers."

Comcast NPRM Comments, 49 (March 7, 2008) [JA____]. Because they are excluded from the definition of "telecommunications carrier," and thereby excluded from the meaning of "provider of telecommunications service," ILECs have no §224 attachment rights. This is a matter of statutory reading—not interpretation.

To justify its departure from the plain text and caselaw, the FCC introduces a syntactic distinction between the terms "telecommunications carrier" and "provider of telecommunications service." Section 224(b)(1) gives the FCC its authority to regulate the rates, terms, and conditions of "pole attachments." 47 U.S.C. §224(b)(1). The term "pole attachment" is defined as "any attachment by a cable television system or provider of telecommunications service to a pole…owned or controlled by a utility." Order ¶209 [JA____] (citing 47 U.S.C. §§224(b)(1)&(a)(4)). Because ILECs are generally "providers of telecommunications service," the FCC reasons, their attachments to poles owned by other utilities are still "pole attachments" for purposes of §224. *Id.* In the FCC's view, Congress's exclusion of ILECs from the term "telecommunications carrier" does not necessarily exclude ILECs from the term "provider of telecommunications service" within the same provision.

The FCC's logic fails at its foundation. The Act plainly indicates that Congress did not intend two different meanings. As the FCC concedes, the Act does not separately define the term "provider of telecommunications service." Order ¶ 209 [JA____]. Congress had no need to define the term separately for purposes of §224 because, as discussed above, the terms are synonymous.

2. Even if the express language of §224 did not exclude ILECs from the protections of §224, the legislative history of the Act forecloses the FCC's expansive reinterpretation.

An essential purpose of the Act, both as originally enacted in 1978 and as amended in 1996, has always been to protect new entrants into communications markets from ILECs (e.g., AT&T and the other "baby Bells"). The original 1978 Act included two opposite groups of entities: (1) attachers, a group limited to "cable television operators"; and (2) pole owners, i.e., "utilities."[16] The term "utility" meant then—and still means today—both electric and ILEC pole owners. In 1978, the Act had a singular focus—to facilitate expansion of an "infant" cable television industry. H. Rep. No. 104-204, 91 ("The beneficial rate to cable companies was established to spur the growth of the cable industry, which in 1978 was in its infancy.").

[16] *See Congressional Record* Vol. 23, 35006 (1977) (comments of Rep. Wirth) ("H.R. 7442 will resolve a longstanding problem in the relationship of cable television companies on the one hand, and power *and telephone* utilities on the other.") (emphasis added).

By 1996, CLECs had come into existence as new competitors to the incumbent telephone companies. But the purpose of the Act remained the same, and the 1996 amendments did nothing to bridge the statutory divide between attachers and utilities. Instead, Congress expanded the Act's protections "to allow competitors to the telephone companies to obtain access to poles owned by utilities and telephone companies at rates that give the owners of poles a fair return on their investment." S. Rep. No. 103-367, 24 (1995).

The 1996 Act introduced the term "ILEC" to distinguish the traditional telephone companies from new entrants into the local telephone markets. An "ILEC" is, in relevant part, any local exchange carrier that, "on the date of enactment of the Telecommunications Act of 1996, provided telephone exchange service" in a given locality. 47 U.S.C. §251(h)(1)(A). Thus, by definition, ILECs were not "new" market entrants in 1996. The Act's exclusion of ILECs from the protections extended to CLECs and telecommunications carriers reflected this distinction. As the FCC's 1998 rulemaking states, the conclusion that "ILECs have no rights with respect the poles of other utilities" is "consistent with Congress' intent to promote competition by ensuring the availability of access to *new* telecommunications entrants." 1998 Report and Order ¶5 [JA____]. Given the clear legislative intent, the FCC cannot reasonably pretend that the *incumbent*

LECs are themselves "new entrants" into the very markets they have historically dominated.

B. The FCC's decision to radically reinterpret §224 to include ILECs was arbitrary and capricious.

Even if the FCC's paradigm-changing reinterpretation of §224 were permissible, its decision to extend attachment rights to ILECs is an arbitrary and capricious reversal of well-established precedent. When an agency departs from previous precedent, it "must supply a reasoned analysis" demonstrating logical and defensible reasons for a deliberate change of course. *State Farm*, 463 U.S. at 57 (quotation omitted). In contrast, an agency acts arbitrarily and capriciously when it "abruptly departs from a position it previously held without satisfactorily explaining its reason for doing so." *Wisc. Valley Improvement v. FERC*, 236 F.3d 738, 748 (D.C. Cir. 2001).

1. The FCC's abrupt about-face after years of taking the opposite position is arbitrary and capricious.

The FCC's change of course is a complete and abrupt reversal. As the Order concedes, the FCC "initially" and for over a decade thereafter consistently and repeatedly (and correctly) read the terms "telecommunications carrier" and "provider of telecommunications service" as "synonymous." Order ¶212 [JA____]; *see* 1998 Report and Order ¶5 [JA____] ("Because, for purposes of Section 224, an ILEC is a utility but is not a telecommunications carrier…the

ILEC has no rights under Section 224 with respect to the poles of other utilities."); 1996 Order ¶6 [JA____] ("The 1996 Act also created a distinction between pole attachments used by cable operators solely to provide cable service and pole attachments used by cable operators or by any telecommunications carrier to provide any telecommunications service."). Accordingly, it "interpreted the exclusion of [ILECs] from the term telecommunications carrier to mean that §224 does not apply to attachment rates paid by [ILECs]." Order ¶205 [JA____]. No one complained about the exclusion of ILECs when the FCC implemented the Telecom Rate formula in 1998, and the FCC again affirmed the plain text and Congressional intent seven years later:

> As amended by the 1996 Act, Congress in section 224 intended to ensure, *inter alia*, that [ILECs]' control over poles, ducts, conduits, and rights-of-way does not create a bottleneck for the delivery of telecommunications services and certain other services. It therefore amended section 224 in 1996 to give competitive LECs and cable operators a right of access to utility poles, ducts, conduits and rights of way, in addition to maintaining a scheme to assure that the rates, terms and conditions governing such attachments are just and reasonable.[17]

2. The factual foundations of the FCC's about-face are not supported by the record.

The FCC invokes two factual premises in defense of its abrupt about-face: (1) diminished ILEC pole ownership relative to electric utilities has reduced

[17] *In the Matter of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Memorandum Opinion and Order, 20 FCC Rcd. 19415, ¶99 (Dec. 2, 2005).

ILECs' bargaining power; and (2) reduced pole attachment rates for ILECs will result in consumer benefits. *See* Order ¶208 [JA____]. Neither alleged factual foundation is supported by substantial evidence or relevant data in the record.

a. A purported "shift in bargaining power" does not justify the FCC's abrupt reversal.

The FCC claims, "Today, [ILECs] as a whole appear to own approximately 25-30 percent of poles and electric utilities appear to own approximately 65-70 percent of poles, compared to historical ownership levels that that were closer to parity." Order ¶206 [JA____]. But this estimate, extrapolated from five ILECs' comments (*see* Order ¶206, n.617 [JA____]; *id.* at ¶215 [JA____]), is hardly representative. Indeed, the FCC acknowledges that "circumstances can vary considerably from location to location." Order ¶215 [JA____]. Similar to the "classic case of arbitrary and capricious" FCC action discussed by this Court in *U.S. Telecom Assn. v. FCC*, 227 F.3d 450 (D.C. Cir. 2000), the FCC uses non-representative estimates as a type of "reasonable guide" for wholesale changes.

The FCC also fails to identify a relevant baseline by which current levels can be called "diminished." Because the new rule is predicated upon changed circumstances since initial implementation of the 1996 Act, the relevant baseline would be circa 1996-1998. But the FCC's baseline is nearly two decades before then, in 1977. *See* Order ¶206, n.617 [JA____] (citing a 1977 Senate Report finding that "53 percent [of poles] are controlled by power utilities, public and

private"). Even if static until 1996, the cited 1977 figure is useless because it included both "public and private" utilities and does not distinguish between states that regulate pole attachments and those that do not. Under §224, the FCC has no authority over government-owned poles or poles in states that regulate pole attachments.[18]

Based on the purported ownership shift, the FCC concludes that "[ILECs] often may not be in an equivalent bargaining position with electric utilities in pole attachment negotiations in some cases." Order ¶206 [JA____]. But the FCC provides no meaningful explanation of how bargaining power was affected. The Order's bargaining power hypothesis is supported only by a footnote citing literature on theoretical "games of strategy." Order ¶206, n.618 [JA____]. The FCC provides a single "hypothetical illustration" of an ILEC that owns 10% of the poles in a joint use network shared with an electric utility. In those circumstances, the FCC reasons, the ILEC "would face the cost of deploying 90% of poles." *Id.* [JA____]. But the FCC itself confirms that ILEC attachments on electric utility poles are not at risk: "Although [ILECs] cite the potential threat of having to remove attachments from electric utility poles if an agreement is terminated,… we

[18] The definition of "utility" excludes "any person owned by the Federal Government or any State." *See* Order ¶7, n.14 [JA____]. ("The statute … exempts poles owned by municipalities, cooperatives, and non-utilities."). Section 224(c) exempts pole attachments in any State that regulates pole attachments, which today includes 20 states and the District of Columbia. *Id.*

believe that electric utilities are unlikely to pursue such actions given the likelihood that incumbent LECs would, in response, deny electric utilities access to their poles." Order ¶206, n.655 [JA____]. The FCC thus refutes its own "bargaining power" rationale.

b. ILECs' conclusory statements about "consumer benefits" do not support the FCC's interpretation.

The FCC posits that its new rule "reflects the fact that actions to reduce input costs, such as pole rental rates, can expand opportunities for investment." Order ¶208 [JA____]. Such "investment," the FCC says, will in turn help to "bring broadband service to millions of Americans who do not currently have broadband." *Id.* The FCC asserts, as if self-evident, that "in principle, rates charged for pole access are likely to affect deployment decisions for all telecommunications carriers, including [ILECs]." *Id.* The FCC fails, however, to provide any meaningful explanation of how the regulation of ILECs' joint use agreements will result in new broadband deployment.

The FCC's wishful thinking is based entirely on conclusory statements from the ILECs' themselves—the obvious beneficiaries of the FCC's decision. The Order's conclusion that reduced rates for ILECs will increase broadband deployment is based on a single *ex parte* letter from USTA (the ILEC trade association) listing five categories of "consumer benefits"—from "reduced demand on the universal service fund" to "a source of capital for expansion"—that would

supposedly flow from "just and reasonable rates" for ILEC attachments. Order ¶208 [JA____] (citing USTA Mar. 31, 2011 *Ex Parte Letter* [JA____]). The Order fails to explain how any of those factors will lead to increased investment, deployment, or competition. The FCC instead merely ticks off these five "newly dispositive factors as if that had always been its method" of determining whether a given entity has rights under §224. *Verizon Telephone Companies*, 570 F.3d at 304 (finding that the FCC's "flaw" was not in departing from its own prior precedent, but in its failure to provide an explanation for such departure). These "conclusory statements" that such factors are being considered "cannot substitute for the reasoned explanation that is wanting in this decision." *Id.*

In place of evidence that investment on consumer benefits *will* result, the FCC offers only its hopes: "We *expect* these promised consumer benefits to occur and we *encourage* [ILECs] to provide data to the Commission on an ongoing basis demonstrating the extent to which these benefits are being realized. We would be *concerned* if these consumer benefits were not realized." Order ¶208 [JA____] (emphases added). In doing so, the FCC ignores the record evidence that giving ILECs attachment rights will harm, not help, consumers. As NCTA warned, the rule will result in "a huge windfall for shareholders of…[ILECs] at the expense of broadband customers, the exact opposite of what the [FCC] should be doing to advance…broadband availability at reasonable prices." NCTA NPRM Comments,

ii (Mar. 7, 2008) [JA____]. The FCC's generic, unsupported "expectations" are no substitute for rational explanation based on substantial evidence, and the "absence of any meaningful consideration" of how these supposed benefits will actually achieve new broadband deployment is arbitrary and capricious. *U.S. Telecom Assn.*, 227 F.3d at 462 ("On the record before us, however, we cannot 'discern' how the Commission interpreted 'cost-effective,' nor why it considered the substantial costs of the punch list capabilities to be 'not so exorbitant,' nor finally what impact it thought the Order would have on residential ratepayers. Missing, in other words, is 'a rational connection between the facts found and the choice made.'") (quoting *State Farm*, 463 U.S. at 43).

3. The FCC's severance of access rights from other attachment rights within the ILEC rule contradicts the legal basis of the Order as a whole.

The FCC's distinction between "telecommunications carriers" and "providers of telecommunications services" depends on a distinction between the right to nondiscriminatory access under §224(f)(1) (which expressly applies only to "telecommunications carriers") and the right to just and reasonable rates, terms, and conditions (which applies to attachments by "providers of telecommunications services"). The Order as a whole, though, is based on the *opposite* legal theory—that access and other attachment rights are integral aspects of a unified right to "just and reasonable access." Order ¶82 [JA____]. The Order's failure to explain

this contradiction is arbitrary and capricious. The FCC's "have-your-cake-and-eat-it-too" approach to the relationship between access rights and rates, terms, and conditions is an egregious case of arbitrary and capricious decisionmaking. *See, e.g.*, *NCTA v. Brand X*, 545 U.S. at 981 (stating that "[u]nexplained inconsistency is…a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedures Act") (internal citations omitted); *Business Roundtable v. SEC*, 647 F.3d 1144, 1153-54 (D.C. Cir. 2011) ("internally inconsistent" agency explanation held arbitrary and capricious); *Airline Pilots Ass'n v. FAA*, 3 F.3d 449, 450 (D.C. Cir. 1993) ("fundamental inconsistencies" in applying statute were unreasonable under *Chevron* and arbitrary and capricious).

a. The FCC's position requires that access rights are "severable" from other attachment rights.

ILECs, because they are not "telecommunications carriers" under §224, undisputedly have no access rights under §224(f)(1). The term "telecommunications carrier" is narrower than "provider of telecommunications services" only if the access right is "severable" from the bundle of "just and reasonable" rights under §224(b). The NPRM, in fact, specifically sought comment on whether these rights are severable. NPRM ¶24 [JA____] ("We seek comment on the view that, under section 224, 'access' and 'rates, terms, and conditions' are severable rights that should be implemented separately.") (internal

footnote omitted). Predictably, to justify its decision to extend §224(b) rights to ILECs, the Order assumes that access rights are indeed severable from other attachment rights. *See, e.g.*, Order ¶40 [JA____] (access timeline applies only to requests by "telecommunications carriers").

b. The Order as a whole requires that access and other attachment rights are not severable.

For purposes of "comprehensively revis[ing]" its pole attachment rules (Order ¶1 [JA____]), the Order treats §224(f)(1) access rights as an integral subset of "just and reasonable" attachment rights under §224(b). As the FCC contends: "Section 224(b)(1) applies the 'just and reasonable' standard to all rates, terms, and conditions of pole attachments, including the conditional access regime set up under section 224(f)." Order ¶93 [JA____]. Although only "rates, terms, and conditions" (not access rights) are mentioned in §224(b), the Order treats §224(f)(1) access as if it were an obvious term or condition: "The access rules we adopt today fit squarely within our statutory authority over terms and conditions for pole attachments pursuant to section 224(f)." Order ¶91 [JA____]. In sum, according to the Order, covered attachers have a right to "'just and reasonable' access" under §224(b), and §224(f)(1) is a mere clarification of the basic right of access. Order ¶90 [JA____] ("Congress also gave more specific substantive guidance for access to poles in section 224(f): 'just and reasonable' access must also be 'nondiscriminatory.'").

For all the Commission's talk of "just and reasonable access," however, the "just and reasonable" standard of §224(b) would mean something very different for ILECs if ILECs had rights under §224(b)—just and reasonable rates, terms, and conditions *without the right of access* afforded to all other attachers under 224(f)(1). This blatant, unexplained contradiction is arbitrary and capricious.

II. The FCC's reinterpreted Telecom Rate conflicts with the Act, ignores Congressional intent, and represents outcome-driven arbitrary and capricious decisionmaking.

In 1996, Congress expressly chose not to extend the Cable Rate—established in 1978 to grow the then-infant cable industry[19]—to telecommunications carriers. Instead, Congress mandated a different rate and ensured that even cable operators would pay the higher rate if they chose to offer telecommunications services. The Order attempts to end-run express statutory language, Congressional intent, and more than fifteen years of agency precedent. The Order does not, as the FCC contends, "reinterpret" an ambiguous statutory provision, but rather performs some basic algebra designed to achieve its goal of transforming the Telecom Rate into the Cable Rate. Congress's intent is clear, though—the Telecom Rate must apportion the fully allocated cost of the entire

[19] *See* H. Rpt. 104-204, 91 ("The beneficial rate to cable companies was established to spur the growth of the cable industry, which in 1978 was in its infancy.").

pole, resulting in a rate higher than the Cable Rate. The FCC's attempt to neutralize statutory language and subvert Congress's intent cannot stand.

A. The statute contemplates a Telecom Rate higher than the Cable Rate.

1. The Act's plain language requires a higher rate.

The FCC's "reinterpretation" of the Telecom Rate to "approximate" the Cable Rate contravenes the Act's express prescription of a different rate for telecommunications carriers. Though the Cable Rate provides for a range of rates between "the additional costs of providing pole attachments" on the lower end to the product of "the percentage of the total usable space . . . occupied by the pole attachment [and] the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole" on the upper end (*see* 47 U.S.C. §224(d)(1)), the Telecom Rate plainly requires apportionment of the cost of providing both "usable space" and "other than the usable space." *Id.* at §§224(e)(2)-(3). Thus, the Cable Rate and the Telecom Rate include different components, which, in turn, yield different results.

In fact, §224(d)(3) states that "[u]ntil the effective date of the regulations required under subsection (e), [the Cable Rate] shall also apply to the rate for any pole attachment used . . . to provide telecommunications service." If Congress intended algebraic conflation of the two rates, this express interim rate—and indeed all of subsection (e)—would have been superfluous. *See Corley v. U.S.*,

556 U.S. 303, 129 S.Ct. 1558, 1566 (2009) ('[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant ....'") (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)); *Nat'l Ass'n of Broadcasters v. FCC*, 569 F.3d 416, 421-22 (D.C. Cir. 2009) (rejecting a reading that rendered statutory provision superfluous) (citing *Hibbs*, 542 U.S. at 101).

The Order concedes that the two rates "*could* be different," but denies "that they must always be different or that the telecom rate necessarily must be higher." Order ¶168 [JA____] (emphasis added). On this hypothetical basis, the Order designs a new formula that will make the Telecom Rate "approximate" the Cable Rate. But this new approach belies the Act itself and more than a decade of FCC and court decisions acknowledging the plain language of the Act.

First, the Act expressly anticipates that the Telecom Rate formula would yield higher rates than the Cable Rate:

> Any increase in the rates for pole attachments that result from the adoption of regulations required by [subsection (e)] shall be phased in equal annual increments over a period of 5 years beginning on the effective date of such regulations.

47 U.S.C. §224(e)(4).[20] Second, courts have confirmed the statute's dual rate structure. In *Alabama Power Co. v. FCC*, 311 F.3d 1357, 1371 n.23 (11th Cir.

[20] The use of the word "any" to modify "increase" recognizes that only cable operators providing telecommunications services would experience a change.

2002), the court recognized: "[T]he Telecom Rate provided… yields a higher rate for telecommunications attachments than the Cable Rate provides for cable attachments."

To sustain its end-run of the statute, the Order suggests that the higher Telecom Rate was not required by the statute itself, but that it was instead simply "one of the permissible outcomes" initially chosen by the FCC in implementing §224(e). Order ¶171 [JA____]. But, as the FCC had always previously maintained, the higher rate is commanded by the statute and intended by Congress:

- "We note that in the one case *where Congress affirmatively wanted a higher rate* for a particular service offered by a cable system, it provided for one in section 224(e). In requiring that the Section 224(d) rate apply to any pole attachment used 'solely to provide cable service,' we do not believe Congress intended to bar the Commission from determining that the Section 224(d) rate methodology also would be just and reasonable in situations where the Commission is not *statutorily required to apply the higher Section 224(e) rate*." 1998 Report and Order ¶34 [JA___] (emphasis added).

- "Because the rate for cable television attachments satisfies the constitutional minimum of 'just compensation,' *Congress's determination that other pole attachers should pay a higher rate* is indeed relevant." FCC Br. in Opp. to Cert. at 18, *Alabama Power Co.*

Cable operators who "solely . . . provide cable service" would continue to pay the Cable Rate. Cable operators who had been providing telecommunications services would be subject to an increase. *See* 1996 Order ¶6 [JA____] ("The 1996 Act also created a distinction between pole attachments used by cable operators solely to provide cable service and pole attachments used by cable operators or by any telecommunications carrier to provide any telecommunications service. The Act prescribed a new methodology for determining pole attachment rates for the latter group.") (internal footnote omitted).

> *v. FCC*, 540 U.S. 937 (2003) (No. 02-1474) [JA___] (emphasis added).

The FCC's departure from the statute's mandate cannot now be sustained on grounds that "times have changed." Even if the FCC had produced adequate data to justify such a contention, Congress's intent still controls. *See Chevron*, 467 U.S. at 842-43 ("If the intent of Congress is clear, that is the end of the matter....").

2. The statute requires a fully allocated cost formula.

Section 224(e) provides for the apportionment of the cost of the entire pole—both usable space and other-than-usable space. There is no "lower bound" or incremental cost option under §224(e). The costs are what they are, and they must be apportioned according to the statutory formula. But the FCC contends that the term "cost" is not separately defined for purposes of §224(e) and is, therefore, "ambiguous." Order ¶156 [JA____]. The FCC then explains that it intends to "apply cost causation principles to each category of a pole owner's costs" to establish a lower-bound Telecom Rate. *Id.* at ¶144 [JA____]. The FCC posits that "attachers cause none or no more than a *de minimis* amount of [capital] costs" and that "past investment in an existing pole would have been incurred regardless of the demand for attachments." *Id.* at ¶145 [JA____]. Thus, the FCC reasons: "where there is space available on a pole, an attacher would be required to pay for none of the capital costs of that pole." *Id.* at ¶145 [JA____].

The FCC apparently wants to hold attachers accountable only for the costs those attachers actually cause, rather than for their apportioned share of the actual costs as provided by the statute. But the FCC knows that §224(e) refers to the cost of "space"—not costs "caused" by the attacher. Thus, the FCC does not directly redefine "cost" at all. Indeed, the FCC retained its existing definition of cost as "net cost of a bare pole x carrying charge," but in order to hit its policy target of reaching the Cable Rate, the FCC simply slashes the portion of that cost recoverable through the Telecom Rate. Specifically, the FCC applies a non-statutory multiplier of either 44% or 66%, depending upon whether the pole attachment is located in an urbanized or non-urbanized area:

Old Telecom Formula

$$\text{Maximum Rate} = \text{Space Factor} \times \text{Net Cost of a Bare Pole} \times \left[\begin{matrix}\text{Carrying}\\ \text{Charge}\\ \text{Rate}\end{matrix}\right]$$

$$\text{Where Space Factor} = \left[\frac{(\text{Space Occupied}) + \left(\frac{2}{3} \times \frac{\text{Unusuable Space}}{\text{No. of Attaching Entities}}\right)}{\text{Pole Height}}\right]$$

vs.

New Telecom Formula

Rate = Space Factor × Cost

Where Cost

in Urbanized Service Areas = 0.66 × (Net Cost of a Bare Pole ×Carrying Charge Rate)

in Non-Urbanized Service Areas = 0.44 × (Net Cost of a Bare Pole ×Carrying Charge Rate)

$$\text{Where Space Factor} = \left[\frac{(\text{Space Occupied}) + \left(\frac{2}{3} \times \frac{\text{Unusuable Space}}{\text{No. of Attaching Entities}}\right)}{\text{Pole Height}}\right]$$

Thus, for all its talk about redefining costs, in the end, the FCC simply takes an axe to the cost apportioned through the old Telecom Rate formula. The FCC does not even disguise the fact that the 66% and 44% figures were chosen to "approximate the cable rate" rather than to achieve any authorized statutory

purpose. Order ¶149 [JA____]; *see also id.* at n.453 [JA____] (explaining that 66% and 44% results in recovery of approximately 7.4% of the fully allocated costs of the pole).

Section 224(e) leaves no room for such discount factors. Congress thought it appropriate for a pole owner to apportion *all* costs of usable space and two-thirds of the total costs of other-than-usable space. When it wanted to discount costs, Congress did so expressly by a fraction of two-thirds (in the context of other-than-usable space), and the FCC has no authority to neutralize the statutory language with additional multipliers that reduce the fraction of costs Congress chose to apportion.

a. The statute expressly requires that the Telecom Rate include all costs.

The "fully allocated" cost formula is not merely a *permissible* choice to implement the Telecom Rate. The formula is required by the Act. Subsections (e)(2) and (e)(3) require allocation of the cost of both the "usable" and the "other than usable" space of a pole. Because a pole contains only "usable" space (i.e., attachment space) and "other than usable" space (i.e., common space), §224(e) as a whole was designed to allocate costs associated with the *entire* pole.

Section 224(e), moreover, was not written in a vacuum. *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("[S]tatutory language cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the

words of a statute must be read in their context and with a view to their place in the overall statutory scheme."). The Telecom Rate's "cost" components need not be specifically enumerated in §224(e), as the FCC contends, because its meaning was clear from §224(d). The key term in §224(e) is "space":

- "A utility shall apportion *the cost of providing space on a pole*, …other than the usable *space* among entities so that such apportionment equals two-thirds of the *costs of providing space* other than the usable *space* that would be allocated to such entity under an equal apportionment of such costs among all attaching entities." 47 U.S.C. §224(e)(2) (emphases added).
- "A utility shall apportion the *cost of providing usable space* among all entities according to the percentage of usable space required for each entity." *Id.* at §224(e)(3) (emphases added).

The costs of "space" (both usable and other-than-usable) are what they are, and must be allocated to each attacher according to the statutory apportionment. Congress even specified in §224(d)(1) that the costs associated with pole "space" are "operating expenses and actual capital costs." There is no room to add or subtract from Congress's definition of costs.

In 1996, Congress had no reason to doubt that the FCC would read subsection (e) in this way because the FCC had interpreted the "cost" apportioned pursuant to the Cable Rate in this manner for more than fifteen years. Specifically, the FCC has always included the costs associated with pole space under §224(d) to include administrative, maintenance, depreciation, taxes, and a rate of return. "In construing a statute, courts 'presume that Congress is knowledgeable about

existing law pertinent to the legislation it enacts.' This includes knowledge of applicable administrative regulations." *Wilderness Watch v. United States Forest Service*, 143 F. Supp. 2d 1186, 1205 (D. Mont. 2000) (quoting *United States v. Hunter*, 101 F.3d 82, 85 (9th Cir. 1996) (quoting *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988))); *accord FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 157 (2000) (explaining that "consistency of the [agency's] prior position is significant" because it "provides important context to Congress' enactment").

Even after the Telecom Rate was enacted, the FCC not only interpreted "cost" consistent with its own precedent but also specifically held the statute itself required it to do so:

> The 1996 Act also created a distinction between pole attachments used by cable operators solely to provide cable service and pole attachments used by cable operators or by any telecommunications carrier to provide any telecommunications service. *The Act prescribed a new methodology* for determining pole attachment rates for the latter group. The new formulas will require that, in addition to paying their share of a pole's usable space, these telecommunications service providers also must pay their share of *the fully allocated costs* associated with the [other-than-usable] space of the pole, duct, conduit, or right-of-way.

1996 Order ¶6 [JA____] (emphases added); *see also* Order ¶157 [JA____] (citing 1998 Report and Order ¶43, n.160).

b. The FCC's "cost causation" approach to setting a lower-bound Telecom Rate conflicts with the Act's plain language.

Section 224(e) provides for an *apportionment* of the cost of the entire pole, not an accounting of who caused which costs. But the FCC's new Telecom Rate is premised "on the basic principles of cost causation that would underlie a marginal cost rate without defining 'cost' as equivalent to marginal or incremental cost *per se*." Order ¶143 [JA____]. Working from this premise, the FCC then excludes "capital costs" from the "cost of providing space." *Id.* at ¶144 [JA____] (rationalizing that "the attacher is not the 'cost causer' of these costs" and "[p]ast investment in an existing pole would have been incurred regardless of the demand for attachments."). But the statute says nothing of cost *causation*; it speaks only to cost *allocation*. The costs are what they are.

This cost causation approach conflicts with the Act's plain language. Subsection (e)(2) unambiguously requires apportionment to attachers of "the cost of providing space on a pole . . . *other than the usable space*." (Emphasis added). Subsection (e)(3) is equally clear in requiring apportionment of "the cost of providing *usable* space." (emphasis added). By excluding capital costs that are not "caused" by an attacher, the FCC has disregarded the statutory command that attachers be apportioned costs of both the "other than usable space," 47 U.S.C. § 224(e)(2), and the "usable space" *id.* at §224(e)(3). *See Chevron*, 467 U.S. at 842-

43 (holding that the court must give effect to the intent of Congress and "must reject administrative constructions which are contrary to clear congressional intent").

Even if the plain language of subsection (e) were not enough to convey Congress's intent, the fallacy of the FCC's cost causation approach is apparent in subsection (d). The lower bound of the Cable Rate is "the additional costs of providing pole attachments" (i.e., incremental cost). 47 U.S.C. §224(d)(1). Had Congress intended the Telecom Rate to be based on a cost causation theory, it certainly knew the words to employ.

The FCC essentially substituted the word "attachment" for "space" even though Congress expressly chose not to:

- "[I]n establishing the lower bound telecom rate, we adopt an approach that seeks to define 'cost' in a manner that fully compensates the utility for the marginal costs *of attachment* once the statutory apportionments are applied." Order ¶144, n.428 [JA____] (emphasis added).
- "We reject certain electric utilities' argument that. . .the Commission is precluded from adopting a definition of cost that yields a rate more closely approximating the 'additional' or incremental cost *of a pole attachment*." *Id.* at ¶160 [JA____] (emphasis added).
- "Where no capital costs arise *from a new attachment*, the new attacher has 'caused' none of the capital outlay . . . ." *Id.* at ¶197 [JA____] (emphasis added).

The FCC now unabashedly applies a cost-causation analysis to the new Telecom Rate even though, unlike the §224(d) Cable Rate, §224(e) says nothing of

"*additional* costs of providing *attachments*." The FCC's complete disregard of this disparity in language cannot stand. *Northpoint Tech.*, 412 F.3d at 151 (stating it is unreasonable to offer an explanation that is "manifestly contrary to the statute").

B. The new Telecom Rate is the result of arbitrary and capricious decisionmaking.

Even if the term "cost" as used in §224(e) were ambiguous, the FCC's proposed "reinterpretation" is unreasonable and constitutes arbitrary and capricious decisionmaking. According to the FCC, because the term "cost" is ambiguous, there is a range of rates that will satisfy the statute. *See* Order ¶¶ 135 [JA____], 140 [JA____]. Even if Congress had permitted a range (as in §224(d)), it is unreasonable, as well as arbitrary and capricious, to concoct a so-called lower-bound Telecom Rate based upon slashed "costs" to neutralize *statutory* requirements that otherwise result in a higher rate than the FCC likes. Specifically for purposes of establishing its lower-bound Telecom Rate, the Order excludes capital costs (taxes, depreciation, and a rate of return) from the meaning of "cost," even though, as explained above, such costs are expressly mentioned in §224(d) and have always been recoverable under agency precedent. *See*, *supra*, Part II A.

1. The FCC's reinterpreted Telecom Rate reverses fifteen years of agency precedent.

The FCC's actions represent an unjustified departure from its past practices. Although an agency is permitted to revisit its prior determinations, it must offer a

reasoned justification: "[T]he requirements that an agency explain its departure from precedent, and adequately explain the rationale of its decision, are prerequisites to a judicial finding that an agency's action is not arbitrary and capricious." *McHenry v. Bond*, 668 F.2d 1185, 1193 (11th Cir. 1982); *see also Wisc. Valley Improvement*, 236 F.3d at 748 (noting that an agency acts arbitrarily and capriciously when it "abruptly departs from a position it previously held without satisfactorily explaining its reason for doing so").

The FCC has not justified its sudden about-face. For more than fifteen years, the FCC interpreted §224(e) to require a Telecom Rate that is higher than the Cable Rate based on the apportionment of fully allocated costs. The Order's stark departure from this long-standing interpretation is a self-professed, results-oriented approach supported by neither record evidence nor rational explanation. Though the FCC cites generally to its goal of "remov[ing] market distortions that affect attachers' deployment decisions" (*see* Order ¶43 [JA____]), it presented no actual evidence meaningfully linking the distinction between the Cable Rate and Telecom Rate with broadband deployment decisions. *See FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 129 S. Ct. 1800, 1811 (2009) ("[A] reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy."); *State Farm*, 463 U.S. at 42 ("If Congress established a

presumption from which judicial review should start, that presumption . . . is . . . against changes in current policy that are not justified by the rulemaking record.").

2. The FCC's reliance on cost causation is arbitrary and capricious.

An agency decision is arbitrary and capricious if it has "relied on factors which Congress has not intended it to consider." *Cablevision Systems Corp. v. FCC*, 597 F.3d 1306, 1310-11 (D.C. Cir. 2010) (quoting *State Farm*, 463 U.S. at 43). As explained above, §224(e) provides for an apportionment of actual costs—not a determination of which party causes which costs. The only "factors" that are relevant here are the "cost" factor multiplied by the "space" factor. By factoring in cost causation, the FCC not only adds a non-statutory factor, but also attempts to cancel out the statutory factors in order to reach its pre-determined policy result. Because the FCC gives no explanation of how its cost causation approach is consistent with the plain language of §224(e), its policy-driven new math is arbitrary and capricious.

3. Neither the Act nor the record supports defining "cost" differently in urbanized and non-urbanized areas.

In order to reach its predetermined policy goal of making the Telecom Rate "approximate" the Cable Rate, the FCC, as explained above, performed some algebra to figure out the discount required to bring the Telecom Rate to 7.4% of the fully allocated pole cost. *See, e.g.*, Order ¶150, n.453 [JA____]. Because of its

regulatory presumptions about the average number of attachers in different areas, however, a single discount percentage did not result in the same 7.4% for both urbanized and non-urbanized areas. So the FCC simply changed the inputs: "[we] adopt[] . . . the following definition of 'cost' for purposes of section 224(e): (a) in urban areas, 66 percent of the fully allocated costs . . . ; and (b) in non-urban areas, 44 percent of the fully allocated costs . . . ." *Id.* at ¶149 [JA____] (footnotes omitted).

The only explanation offered by the FCC is that "using the same definition of cost in both types of areas would increase the burden pole attachment rates pose for providers of broadband and other communications services in non-urban areas, as compared to urban areas." Order ¶150 [JA____]. In other words, the end result may be inconvenient to the FCC's goal, but no facts support an actual difference in the definition of "cost." Section 224(e), which requires allocation of the "cost" of the entire pole, does not differentiate between different areas, and the FCC failed to explain the source of its authority to define "cost" differently in different areas. Further, the FCC fails to explain whether or how the costs themselves vary from area to area and fails to consider that, if attachers' costs are higher in non-urbanized areas, perhaps pole owners' costs are higher as well.[21] The irony, and

[21] The FCC's distinction in the meaning of "cost" between urbanized and non-urbanized areas also conflicts with its (non-statutory) "cost causation"

inexcusable inconsistency, of the FCC's position is that it invokes purported differences between urbanized and non-urbanized attachments in order to justify a formula that will in the end produce the *same* rate.

C. If the statutory Telecom Rate no longer satisfies Congress's objectives, only Congress can revise the statute, not the FCC.

Despite its acknowledgement that Congress intended different—indeed, higher—rates for telecommunications carriers, the FCC now claims that difference is a bad idea. Order ¶¶146-48 [JA____]. According to the FCC, the Telecom Rate that has been in place since §224(e) was enacted in 1996 now "hinders important statutory objectives." *Id.* at ¶147 [JA____]. In fact, the FCC repeatedly contends that its new Telecom Rate is required to fulfill statutory *objectives*, but the FCC never explains how the new rate satisfies the *statute itself*.

The alleged consequences of a statutory provision are irrelevant. The FCC must apply the statute as written and leave it to Congress to revise the statute if there are unintended results. "As the Supreme Court has repeatedly explained, however, neither courts nor federal agencies can rewrite a statute's plain text to correspond to its supposed purposes." *Landstar Exp. Am., Inc. v. Fed. Maritime Comm'n*, 569 F.3d 493, 498 (D.C. Cir. 2009) (citing *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 171 (2007) ("statute's remedial purpose cannot compensate for the

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approach. The FCC does not explain how the cost caused by an attacher varies from one location to the next.

lack of a statutory basis [in text]"); *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 462 (2002) ("We will not alter the text in order to satisfy the policy preferences of the Commissioner."); *Brown & Williamson Tobacco Corp. v. FDA*, 153 F.3d 155, 176 (4th Cir. 1998) ("[N]either federal agencies nor the courts can substitute their policy judgments for those of Congress. . . .") (citations omitted).

If the FCC believes the statutory mandates are inadequate in light of changed circumstances, it "must take its case to Congress." *MCI Telecommunications Corp. v. F.C.C.*, 765 F.2d 1186, 1195 (D.C. Cir. 1985) ("authorization must come from Congress, not from this court or from the Commission's own conception of how the statute should be rewritten in light of changed circumstances"); *Association of Am. Railroads v. ICC*, 564 F.2d 486, 495 (D.C. Cir. 1977) ("The Commission's attempted reinterpretation would accomplish by administrative fiat what it failed to accomplish through the Congress."). Congressional action is, in fact, precisely the solution that the FCC itself recommended in the National Broadband Plan. *See* National Broadband Plan, *101 (admitting that "without statutory change, the convoluted rate structure for cable and telecommunications providers will persist" and recommending that "Congress should consider amending Section 224 of the Act to establish a harmonized access policy for all poles, ducts, conduits and rights-of-way").

III. The FCC's Expansion of the Refund Period Exceeds its Statutory Authority and Violates the APA.

A. The FCC Lacks Authority to Award Retroactive Refunds.

The FCC's revision to Rule 1.1410 expands the pole attachment "refund" period back to a starting point "consistent with the applicable statute of limitations." Though "the applicable statutes of limitations" is left undefined, the import of the language is apparent—refunds begin at some point before a complaint is filed. But a complaint is the very trigger for the FCC's jurisdiction in the first place. Section 224 authorizes the FCC to "hear and resolve complaints concerning…rates, terms, and conditions." 47 U.S.C. §224(b)(1). No filed rates or other pre-approval is required under §224. Instead, the parties are free to negotiate whatever rates they choose, subject to subsequent complaint in the event of a dispute. Consistent with this complaint-based approach, the Telecom Rate formula in §224(e) applies only "when the parties fail to resolve a dispute over such charges." *Id.* at §224(e) (prescribing rate for "telecommunications carriers to provide telecommunications services, *when the parties fail to resolve a dispute over such charges*.") (emphasis added). And the FCC's rules have long provided that its Cable Rate formula similarly applies "[w]hen the parties fail to resolve a dispute regarding charges for pole attachments." 47 C.F.R. §1.1409(e)(1). Because the filing of a complaint definitively marks the failure to resolve the dispute, there can be no refund for amounts paid prior to the date of complaint.

The legislative history of §224 confirms Congress's intent to grant only prospective regulatory authority:

> This expansion of FCC regulatory authority is strictly circumscribed.... FCC regulation will occur only when a utility or CATV system invokes the powers conferred by S. 1547, as reported, to hear and resolve complaints relating to the rates, terms, and conditions of pole attachments.

S. Rep. No. 95-580, 14 (1977).

B. The FCC's revision of the refund rule is an arbitrary and capricious departure from FCC precedent.

For over thirty years, the FCC acknowledged the limits placed on its refund authority. When the FCC first adopted the refund rule in 1978, it rejected a proposal to calculate refunds from the date the allegedly unjust or unreasonable rate was first paid, reasoning that "refunds from the date of the complaint are entirely appropriate in a complainant form of regulation...[i]n order to avoid abuse and encourage early filing when rates are considered objectionable...." 1978 Order ¶ 45; *see also Am. Television and Comm. Corp. v. Florida Power Corp.*, FCC File No. PA-83-0035; File No. PA-84-0004 (1984) ("[t]he Commission has determined that where substantial overcharges have been established by the record, a refund of excess payments retroactive to the date of the filing of the complaint, plus interest, is a suitable remedy which advances the Congressional goals set forth in the legislative history associated with 47 U.S.C. § 224").

In an effort to explain the FCC's about-face, the Order stated:

> In the more than 30 years since [the 1978 Order] issued, we have had the opportunity to weigh this concern about potential abuse against our experience that the rule, as currently written, creates a disincentive to engage in pre-complaint negotiation. We find that the benefits of encouraging negotiated resolution of disputes outweighs any concern that attachers will 'abuse' the process by unduly delaying the filing of overcharge complaints.

Order ¶ 111, n.345 [JA____]. The FCC, though, failed to identify any examples or basis for its perception of a "disincentive to engage in pre-complaint negotiations." *See* Order ¶¶ 110-12 [JA____]. An agency decision that fails to explain how any purported "knowledge or experience" supports its decision is arbitrary and capricious. *See McDonnnell Douglas Corp. v. U.S. Dep't of the Air Force*, 375 F.3d 1182, 1191 (D.C. Cir. 2004) (holding Air Force's failure to explain how its knowledge and experience supported its decision to release pricing information rendered that decision arbitrary and capricious).

The FCC's supposed concern that attachers are not being made whole (*see* Order ¶110 [JA____]), is particularly unreasonable. As the FCC has repeatedly acknowledged, "the [FCC]'s regulations apply 'when the parties fail to resolve a dispute over such charges'" and accordingly, the "pole attachment complaint rules apply 'when parties are unable to arrive at a negotiated agreement." *See* 2001 Order on Reconsideration, ¶10. Under the "sign and sue rule," an attacher may immediately file a complaint with the FCC after executing a pole attachment agreement contesting any provision it contends to be unjust or unreasonable. *See*

id. If it does so, and prevails, the attacher is made whole—it will have made no payments under the unjust/unreasonable rate provision prior to filing the complaint and will receive a refund with respect to any such payments made after the filing. Under the FCC's own regulations, its justification for retroactive refunds is unreasonable.

CONCLUSION

The FCC's "reinterpretations" of its statutory authority in order to accomplish its policy goals fail to pass muster under *Chevron* analysis and constitute arbitrary and capricious agency action. Congress's intent is apparent from the plain language of the statute and the legislative history of the Act. The FCC cannot jettison Congress's intent simply because it now believes the laws Congress enacted no longer serve their purpose. That is a question left within Congress's hands. The FCC's attempts to circumvent the legislative process under the guise of "filling gaps" should not stand.

Petitioners respectfully request that the Court hold unlawful, vacate, enjoin, and set aside the portions of the Order addressed herein, including but not limited to new Rule 1.1424 and the revisions to Rules 1.1401, 1.1402, 1.1409, and 1.1410.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7) and D.C. Cir. R. 32(a)(2), I hereby certify that the textual portion of the foregoing brief (exclusive of tables of contents and authorities, glossary, certificates of service and length, but including footnotes) contains 12,754 words as determined by the word-counting feature of Microsoft Word.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, pursuant to D.C. Cir. R. 25(c), service of the foregoing will be made electronically via CM/ECF system upon the following counsel of record this 3rd day of January, 2012:

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Addendum of Pertinent Statutes and Regulations

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[1] The 2011 version of Title 47 of the Code of Federal Regulations has not yet been printed. The revised regulations are therefore reproduced from the FCC's Order implementing them.

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by whatever name the instrument may be designated by the Commission.

(43) Telecommunications

The term "telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

(44) Telecommunications carrier

The term "telecommunications carrier" means any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226 of this title). A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.

(45) Telecommunications equipment

The term "telecommunications equipment" means equipment, other than customer premises equipment, used by a carrier to provide telecommunications services, and includes software integral to such equipment (including upgrades).

(46) Telecommunications service

The term "telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

(47) Telephone exchange service

The term "telephone exchange service" means (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.

(48) Telephone toll service

The term "telephone toll service" means telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service.

(49) Television service

(A) Analog television service

The term "analog television service" means television service provided pursuant to the transmission standards prescribed by the Commission in section 73.682(a) of its regulations (47 C.F.R. 73.682(a)).

(B) Digital television service

The term "digital television service" means television service provided pursuant to the transmission standards prescribed by the Commission in section 73.682(d) of its regulations (47 C.F.R. 73.682(d)).

(50) Transmission of energy by radio

The term "transmission of energy by radio" or "radio transmission of energy" includes both such transmission and all instrumentalities, facilities, and services incidental to such transmission.

(51) United States

The term "United States" means the several States and Territories, the District of Columbia, and the possessions of the United States, but does not include the Canal Zone.

(52) Wire communication

The term "wire communication" or "communication by wire" means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

(June 19, 1934, ch. 652, title I, § 3, 48 Stat. 1065; May 20, 1937, ch. 229, § 2, 50 Stat. 189; Proc. No. 2695, eff. July 4, 1946, 11 F.R. 7517, 60 Stat. 1352; July 16, 1952, ch. 879, § 2, 66 Stat. 711; Apr. 27, 1954, ch. 175, §§ 2, 3, 68 Stat. 64; Aug. 13, 1954, ch. 729, § 3, 68 Stat. 707; Aug. 13, 1954, ch. 735, § 1, 68 Stat. 729; Aug. 6, 1956, ch. 973, § 3, 70 Stat. 1049; Pub. L. 89–121, § 1, Aug. 13, 1965, 79 Stat. 511; Pub. L. 90–299, § 2, May 3, 1968, 82 Stat. 112; Pub. L. 97–259, title I, § 120(b), Sept. 13, 1982, 96 Stat. 1097; Pub. L. 103–66, title VI, § 6002(b)(2)(B)(ii), Aug. 10, 1993, 107 Stat. 396; Pub. L. 104–104, § 3(a), (c), Feb. 8, 1996, 110 Stat. 58, 61; Pub. L. 105–33, title III, § 3001(b), Aug. 5, 1997, 111 Stat. 258.)

REFERENCES IN TEXT

For definition of Canal Zone, referred to in pars. (22) and (51), see section 3602(b) of Title 22, Foreign Relations and Intercourse.

Part II of subchapter III of this chapter, referred to in pars. (31), (34), and (36), is classified to section 351 et seq. of this title. Part III of subchapter III of this chapter, referred to in par. (31)(A), is classified to section 381 et seq. of this title.

CODIFICATION

In par. (34)(A), "chapter 71 of title 46" substituted for "the Act of May 12, 1948 (46 U.S.C. 229a–h)" on authority of Pub. L. 98–89, § 2(b), Aug. 26, 1983, 97 Stat. 598, section 1 of which enacted Title 46, Shipping.

References to Philippine Islands in pars. (22) and (51) of this section omitted on authority of Proc. No. 2695, issued pursuant to section 1394 of Title 22, Foreign Relations and Intercourse, which proclamation recognized the independence of Philippine Islands as of July 4, 1946. Proc. No. 2695 is set out under section 1394 of Title 22.

AMENDMENTS

1997—Pars. (49) to (52). Pub. L. 105–33 added par. (49) and redesignated former pars. (49) to (51) as (50) to (52), respectively.

1996—Pub. L. 104–104, § 3(a)(2), (c)(4)–(8), redesignated subsecs. (a) to (ff) as pars. (1) to (32), respectively, realigned margins, inserted headings and words "The term", changed capitalization, added pars. (33) to (51), reordered pars. in alphabetical order based on headings of pars. and renumbered pars. as so reordered.

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1983—Subsec. (a). Pub. L. 98–214, §8(a)(1), (2), designated existing provisions as subsec. (a) and substituted "$50,000" for "$500" in provisions after par. (2).

Subsec. (a)(2). Pub. L. 98–214, §8(b), inserted "facility" after "telephone".

Subsec. (b). Pub. L. 98–214, §8(a)(3), added subsec. (b).

EFFECTIVE DATE OF 1998 AMENDMENTS

Pub. L. 105–277, div. C, title XIV, §1406, Oct. 21, 1998, 112 Stat. 2681–741, provided that: "This title [enacting section 231 of this title, amending this section and section 230 of this title, and enacting provisions set out as notes under sections 231 and 609 of this title] and the amendments made by this title shall take effect 30 days after the date of enactment of this Act [Oct. 21, 1998]."

Amendment by Pub. L. 105–244 effective Oct. 1, 1998, except as otherwise provided in Pub. L. 105–244, see section 3 of Pub. L. 105–244, set out as a note under section 1001 of Title 20, Education.

EFFECTIVE DATE OF 1989 AMENDMENT

Amendment by Pub. L. 101–166 effective 120 days after Nov. 21, 1989, see section 521(3) of Pub. L. 101–166, set out as a note under section 152 of this title.

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100–297 effective July 1, 1988, see section 6303 of Pub. L. 100–297, set out as a note under section 1071 of Title 20, Education.

CONSTRUCTION OF 2006 AMENDMENT

Pub. L. 109–162, title I, §113(b), Jan. 5, 2006, 119 Stat. 2987, provided that: "This section [amending this section] and the amendment made by this section may not be construed to affect the meaning given the term 'telecommunications device' in section 223(h)(1) of the Communications Act of 1934 [47 U.S.C. 223(h)(1)], as in effect before the date of the enactment of this section [Jan. 5, 2006]."

EXPEDITED REVIEW

Section 561 of title V of Pub. L. 104–104 provided that:

"(a) THREE-JUDGE DISTRICT COURT HEARING.—Notwithstanding any other provision of law, any civil action challenging the constitutionality, on its face, of this title [see Short Title of 1996 Amendment note set out under section 609 of this title] or any amendment made by this title, or any provision thereof, shall be heard by a district court of 3 judges convened pursuant to the provisions of section 2284 of title 28, United States Code.

"(b) APPELLATE REVIEW.—Notwithstanding any other provision of law, an interlocutory or final judgment, decree, or order of the court of 3 judges in an action under subsection (a) holding this title or an amendment made by this title, or any provision thereof, unconstitutional shall be reviewable as a matter of right by direct appeal to the Supreme Court. Any such appeal shall be filed not more than 20 days after entry of such judgment, decree, or order."

REGULATIONS; DISPOSITION OF COMPLAINTS PENDING ON DECEMBER 8, 1983

Section 8(c), (d) of Pub. L. 98–214 provided that:

"(c) The Federal Communications Commission shall issue regulations pursuant to section 223(b)(2) of the Communications Act of 1934 (as added by subsection (a) of this section) [subsec. (b)(2) of this section] not later than one hundred and eighty days after the date of the enactment of this Act [Dec. 8, 1983].

"(d) The Commission shall act on all complaints alleging violation of section 223 of the Communications Act of 1934 [this section] which are pending on the date of the enactment of this Act [Dec. 8, 1983] within ninety days of such date of enactment."

§ 224. Pole attachments

(a) Definitions

As used in this section:

(1) The term "utility" means 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. Such term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State.

(2) The term "Federal Government" means the Government of the United States or any agency or instrumentality thereof.

(3) The term "State" means any State, territory, or possession of the United States, the District of Columbia, or any political subdivision, agency, or instrumentality thereof.

(4) The term "pole attachment" means 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.

(5) For purposes of this section, the term "telecommunications carrier" (as defined in section 153 of this title) does not include any incumbent local exchange carrier as defined in section 251(h) of this title.

(b) Authority of Commission to regulate rates, terms, and conditions; enforcement powers; promulgation of regulations

(1) Subject to the provisions of subsection (c) of this section, the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions. For purposes of enforcing any determinations resulting from complaint procedures established pursuant to this subsection, the Commission shall take such action as it deems appropriate and necessary, including issuing cease and desist orders, as authorized by section 312(b) of this title.

(2) The Commission shall prescribe by rule regulations to carry out the provisions of this section.

(c) State regulatory authority over rates, terms, and conditions; preemption; certification; circumstances constituting State regulation

(1) Nothing in this section shall be construed to apply to, or to give the Commission jurisdiction with respect to rates, terms, and conditions, or access to poles, ducts, conduits, and rights-of-way as provided in subsection (f) of this section, for pole attachments in any case where such matters are regulated by a State.

(2) Each State which regulates the rates, terms, and conditions for pole attachments shall certify to the Commission that—

(A) it regulates such rates, terms, and conditions; and

(B) in so regulating such rates, terms, and conditions, the State has the authority to consider and does consider the interests of the subscribers of the services offered via such attachments, as well as the interests of the consumers of the utility services.

(3) For purposes of this subsection, a State shall not be considered to regulate the rates, terms, and conditions for pole attachments—

(A) unless the State has issued and made effective rules and regulations implementing the State's regulatory authority over pole attachments; and

(B) with respect to any individual matter, unless the State takes final action on a complaint regarding such matter—

(i) within 180 days after the complaint is filed with the State, or

(ii) within the applicable period prescribed for such final action in such rules and regulations of the State, if the prescribed period does not extend beyond 360 days after the filing of such complaint.

(d) Determination of just and reasonable rates; "usable space" defined

(1) For purposes of subsection (b) of this section, a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.

(2) As used in this subsection, the term "usable space" means the space above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment.

(3) This subsection shall apply to the rate for any pole attachment used by a cable television system solely to provide cable service. Until the effective date of the regulations required under subsection (e) of this section, this subsection shall also apply to the rate for any pole attachment used by a cable system or any telecommunications carrier (to the extent such carrier is not a party to a pole attachment agreement) to provide any telecommunications service.

(e) Regulations governing charges; apportionment of costs of providing space

(1) The Commission shall, no later than 2 years after February 8, 1996, prescribe regulations in accordance with this subsection to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services, when the parties fail to resolve a dispute over such charges. Such regulations shall ensure that a utility charges just, reasonable, and nondiscriminatory rates for pole attachments.

(2) A utility shall apportion the cost of providing space on a pole, duct, conduit, or right-of-way other than the usable space among entities so that such apportionment equals two-thirds of the costs of providing space other than the usable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities.

(3) A utility shall apportion the cost of providing usable space among all entities according to the percentage of usable space required for each entity.

(4) The regulations required under paragraph (1) shall become effective 5 years after February 8, 1996. Any increase in the rates for pole attachments that result from the adoption of the regulations required by this subsection shall be phased in equal annual increments over a period of 5 years beginning on the effective date of such regulations.

(f) Nondiscriminatory access

(1) A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.

(2) Notwithstanding paragraph (1), a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory[1] basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.

(g) Imputation to costs of pole attachment rate

A utility that engages in the provision of telecommunications services or cable services shall impute to its costs of providing such services (and charge any affiliate, subsidiary, or associate company engaged in the provision of such services) an equal amount to the pole attachment rate for which such company would be liable under this section.

(h) Modification or alteration of pole, duct, conduit, or right-of-way

Whenever the owner of a pole, duct, conduit, or right-of-way intends to modify or alter such pole, duct, conduit, or right-of-way, the owner shall provide written notification of such action to any entity that has obtained an attachment to such conduit or right-of-way so that such entity may have a reasonable opportunity to add to or modify its existing attachment. Any entity that adds to or modifies its existing attachment after receiving such notification shall bear a proportionate share of the costs incurred by the owner in making such pole, duct, conduit, or right-of-way accessible.

(i) Costs of rearranging or replacing attachment

An entity that obtains an attachment to a pole, conduit, or right-of-way 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).

(June 19, 1934, ch. 652, title II, § 224, as added Pub. L. 95–234, § 6, Feb. 21, 1978, 92 Stat. 35; amended Pub. L. 97–259, title I, § 106, Sept. 13, 1982, 96 Stat. 1091; Pub. L. 98–549, § 4, Oct. 30, 1984, 98 Stat. 2801; Pub. L. 103–414, title III, § 304(a)(7), Oct. 25, 1994, 108 Stat. 4297; Pub. L. 104–104, title VII, § 703, Feb. 8, 1996, 110 Stat. 149.)

AMENDMENTS

1996—Subsec. (a)(1). Pub. L. 104–104, § 703(1), inserted first sentence and struck out former first sentence which read as follows: "The term 'utility' means any person whose rates or charges are regulated by the Federal Government or a State and who owns or controls

[1] So in original. Probably should be "nondiscriminatory".

poles, ducts, conduits, or rights-of-way used, in whole or in part, for wire communication."

Subsec. (a)(4). Pub. L. 104–104, § 703(2), inserted "or provider of telecommunications service" after "system".

Subsec. (a)(5). Pub. L. 104–104, § 703(3), added par. (5).

Subsec. (c)(1). Pub. L. 104–104, § 703(4), inserted ", or access to poles, ducts, conduits, and rights-of-way as provided in subsection (f) of this section," after "conditions".

Subsec. (c)(2)(B). Pub. L. 104–104, § 703(5), substituted "the services offered via such attachments" for "cable television services".

Subsec. (d)(3). Pub. L. 104–104, § 703(6), added par. (3).

Subsecs. (e) to (i). Pub. L. 104–104, § 703(7), added subsecs. (e) to (i).

1994—Subsec. (b)(2). Pub. L. 103–414 substituted "The Commission" for "Within 180 days from February 21, 1978, the Commission".

1984—Subsec. (c)(3). Pub. L. 98–549 added par. (3).

1982—Subsec. (e). Pub. L. 97–259 struck out subsec. (e) which provided that, upon expiration of 5-year period that began on Feb. 21, 1978, provisions of subsec. (d) of this section would cease to have any effect.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–549 effective 60 days after Oct. 30, 1984, except where otherwise expressly provided, see section 9(a) of Pub. L. 98–549, set out as a note under section 521 of this title.

EFFECTIVE DATE

Section effective on thirtieth day after Feb. 21, 1978, see section 7 of Pub. L. 95–234, set out as an Effective Date of 1978 Amendment note under section 152 of this title.

§ 225. Telecommunications services for hearing-impaired and speech-impaired individuals

(a) Definitions

As used in this section—

(1) Common carrier or carrier

The term "common carrier" or "carrier" includes any common carrier engaged in interstate communication by wire or radio as defined in section 153 of this title and any common carrier engaged in intrastate communication by wire or radio, notwithstanding sections 152(b) and 221(b) of this title.

(2) TDD

The term "TDD" means a Telecommunications Device for the Deaf, which is a machine that employs graphic communication in the transmission of coded signals through a wire or radio communication system.

(3) Telecommunications relay services

The term "telecommunications relay services" means telephone transmission services that provide the ability for an individual who has a hearing impairment or speech impairment to engage in communication by wire or radio with a hearing individual in a manner that is functionally equivalent to the ability of an individual who does not have a hearing impairment or speech impairment to communicate using voice communication services by wire or radio. Such term includes services that enable two-way communication between an individual who uses a TDD or other nonvoice terminal device and an individual who does not use such a device.

(b) Availability of telecommunications relay services

(1) In general

In order to carry out the purposes established under section 151 of this title, to make available to all individuals in the United States a rapid, efficient nationwide communication service, and to increase the utility of the telephone system of the Nation, the Commission shall ensure that interstate and intrastate telecommunications relay services are available, to the extent possible and in the most efficient manner, to hearing-impaired and speech-impaired individuals in the United States.

(2) Use of general authority and remedies

For the purposes of administering and enforcing the provisions of this section and the regulations prescribed thereunder, the Commission shall have the same authority, power, and functions with respect to common carriers engaged in intrastate communication as the Commission has in administering and enforcing the provisions of this subchapter with respect to any common carrier engaged in interstate communication. Any violation of this section by any common carrier engaged in intrastate communication shall be subject to the same remedies, penalties, and procedures as are applicable to a violation of this chapter by a common carrier engaged in interstate communication.

(c) Provision of services

Each common carrier providing telephone voice transmission services shall, not later than 3 years after July 26, 1990, provide in compliance with the regulations prescribed under this section, throughout the area in which it offers service, telecommunications relay services, individually, through designees, through a competitively selected vendor, or in concert with other carriers. A common carrier shall be considered to be in compliance with such regulations—

(1) with respect to intrastate telecommunications relay services in any State that does not have a certified program under subsection (f) of this section and with respect to interstate telecommunications relay services, if such common carrier (or other entity through which the carrier is providing such relay services) is in compliance with the Commission's regulations under subsection (d) of this section; or

(2) with respect to intrastate telecommunications relay services in any State that has a certified program under subsection (f) of this section for such State, if such common carrier (or other entity through which the carrier is providing such relay services) is in compliance with the program certified under subsection (f) of this section for such State.

(d) Regulations

(1) In general

The Commission shall, not later than 1 year after July 26, 1990, prescribe regulations to implement this section, including regulations that—

(A) establish functional requirements, guidelines, and operations procedures for telecommunications relay services;

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"(4) a description of the technologies or methods identified by the study that may meet the requirements for use as affirmative defenses for purposes of section 231(c) of the Communications Act of 1934 [47 U.S.C. 231(c)] (as added by this title).

"(g) RULES OF THE COMMISSION.—

"(1) QUORUM.—Nine members of the Commission shall constitute a quorum for conducting the business of the Commission.

"(2) MEETINGS.—Any meetings held by the Commission shall be duly noticed at least 14 days in advance and shall be open to the public.

"(3) OPPORTUNITIES TO TESTIFY.—The Commission shall provide opportunities for representatives of the general public to testify.

"(4) ADDITIONAL RULES.—The Commission may adopt other rules as necessary to carry out this section.

"(h) GIFTS, BEQUESTS, AND DEVISES.—The Commission may accept, use, and dispose of gifts, bequests, or devises of services or property, both real (including the use of office space) and personal, for the purpose of aiding or facilitating the work of the Commission. Gifts or grants not used at the termination of the Commission shall be returned to the donor or grantee.

"(*l*)[i] TERMINATION.—The Commission shall terminate 30 days after the submission of the report under subsection (d) or November 30, 2000, whichever occurs earlier.

"(m)[j] INAPPLICABILITY OF FEDERAL ADVISORY COMMITTEE ACT.—The Federal Advisory Committee Act (5 U.S.C. App.) shall not apply to the Commission."

PART II—DEVELOPMENT OF COMPETITIVE MARKETS

§ 251. Interconnection

(a) General duty of telecommunications carriers

Each telecommunications carrier has the duty—

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256 of this title.

(b) Obligations of all local exchange carriers

Each local exchange carrier has the following duties:

(1) Resale

The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) Number portability

The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) Dialing parity

The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) Access to rights-of-way

The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224 of this title.

(5) Reciprocal compensation

The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) Additional obligations of incumbent local exchange carriers

In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties:

(1) Duty to negotiate

The duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network—

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.

(3) Unbundled access

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) Resale

The duty—

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such tele-

communications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

(5) Notice of changes

The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

(6) Collocation

The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

(d) Implementation

(1) In general

Within 6 months after February 8, 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.

(2) Access standards

In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the Commission shall consider, at a minimum, whether—

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

(3) Preservation of State access regulations

In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that—

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

(e) Numbering administration

(1) Commission authority and jurisdiction

The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.

(2) Costs

The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.

(3) Universal emergency telephone number

The Commission and any agency or entity to which the Commission has delegated authority under this subsection shall designate 9–1–1 as the universal emergency telephone number within the United States for reporting an emergency to appropriate authorities and requesting assistance. The designation shall apply to both wireline and wireless telephone service. In making the designation, the Commission (and any such agency or entity) shall provide appropriate transition periods for areas in which 9–1–1 is not in use as an emergency telephone number on October 26, 1999.

(f) Exemptions, suspensions, and modifications

(1) Exemption for certain rural telephone companies

(A) Exemption

Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof).

(B) State termination of exemption and implementation schedule

The party making a bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A). Within 120 days after the State commission receives notice of the request, the State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with Commission regulations.

(C) Limitation on exemption

The exemption provided by this paragraph shall not apply with respect to a request

under subsection (c) of this section from a cable operator providing video programming, and seeking to provide any telecommunications service, in the area in which the rural telephone company provides video programming. The limitation contained in this subparagraph shall not apply to a rural telephone company that is providing video programming on February 8, 1996.

(2) Suspensions and modifications for rural carriers

A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) of this section to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification—

(A) is necessary—

(i) to avoid a significant adverse economic impact on users of telecommunications services generally;

(ii) to avoid imposing a requirement that is unduly economically burdensome; or

(iii) to avoid imposing a requirement that is technically infeasible; and

(B) is consistent with the public interest, convenience, and necessity.

The State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers.

(g) Continued enforcement of exchange access and interconnection requirements

On and after February 8, 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996, under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996. During the period beginning on February 8, 1996, and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

(h) "Incumbent local exchange carrier" defined

(1) Definition

For purposes of this section, the term "incumbent local exchange carrier" means, with respect to an area, the local exchange carrier that—

(A) on February 8, 1996, provided telephone exchange service in such area; and

(B)(i) on February 8, 1996, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or

(ii) is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in clause (i).

(2) Treatment of comparable carriers as incumbents

The Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if—

(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);

(B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and

(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

(i) Savings provision

Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201 of this title.

(June 19, 1934, ch. 652, title II, § 251, as added Pub. L. 104–104, title I, § 101(a), Feb. 8, 1996, 110 Stat. 61; amended Pub. L. 106–81, § 3(a), Oct. 26, 1999, 113 Stat. 1287.)

AMENDMENTS

1999—Subsec. (e)(3). Pub. L. 106–81 added par. (3).

§ 252. Procedures for negotiation, arbitration, and approval of agreements

(a) Agreements arrived at through negotiation

(1) Voluntary negotiations

Upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before February 8, 1996, shall be submitted to the State commission under subsection (e) of this section.

(2) Mediation

Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.

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summary of the comments, and a response to the comments, and an analysis of the proposal in terms of its environmental consequences, and any reasonable alternatives, and recommendations, if any, and shall cite the Commission's internal appeal procedures (*See* 47 CFR 1.101–1.120).

(b) The FEIS and any supplements will be distributed and published in the same manner as specified in §1.1315. Copies of the comments and reply comments, or summaries thereof where the record is voluminous, shall be attached to the FEIS.

§1.1319 Consideration of the environmental impact statements.

(a) If the action is subject to a hearing:

(1) In rendering his initial decision, the Administrative Law Judge shall utilize the FEIS in considering the environmental issues, together with all other non-environmental issues. In a comparative context, the respective parties shall be afforded the opportunity to comment on the FEIS, and the Administrative Law Judge's decision shall contain an evaluation of the respective applications based on environmental and non-environmental public interest factors.

(2) Upon review of an initial decision, the Commission will consider and assess all aspects of the FEIS and will render its decision, giving due consideration to the environmental and non-environmental issues.

(b) In all non-hearing matters, the Commission, as part of its decision-making process, will review the FEIS, along with other relevant issues, to ensure that the environmental effects are specifically assessed and given comprehensive consideration.

[51 FR 15000, Apr. 22, 1986, as amended at 62 FR 4171, Jan. 29, 1997]

Subpart J—Pole Attachment Complaint Procedures

SOURCE: 43 FR 36094, Aug. 15, 1978, unless otherwise noted.

§1.1401 Purpose.

The rules and regulations contained in subpart J of this part provide complaint and enforcement procedures to ensure that telecommunications carriers and cable system operators have nondiscriminatory access to utility poles, ducts, conduits, and rights-of-way on rates, terms, and conditions that are just and reasonable.

[61 FR 45618, Aug. 29, 1996]

§1.1402 Definitions.

(a) The term *utility* means any person that 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. Such term does not include any railroad, any person that is cooperatively organized, or any person owned by the Federal Government or any State.

(b) The term *pole attachment* means 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.

(c) With respect to poles, the term *usable space* means the space on a utility pole above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment, and which includes space occupied by the utility. With respect to conduit, the term *usable space* means capacity within a conduit system which is available, or which could, with reasonable effort and expense, be made available, for the purpose of installing wires, cable and associated equipment for telecommunications or cable services, and which includes capacity occupied by the utility.

(d) The term *complaint* means a filing by a cable television system operator, a cable television system association, a utility, an association of utilities, a telecommunications carrier, or an association of telecommunications carriers alleging that it has been denied access to a utility pole, duct, conduit, or right-of-way in violation of this subpart and/or that a rate, term, or condition for a pole attachment is not just and reasonable.

(e) The term *complainant* means a cable television system operator, a cable television system association, a utility, an association of utilities, a

telecommunications carrier, or an association of telecommunications carriers who files a complaint.

(f) The term *respondent* means a cable television system operator, a utility, or a telecommunications carrier against whom a complaint is filed.

(g) The term *State* means any State, territory, or possession of the United States, the District of Columbia, or any political subdivision, agency, or instrumentality thereof.

(h) For purposes of this subpart, the term *telecommunications carrier* means any provider of telecommunications services, except that the term does not include aggregators of telecommunications services (as defined in 47 U.S.C. 226) or incumbent local exchange carriers (as defined in 47 U.S.C. 251(h)).

(i) The term *conduit* means a structure containing one or more ducts, usually placed in the ground, in which cables or wires may be installed.

(j) The term *conduit* system means a collection of one or more conduits together with their supporting infrastructure.

(k) The term *duct* means a single enclosed raceway for conductors, cable and/or wire.

(l) With respect to poles, the term *unusable space* means the space on a utility pole below the usable space, including the amount required to set the depth of the pole.

(m) The term *attaching entity* includes cable system operators, telecommunications carriers, incumbent and other local exchange carriers, utilities, governmental entities and other entities with a physical attachment to the pole, duct, conduit or right of way. It does not include governmental entities with only seasonal attachments to the pole.

(n) The term *inner-duct* means a duct-like raceway smaller than a duct that is inserted into a duct so that the duct may carry multiple wires or cables.

[43 FR 36094, Aug. 15, 1978, as amended at 52 FR 31770, Aug. 24, 1987; 61 FR 43024, Aug. 20, 1996; 61 FR 45618, Aug. 29, 1996; 63 FR 12024, Mar. 12, 1998; 65 FR 31281, May 17, 2000; 66 FR 34580, June 29, 2001]

§1.1403 Duty to provide access; modifications; notice of removal, increase or modification; petition for temporary stay; and cable operator notice.

(a) A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it. Notwithstanding this obligation, a utility may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, 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.

(b) Requests for access to a utility's poles, ducts, conduits or rights-of-way by a telecommunications carrier or cable operator must be in writing. If access is not granted within 45 days of the request for access, the utility must confirm the denial in writing by the 45th day. The utility's denial of access shall be specific, shall include all relevant evidence and information supporting its denial, and shall explain how such evidence and information relate to a denial of access for reasons of lack of capacity, safety, reliability or engineering standards.

(c) A utility shall provide a cable television system operator or telecommunications carrier no less than 60 days written notice prior to:

(1) Removal of facilities or termination of any service to those facilities, such removal or termination arising out of a rate, term or condition of the cable television system operator's of telecommunications carrier's pole attachment agreement;

(2) Any increase in pole attachment rates; or

(3) Any modification of facilities other than routine maintenance or modification in response to emergencies.

(d) A cable television system operator or telecommunications carrier may file a "Petition for Temporary Stay" of the action contained in a notice received pursuant to paragraph (c) of this section within 15 days of receipt of such notice. Such submission shall not be considered unless it includes, in

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(b) The response shall be served on the complainant and all parties listed in complainant's certificate of service.

(c) The reply shall be served on the respondent and all parties listed in respondent's certificate of service.

(d) Failure to respond may be deemed an admission of the material factual allegations contained in the complaint.

[44 FR 31650, June 1, 1979]

§ 1.1408 Number of copies and form of pleadings.

(a) An original and three copies of the complaint, response, and reply shall be filed with the Commission.

(b) All papers filed in the complaint proceeding must be drawn in conformity with the requirements of §§ 1.49, 1.50 and 1.52.

§ 1.1409 Commission consideration of the complaint.

(a) In its consideration of the complaint, response, and reply, the Commission may take notice of any information contained in publicly available filings made by the parties and may accept, subject to rebuttal, studies that have been conducted. The Commission may also request that one or more of the parties make additional filings or provide additional information. Where one of the parties has failed to provide information required to be provided by these rules or requested by the Commission, or where costs, values or amounts are disputed, the Commission may estimate such costs, values or amounts it considers reasonable, or may decide adversely to a party who has failed to supply requested information which is readily available to it, or both.

(b) The complainant shall have the burden of establishing a *prima facie* case that the rate, term, or condition is not just and reasonable or that the denial of access violates 47 U.S.C. § 224(f). If, however, a utility argues that the proposed rate is lower than its incremental costs, the utility has the burden of establishing that such rate is below the statutory minimum just and reasonable rate. In a case involving a denial of access, the utility shall have the burden of proving that the denial was lawful, once a *prima facie* case is established by the complainant.

(c) The Commission shall determine whether the rate, term or condition complained of is just and reasonable. For the purposes of this paragraph, a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.

(d) The Commission shall deny the complaint if it determines that the complainant has not established a *prima facie* case, or that the rate, term or condition is just and reasonable, or that the denial of access was lawful.

(e) When parties fail to resolve a dispute regarding charges for pole attachments and the Commission's complaint procedures under Section 1.1404 are invoked, the Commission will apply the following formulas for determining a maximum just and reasonable rate:

(1) The following formula shall apply to attachments to poles by cable operators providing cable services. This formula shall also apply to attachments to poles by any telecommunications carrier (to the extent such carrier is not a party to a pole attachment agreement) or cable operator providing telecommunications services until February 8, 2001:

$$\text{Maximum Rate} = \text{Space Factor} \times \text{Net Cost of a Bare Pole} \times \text{Carrying Charge Rate}$$

$$\text{Where Space Factor} = \frac{\text{Space Occupied by Attachment}}{\text{Total Usable Space}}$$

(2) Subject to paragraph (f) of this section the following formula shall apply to attachments to poles by any telecommunications carrier (to the extent such carrier is not a party to a pole attachment agreement) or cable operator providing telecommunications services beginning February 8, 2001:

$$\text{Maximum Rate} = \text{Space Factor} \times \text{Net Cost of a Bare Pole} \times \left[\begin{array}{c}\text{Carrying}\\ \text{Charge}\\ \text{Rate}\end{array}\right]$$

$$\text{Where Space Factor} = \left[\frac{\left(\begin{array}{c}\text{Space}\\ \text{Occupied}\end{array}\right) + \left(\frac{2}{3} \times \frac{\text{Unusable Space}}{\text{No. of Attaching Entities}}\right)}{\text{Pole Height}}\right]$$

(3) The following formula shall apply to attachments to conduit by cable operators and telecommunications carriers:

$$\underset{\text{Linear ft./m.}}{\text{Maximum Rate per}} = \underbrace{\left[\frac{1}{\text{Number of Ducts}} \times \frac{1\text{ Duct}}{\text{No. of Inner Ducts}}\right]}_{\text{(Percentage of Conduit Capacity)}} \times \underbrace{\left[\begin{array}{c}\text{No. of}\\ \text{Ducts}\end{array} \times \frac{\text{Net Conduit Investment}}{\text{System Duct Length (ft./m.)}}\right]}_{\text{(Net Linear Cost of a Conduit)}} \times \begin{array}{c}\text{Carrying}\\ \text{Charge}\\ \text{Rate}\end{array}$$

simplified as:

$$\underset{\text{Per Linear ft./m.}}{\text{Maximum Rate}} = \frac{1\text{ Duct}}{\text{No. of Inner Ducts}} \times \frac{\text{Net Conduit Investment}}{\text{System Duct Length (ft./m.)}} \times \begin{array}{c}\text{Carrying}\\ \text{Charge}\\ \text{Rate}\end{array}$$

If no inner-duct is installed the fraction, "1 Duct divided by the No. of Inner-Ducts" is presumed to be ½.

(f) Paragraph (e)(2) of this section shall become effective February 8, 2001 (i.e., five years after the effective date of the Telecommunications Act of 1996). Any increase in the rates for pole attachments that results from the adoption of such regulations shall be phased in over a period of five years beginning on the effective date of such regulations in equal annual increments. The five-year phase-in is to apply to rate increases only. Rate reductions are to be implemented immediately. The determination of any rate

increase shall be based on data currently available at the time of the calculation of the rate increase.

[43 FR 36094, Aug. 15, 1978, as amended at 52 FR 31770, Aug. 24, 1987; 61 FR 43025; Aug. 20, 1996; 61 FR 45619, Aug. 29, 1996; 63 FR 12025, Mar. 12, 1998; 65 FR 31282, May 17, 2000; 66 FR 34580, June 29, 2001]

§ 1.1410 Remedies.

If the Commission determines that the rate, term, or condition complained of is not just and reasonable, it may prescribe a just and reasonable rate, term, or condition and may:

(a) Terminate the unjust and unreasonable rate, term, or condition;

(b) Substitute in the pole attachment agreement the just and reasonable rate, term, or condition established by the Commission; and

(c) Order a refund, or payment, if appropriate. The refund or payment will normally be the difference between the amount paid under the unjust and/or unreasonable rate, term, or condition and the amount that would have been paid under the rate, term, or condition established by the Commission from the date that the complaint, as acceptable, was filed, plus interest.

[44 FR 31650, June 1, 1979]

§ 1.1411 Meetings and hearings.

The Commission may decide each complaint upon the filings and information before it, may require one or more informal meetings with the parties to clarify the issues or to consider settlement of the dispute, or may, in its discretion, order evidentiary procedures upon any issues it finds to have been raised by the filings.

§ 1.1412 Enforcement.

If the respondent fails to obey any order imposed under this subpart, the Commission on its own motion or by motion of the complainant may order the respondent to show cause why it should not cease and desist from violating the Commission's order.

§ 1.1413 Forfeiture.

(a) If any person willfully fails to obey any order imposed under this subpart, or any Commission rule, or

(b) If any person shall in any written response to Commission correspondence or inquiry or in any application, pleading, report, or any other written statement submitted to the Commission pursuant to this subpart make any misrepresentation bearing on any matter within the jurisdiction of the Commission, the Commission may, in addition to any other remedies, including criminal penalties under section 1001 of Title 18 of the United States Code, impose a forfeiture pursuant to section 503(b) of the Communications Act, 47 U.S.C. 503(b).

§ 1.1414 State certification.

(a) If the Commission does not receive certification from a state that:

(1) It regulates rates, terms and conditions for pole attachments;

(2) In so regulating such rates, terms and conditions, the state has the authority to consider and does consider the interests of the subscribers of cable television services as well as the interests of the consumers of the utility services; and,

(3) It has issued and made effective rules and regulations implementing the state's regulatory authority over pole attachments (including a specific methodology for such regulation which has been made publicly available in the state), it will be rebuttably presumed that the state is not regulating pole attachments.

(b) Upon receipt of such certification, the Commission shall give public notice. In addition, the Commission shall compile and publish from time to time, a listing of states which have provided certification.

(c) Upon receipt of such certification, the Commission shall forward any pending case thereby affected to the state regulatory authority, shall so notify the parties involved and shall give public notice thereof.

(d) Certification shall be by order of the state regulatory body or by a person having lawful delegated authority under provisions of state law to submit such certification. Said person shall provide in writing a statement that he or she has such authority and shall cite the law, regulation or other instrument conferring such authority.

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APPENDIX A

Final Rules

Part 1, Subpart J of Title 47 of the Code of Federal Regulations is amended as follows:

1. The table of contents of Part 1 is revised to read as follows:

* * *

Subpart J—Pole Attachment Complaint Procedures

* * *

2. Section 1.1401 is revised to read as follows:

§ 1.1401 Purpose.

The rules and regulations contained in subpart J of this part provide complaint and enforcement procedures to ensure that telecommunications carriers and cable system operators have nondiscriminatory

access to utility poles, ducts, conduits, and rights-of-way on rates, terms, and conditions that are just and reasonable. They also provide complaint and enforcement procedures for incumbent local exchange carriers (as defined in 47 U.S.C. 251(h)) to ensure that the rates, terms, and conditions of their access to pole attachments are just and reasonable.

3. Section 1.1402 is revised to read as follows:

§ 1.1402 Definitions.

* * *

(d) The term *complaint* means a filing by a cable television system operator, a cable television system association, a utility, an association of utilities, a telecommunications carrier, or an association of telecommunications carriers alleging that it has been denied access to a utility pole, duct, conduit, or right-of-way in violation of this subpart and/or that a rate, term, or condition for a pole attachment is not just and reasonable. It also means a filing 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 a rate, term, or condition for a pole attachment is not just and reasonable.

(e) The term *complainant* means a cable television system operator, a cable television system association, a utility, an association of utilities, a telecommunications carrier, an association of telecommunications carriers, an incumbent local exchange carrier (as defined in 47 U.S.C. 251(h)) or an association of incumbent local exchange carriers who files a complaint.

4. Section 1.1404 is revised to read as follows:

§ 1.1404 Complaint.

(k) The complaint shall include a certification that the complainant has, in good faith, engaged or attempted to engage in executive-level discussions with the respondent to resolve the pole attachment dispute. Executive-level discussions are discussions among representatives of the parties who have sufficient authority to make binding decisions on behalf of the company they represent regarding the subject matter of the discussions. Such certification shall include a statement that, prior to the filing of the complaint, the complainant mailed a certified letter to the respondent outlining the allegations that form the basis of the complaint it anticipated filing with the Commission, inviting a response within a reasonable period of time, and offering to hold executive-level discussions regarding the dispute. A refusal by a respondent to engage in the discussions contemplated by this rule shall constitute an unreasonable practice under section 224 of the Act.

* * *

(m) In a case where a cable television system operator or telecommunications carrier as defined in 47 C.F.R. 224(a)(5) claims that it has been denied access to a pole, duct, conduit or right-of-way despite a request made pursuant to section 47 U.S.C. 224(f), the complaint shall include the data and information necessary to support the claim, including:

(1) The reasons given for the denial of access to the utility's poles, ducts, conduits, or rights-of-way;
(2) The basis for the complainant's claim that the denial of access is unlawful;
(3) The remedy sought by the complainant;
(4) A copy of the written request to the utility for access to its poles, ducts, conduits, or rights-of-way; and

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(5) A copy of the utility's response to the written request including all information given by the utility to support its denial of access. A complaint alleging unlawful denial of access will not be dismissed if the complainant is unable to obtain a utility's written response, or if the utility denies the complainant any other information needed to establish a prima facie case.

* * *

(ix) The annual carrying charges attributable to the cost of owning a pole. The utility shall submit these charges separately for each of the following categories: depreciation, rate of return, taxes, maintenance, and administrative. These charges may be expressed as a percentage of the net pole investment. With its pleading, the utility shall file a copy of the latest decision of the state regulatory body or state court that determines the treatment of accumulated deferred taxes if it is at issue in the proceeding and shall note the section that specifically determines the treatment and amount of accumulated deferred taxes.

* * *

5. Section 1.1409(e) is revised to read as follows:

§ 1.1409 Commission consideration of the complaint.

* * * *

(e) * * *

(2) With respect to attachments to poles by any telecommunications carrier or cable operator providing telecommunications services, the maximum just and reasonable rate shall be the higher of the rate yielded by section 1.1409(e)(2)(i) or 1.1409(e)(2)(ii) of this Part.

(i) The following formula applies to the extent that it yields a rate higher than that yielded by the applicable formula in section 1.1409(e)(2)(ii):

Rate = Space Factor x Cost

Where Cost

in Urbanized Service Areas = 0.66 x (Net Cost of a Bare Pole x Carrying Charge Rate)

in Non-Urbanized Service Areas = 0.44 x (Net Cost of a Bare Pole x Carrying Charge Rate)

$$\text{Where Space Factor} = \left[\frac{\left(\frac{\text{Space}}{\text{Occupied}} \right) + \left(\frac{2}{3} \times \frac{\text{Unusable Space}}{\text{No. of Attaching Entities}} \right)}{\text{Pole Height}} \right]$$

(ii) The following formula applies to the extent that it yields a rate higher than that yielded by the applicable formula in section 1.1409(e)(2)(i):

$$\text{Rate} = \text{Space Factor} \times \text{Net Cost of a Bare Pole} \times \left[\begin{array}{c}\text{Maintenance and Administrative}\\ \text{Carrying Charge Rate}\end{array}\right]$$

$$\text{Where Space Factor} = \left[\frac{\left(\begin{array}{c}\text{Space}\\ \text{Occupied}\end{array}\right) + \left(\frac{2}{3} \times \frac{\text{Unusable Space}}{\text{No. of Attaching Entities}}\right)}{\text{Pole Height}}\right]$$

6. Section 1.1410 is revised to read as follows:

§ 1.1410 Remedies.

(a) If the Commission determines that the rate, term, or condition complained of is not just and reasonable, it may prescribe a just and reasonable rate, term, or condition and may:

(1) Terminate the unjust and/or unreasonable rate, term, or condition;
(2) Substitute in the pole attachment agreement the just and reasonable rate, term, or condition established by the Commission;
(3) Order a refund, or payment, if appropriate. The refund or payment will normally be the difference between the amount paid under the unjust and/or unreasonable rate, term, or condition and the amount that would have been paid under the rate, term, or condition established by the Commission, plus interest, consistent with the applicable statute of limitations; and

(b) If the Commission determines that access to a pole, duct, conduit, or right-of-way has been unlawfully denied or delayed, it may order that access be permitted within a specified time frame and in accordance with specified rates, terms, and conditions.

7. Section 1.1420 is added as follows:

§ 1.1420 Timeline for access to utility poles.

(a) 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.

(b) All time limits in this subsection are to be calculated according to section 1.4 of this title.

(c) *Survey*. A utility shall respond as described in section 1.1043(b) to a cable operator or telecommunications carrier 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 subsection (g)). This response may be a notification that the utility has completed a survey of poles for which access has been requested. A complete application is an application that provides the utility with the information necessary under its procedures to begin to survey the poles.

(d) *Estimate*. Where a request for access is not denied, a utility shall present to a cable operator or telecommunications carrier an estimate of charges to perform all necessary make-ready work within 14 days of providing the response required by section 1.1420(c), or in the case where a prospective attacher's contractor has performed a survey, within 14 days of receipt by the utility of such survey.

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(h) A utility may deviate from the time limits specified in this section:

(1) Before offering an estimate of charges if the parties have no agreement specifying the rates, terms, and conditions of attachment.

(2) During performance of make-ready for good and sufficient cause that renders it infeasible for the utility to complete the make-ready work within the prescribed time frame. A utility that so deviates shall immediately notify, in writing, the cable operator or telecommunications carrier requesting attachment and other affected entities with existing attachments, and shall include the reason for and date and duration of the deviation. The utility shall deviate from the time limits specified in this section for a period no longer than necessary and shall resume make-ready performance without discrimination when it returns to routine operations.

(i) If a utility fails to respond as specified in subsection (c), a cable operator or telecommunications carrier requesting attachment in the communications space may, as specified in section 1.1422, hire a contractor to complete a survey. If make-ready is not complete by the date specified in subsection (e)(1)(ii), a cable operator or telecommunications carrier requesting attachment in the communications space may hire a contractor to complete the make-ready:

(1) Immediately, if the utility has failed to assert its right to perform remaining make-ready work by notifying the requesting attacher that it will do so; or

(2) After 15 days if the utility has asserted its right to perform make-ready by the date specified in subsection (e)(1)(ii) and has failed to complete make-ready.

8. Section 1.1422 is added as follows:

§ 1.1422 Contractors for survey and make-ready.

(a) A utility shall make available and keep up-to-date a reasonably sufficient list of contractors it authorizes to perform surveys and make-ready in the communications space on its utility poles in cases where the utility has failed to meet deadlines specified in section 1.1420.

(b) If a cable operator or telecommunications carrier hires a contractor for purposes specified in section 1.1420, it shall choose from among a utility's list of authorized contractors.

(c) A cable operator or telecommunications carrier that hires a contractor for survey or make-ready work shall provide a utility with a reasonable opportunity for a utility representative to accompany and consult with the authorized contractor and the cable operator or telecommunications carrier.

(d) The consulting representative of an electric utility may make final determinations, on a nondiscriminatory basis, where there is insufficient capacity and for reasons of safety, reliability, and generally applicable engineering purposes.

9. Section 1.1424 is added as follows:

§ 1.1424 Complaints by incumbent local exchange carriers.

Complaints 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 a 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, as relevant. In complaint proceedings where an incumbent local exchange carrier (or an association of incumbent local exchange carriers) claims that it 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 for purposes of obtaining comparable rates, terms or conditions, the incumbent local exchange carrier shall bear the burden of demonstrating that it is similarly situated by reference to any relevant evidence, including pole attachment agreements. If a respondent declines or refuses to provide a complainant with access to

agreements or other information upon reasonable request, the complainant may seek to obtain such access through discovery. Confidential information contained in any documents produced may be subject to the terms of an appropriate protective order.