

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
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 ON RECONSIDERATION

Adopted: November 17, 2015

Released: November 24, 2015

By the Commission: Commissioner Pai concurring and issuing a statement.

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I. INTRODUCTION

1. In this Order on Reconsideration (Order), we build on the Commission’s prior efforts to harmonize pole attachment rates that cable and telecom service providers pay utility pole owners. The Communications Act of 1934, as amended (Act), contains two formulas for calculating pole attachment rates, a formula adopted in 1978 applicable to cable television systems solely providing cable service, and a formula adopted in 1996 applicable to telecommunications carriers providing telecommunications service.¹ Following the implementation of the 1996 Act² through 2011, rates calculated using the telecom

¹ 47 U.S.C § 224(d) (describing the “cable rate formula”), 47 U.S.C § 224(e) (describing the “telecom rate formula”).

² Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (1996 Act) (codified as amended in scattered sections of 47 U.S.C.).

rate formula have typically been higher than rates calculated using the cable formula in similar circumstances. In 2011, the Commission revised the formulas as described in greater detail below to improve efficiency, reduce potentially excessive costs of network deployment and accelerate broadband buildout, and eliminate the wide disparity between the telecom and cable rate formulas. The 2011 revisions sought to bring the telecom and cable rates into parity. In the intervening time, we have seen that our revisions did not fully achieve that objective. Today, we take the next logical step in achieving the goals set forth in 2011.

2. As detailed below, we take these actions in response to a Petition for Reconsideration or Clarification in this proceeding.³ The rule revisions we adopt amend our rules by defining “cost,” for the purpose of calculating the rates that telecommunications carriers pay for pole attachments, as a percentage of fully allocated costs that will depend on whether the average number of attaching entities in a service area is 2, 3, 4, or 5.⁴ The rates that attachers pay to attach to poles are currently determined, among other things, by whether the attacher is a “cable television system solely . . . provid[ing] cable service” or a “telecommunications carrier providing telecommunications services”⁵ The Commission, in its 2011 *Report and Order and Order on Reconsideration* in this proceeding (*2011 Pole Attachment Order*), sought to bring parity to pole attachment rates calculated using the telecom or cable rate formula so that all attachments rates would be at or near the cable rate formula level.⁶ The *2011 Pole Attachment Order* adopted cost allocators in the telecom rate formula that closely approximate the treatment of cost in the cable rate formula. However, these allocators applied only in situations where poles have 5 attaching entities (0.66 percent of cost) or 3 attaching entities (0.44 percent of cost).⁷ On June 8, 2011, the National Cable and Telecommunications Association (NCTA), COMPTTEL, and tw telecom inc. (Petitioners) filed a petition for reconsideration or clarification of the rules adopted in the *2011 Pole Attachment Order*, asking the Commission either to clarify that 66 percent and 44 percent are “illustrations” of the new rule, or to revise the rules to “provide corresponding cost adjustments to other entity counts.”⁸

3. In response to NCTA’s petition, and to the record developed in this proceeding, we now introduce new cost allocators for poles with 2 attaching entities (0.31 percent of costs) and 4 attaching entities (0.56 percent of cost). When the average number of attaching entities is a fraction, the percentage cost allocator will be located between the whole numbers at the point where it most closely approximates the cost used in the cable rate formula. This flexible series of cost allocators should more fully realize the intent of the Commission in its *2011 Pole Attachment Order* to bring parity to pole attachment rates at the cable rate formula level.⁹ We also adopt this definition of cost to prevent pole owners from charging cable operators that also provide telecommunications service (including broadband Internet access

³ Petition for Reconsideration or Clarification of the National Cable and Telecommunications Association, COMPTTEL, and tw telecom inc., WC Docket No. 07-245, GN Docket No. 09-51 (filed June 8, 2011) <http://apps.fcc.gov/ecfs/document/view?id=7021686399> (NCTA Petition).

⁴ See *infra* Appendix A.

⁵ See *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5246, para. 10 (2011) (*2011 Pole Attachment Order*), *aff’d sub. nom. Am. Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183 (D.C. Cir. 2013) (*AEP*), citing 47 U.S.C § 224(d),(e).

⁶ *2011 Pole Attachment Order*, 26 FCC Rcd at 5316-21, paras. 172-81 (discussing harms associated with disparity between cable and telecom rate formulas).

⁷ *Id.* at 5304-05, paras. 149-50.

⁸ NCTA Petition at 5-6.

⁹ See *id.* at Attach. A (illustrating that, at eight electric utilities, the proposed cost methodology produces telecom rates that approximate the cable rate equally well whether the average number of attachers is 5, 3, or 2.6).

service)¹⁰ pole attachment rental rates that can be approximately 70 percent higher than the cable rate under our existing rules.¹¹

4. We additionally act to support incentives for deployment of broadband facilities, particularly in rural areas, and to harmonize regulatory treatment between states where the Commission regulates the rates, terms, and conditions for pole attachments and states where such matters are regulated by the state.¹² Subjecting cable operators to higher pole attachment rates merely because they also provide telecommunications services, such as broadband Internet access, could deter investment in states subject to Commission pole regulation, which would undermine the Commission's broadband deployment policy. By keeping pole attachment rates unified and low, we further our overarching goal to accelerate deployment of broadband by removing barriers to infrastructure investment and promoting competition.¹³

II. BACKGROUND

5. On April 7, 2011, in its *2011 Pole Attachment Order*, the Commission comprehensively revised its rules governing the attachment of cable and telecommunications facilities to utility poles. The *2011 Pole Attachment Order* contains a comprehensive background section outlining pole attachment policy developments through 2011.¹⁴ We do not repeat that material herein. Instead, we incorporate that history by reference here, and preserve a brief background section outlining and describing the provisions, orders, and cases germane to this Order on Reconsideration.

6. In 1978, Congress added section 224 to the Act.¹⁵ As established in 1978, section 224 directed the Commission to ensure that the rates, terms, and conditions of attaching cable television systems' facilities to utility-owned poles were just and reasonable.¹⁶ Section 224 also identified the maximum rate for pole attachments as a percentage of fully-allocated costs.¹⁷ In 1987, the U.S. Supreme Court found that the cable rate formula adopted by the Commission provides pole owners with adequate compensation, and thus does not result in an unconstitutional taking.¹⁸

7. The 1996 Act expanded the definition of pole attachments to include attachments by providers of telecommunications service,¹⁹ and granted both cable operators and telecommunications

¹⁰ See *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, 5734, para. 308 (2015) (*Open Internet Order*).

¹¹ See NCTA Petition at 5-6 (stating that rebutting the presumptions with 2.6 attachers leads to rates that are 70% higher than the cable rate).

¹² 47 U.S.C. § 224(c)(1).

¹³ See 47 U.S.C. § 1302(b).

¹⁴ See *2011 Pole Attachment Order*, 26 FCC Rcd at 5245-51, paras. 9-18 (general background concerning pole attachments); see *id.* at 5295-96, paras. 127-30) (background specific to pole attachment rates).

¹⁵ Pole Attachment Act of 1978, Pub. L. No. 95-234, 92 Stat. 33 (1978). Section 224 provides that the Commission will regulate pole attachments except where "such matters are regulated by a state." 47 U.S.C. § 224(c)(1).

¹⁶ 47 U.S.C. § 224(b)(1).

¹⁷ 47 U.S.C. § 224(d)(1); see S. Rep. No. 580, 95th Congress, 1st Sess. at 19-21 (1977) (1977 Senate Report), reprinted in 1978 U.S.C.C.A.N. at 127-28; see also *2011 Pole Attachment Order*, 26 FCC Rcd at 5295-96, paras. 127-28; (defining "fully allocated" costs to include operating expenses and capital costs that a utility incurs in owning and maintaining poles).

¹⁸ *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987).

¹⁹ 47 U.S.C. § 224(a)(4).

carriers²⁰ an affirmative right of access to utility poles.²¹ The 1996 Act also included a separate provision for calculating a cost-based rate paid by telecommunications carriers—the telecom rate formula—which incorporates “the cost of providing space on a pole.”²² As implemented by the Commission, the telecom rate formula generally resulted in significantly higher pole rental rates than rates derived from the cable rate formula.²³ The Commission concluded that cable systems that provided Internet access in addition to video services should continue to pay the cable rate; that conclusion was reversed on appeal but later upheld by the Supreme Court.²⁴

8. In the intervening years, the Commission considered a variety of possible reforms to its pole attachment regulations in light of their importance to the deployment of communications networks. The Commission issued a Notice of Proposed Rulemaking in 2007, to respond to petitions for rulemaking regarding pole access and incumbent LEC pole attachment issues, and to seek comment on pole rate issues.²⁵ In 2010, in response to a directive in the American Recovery and Reinvestment Act of 2009,²⁶ the Commission released the National Broadband Plan (NBP), identifying access to rights-of-way—including access to poles—as having a significant impact on the deployment of broadband networks.²⁷ Accordingly, the NBP included several recommendations regarding pole attachment access, enforcement, and pricing policies to further advance broadband deployment.²⁸ Following on the recommendations in the NBP, in its 2010 *Further Notice* the Commission sought comment on a variety of measures to speed access to poles and make pole rental rates as low and close to uniform as possible consistent with section 224 of the Act.

9. In the *2011 Pole Attachment Order*, the Commission sought, in pertinent part, to significantly reform its telecom rate regulations by reinterpreting the ambiguous term “cost” in the

²⁰ For purposes of section 224, Congress excluded incumbent local exchange carriers (LECs) from the definition of “telecommunications carriers.” 47 U.S.C. § 224(a)(5).

²¹ 47 U.S.C. § 224(f)(1). As a general matter, all references to poles in this Order refer to attachments to utility poles and do not include other components of the statutory definition of “pole attachments,” including ducts, conduits and rights-of-way, unless otherwise indicated. 47 U.S.C. § 224(a)(4).

²² 47 U.S.C. 224(e)(2)-(3); see *2011 Pole Attachment Order*, 26 FCC Rcd at 5296-98, paras. 130-131, 135 (describing zone of reasonableness as not more than fully allocated costs, and not less than marginal or incremental costs caused by the attachment).

²³ The Commission has stated that, under the cable formula, each attacher, other than the pole owner, pays about 7.4% of the annual cost of a pole. Under the telecom rate formula, each attacher, other than the pole owner, pays between about 11.2% of the annual cost of a pole in urban areas to about 16.9% in non-urban areas. See *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Order and Further Notice of Proposed Rulemaking, 25 FCC Rcd 11864, 11913-14, para. 11 (2010) (*Order and/or Further Notice*) (sample telecom rates based on Commission’s rebuttable presumptions of 37.5 feet for height of a pole, 24 feet for unusable space on a pole, 13.5 feet for usable space, 1 foot occupied by an attachment, 3 attachers in non-urban areas, and 5 attachers in urban areas). See 47 C.F.R. §§ 1.1417–1.1418.

²⁴ *Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission’s Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, Report and Order, 13 FCC Rcd 6777 (1998) (*1998 Implementation Order*), *aff’d in part rev’d in part sub nom. Gulf Power v. FCC*, 208 F.3d 1263 (11th Cir. 2000), *rev’d sub nom. Nat’l Cable & Telecommunications Ass’n v. Gulf Power*, 534 U.S. 327 (2002) (*Gulf Power*).

²⁵ *Implementation of Section 224 of the Act; Amendment of the Commission’s Rules and Policies Governing Pole Attachments*, WC Docket No. 07-245, RM-11293, RM-11303, Notice of Proposed Rulemaking, 22 FCC Rcd 20195 (2007).

²⁶ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, § 6001(k)(2) (2009).

²⁷ Omnibus Broadband Initiative, Federal Communications Commission, Connecting America: The National Broadband Plan at 109 (2010), <http://download.broadband.gov/plan/national-broadband-plan.pdf>.

²⁸ *Id.* at 109–13.

telecom rate formula in section 224(e) of the Act to yield telecom attachment rates “lowered to more effectively achieve Congress’ goals under the 1996 Act to promote competition and ‘advanced telecommunications capability’ by both wired and wireless providers by ‘remov[ing] barriers to infrastructure investment.’”²⁹ In particular, the Commission sought to “balance the goals of promoting broadband [deployment] . . . with the historical role that pole rental rates have played in supporting the investment in pole infrastructure.”³⁰

10. In order to promote broadband while ensuring that attaching entities continue to support the poles on which they depend, the *2011 Pole Attachment Order* adopted alternative methods for measuring cost, and provided that the method producing the higher rate is the one the parties use.³¹ Utilities thus receive the benefit of any difference between the methods. In this way, the Commission recognizes that telecommunications attachers have historically contributed to the capital costs of the pole network, and that the new telecom rate should not “unduly burden [utility] ratepayers.”³² Balancing The Commission decided under the first of two acceptable methodologies to “allow the pole owner to charge a monthly pole rental rate that reflects some contribution to capital costs”³³ while also reducing the telecom rate.³⁴ The Commission settled on an approach that defines costs “in terms of a percentage of the fully-allocated costs” of the pole – specifically, 66 percent of fully-allocated costs in urban areas and 44 percent in non-urban areas.³⁵ This measure of cost produces a rate that the Commission expected, based on the premise that the Commission’s presumptive number of attachers would not be rebutted, “[would], in general, approximate the cable rate” and thereby promote network investment and broadband deployment.³⁶

11. The Commission also established a second, alternative measure of cost that utilities may use. This alternative approach is based on the principle of “cost causation,” under which the “customer – the cost causer – pays a rate that covers” the costs for which it is “causally responsible.”³⁷ Under this approach, a pole owner may recover its administrative and maintenance costs through the telecom rate,

²⁹ *2011 Pole Attachment Order*, 26 FCC Rcd at 5298-99, para. 136.

³⁰ *Id.* See also, e.g., *id.* at 5241, para. 1 (explaining that the *2011 Pole Attachment Order* was “designed to promote competition and increase the availability of robust, affordable telecommunications and advanced services to consumers throughout the nation”); *id.* at 5295, para. 126 (describing how the reform was intended to “enable consumers to benefit through increased competition, affordability, and availability of advanced communications services, including broadband”); *id.* at 5303-04, para. 147 (citing commenters’ explanation “that reducing the telecom rate would improve the business case for providing advanced services, because it will reduce the expected incremental cash outflows of providing such services, thereby increasing the likelihood that the present value of the expected incremental cash inflows will exceed the present value of the expected incremental cash outflows”); *id.* at 5316-21, paras. 172-81 (discussing how revising the telecom rate will advance the goals of the Act).

³¹ See 47 C.F.R. § 1.1409(b)(2)(i)-(ii). The revision in this Order is to 47 C.F.R. § 1.1409(b)(2)(i), which is the “percentage of fully allocated costs” approach. 47 C.F.R. § 1.1409(e)(2)(ii)—the “cost causation” approach—is not affected.

³² *2011 Pole Attachment Order*, 26 FCC Rcd at 5304-05, para. 149.

³³ This amount is in addition to those costs recovered through make-ready fees.

³⁴ *Id.*

³⁵ *Id.* (quoting 1977 Senate Report at 21).

³⁶ *Id.* at 5304-05, para. 149, 5305, para. 150 n.453 (citing *Order and Further Notice*, 25 FCC Rcd at 11913-14, para. 119 (explaining that the calculations were based on the Commission’s presumptions)). See also, e.g., *Order and Further Notice*, 25 FCC Rcd at 11930, Appx. A (setting forth illustrative examples calculated based on the Commission’s presumptions).

³⁷ *2011 Pole Attachment Order*, 26 FCC Rcd at 5301, para. 143.

but not capital costs other than those associated with make-ready expenses.³⁸ The Commission also noted that capital costs caused by a telecommunications attachers have long been recovered through make-ready charges,³⁹ which “the utility itself sets” without regard to “any mandatory rate formula set by the Commission.”⁴⁰ Other capital costs (*i.e.*, rate of return, taxes, and depreciation) are properly excluded under a cost-causation approach because the pole owner would have incurred those costs “regardless of the demand for attachments.”⁴¹ Although the “percentage of fully-allocated costs” measure of cost discussed above will produce a higher telecom rate “in most cases,” if the cost causation-based approach yields a higher rate, utilities are allowed to charge up to that rate.⁴²

12. On February 26, 2013, the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) rejected utilities’ challenge to the Commission’s action to bring the traditionally higher telecom rate more in line with the cable rate, concluding that “[b]ecause the Commission’s methodology is consistent with the unspecified cost terms contained in § 224(e), and the Commission’s justifications are reasonable, the revision [to the telecom rate formula] warrants judicial deference.”⁴³ In particular, the court observed that section 224(e) is “less specific” than section 224(d) in prescribing how the statutory rate formula should be implemented.⁴⁴ The court agreed with the Commission that “the term ‘cost’ in § 224(e)(2) and (3) is necessarily ambiguous, and could thus ‘yield a range of rates from the existing fully-allocated cost approach at the high end to a rate closer to incremental cost at the low end.’”⁴⁵ The D.C. Circuit thus affirmed the Commission’s interpretation and implementation of section 224(e).

13. On June 8, 2011, Petitioners filed the NCTA Petition, seeking reconsideration or clarification of the newly adopted cost allocation rule.⁴⁶ The NCTA Petition points out that, when paired with the Commission’s presumptive numbers of attachers (5 in urbanized and 3 in non-urbanized areas), the 66 percent and 44 percent cost allocators almost exactly reproduce the 7.4 percent of costs used as an input in the cable rate formula.⁴⁷ The Petitioners report, however, that pole owners in fact often rebut the Commission’s presumptions with much lower average numbers. For example, if the owner rebuts the

³⁸ Administrative and maintenance expenses were included because “it is likely that an attacher is causally responsible” for at least some of those costs. *Id.* at 5302-03, para. 145. Make-ready costs are recovered directly from the attacher.

³⁹ *Id.* at 5301, para. 143.

⁴⁰ *Id.* at 5322, para. 185.

⁴¹ *Id.* at 5301-02, paras. 143-44.

⁴² *Id.* at 5304-05, para. 149, 5305-06, para. 152, 5310-11, para. 161.

⁴³ *AEP*, 708 F.3d at 190.

⁴⁴ *Id.* at 188.

⁴⁵ *Id.* at 189 (quoting *2011 Pole Attachment Order*, 26 FCC Rcd at 5243-45, para. 8). See also *id.* at 189-90 (discussing *Verizon Commc’ns, Inc. v. FCC*, 535 U.S. 467, 500 (2002); *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 703-04 (D.C. Cir. 2000) (per curiam), *aff’d* 535 U.S. 1 (2002); *Associated Gas Distribs. v. FERC*, 824 F.2d 981, 1009-12 (D.C. Cir. 1987)).

⁴⁶ See 47 C.F.R. § 1.1409(i) (defining cost in Urbanized Service Areas as .66 x (Net Cost of a Bare Pole x Carrying Charge Rate) and in Non-Urbanized Service Areas as .44 x (Net Cost of a Bare Pole x Carrying Charge Rate).

⁴⁷ NCTA Petition at 5 (citing *2011 Pole Attachment Order*, 26 FCC Rcd at 5304-05, para. 149 and n.453):

Under the telecom rate formula, each attacher, other than the pole owner, pays approximately 11.2% of the relevant “cost” of a pole in urbanized service areas and about 16.9% in non-urban areas. Under the definition of “cost” as 66% of fully allocated costs in urban areas, the new telecom rate recovers approximately 7.4% of the fully allocated costs of the pole. By defining “cost” as 44% of fully allocated costs in non-urban areas, the new telecom rate likewise recovers approximately 7.4% of the fully allocated costs of the pole in those areas. (internal citations omitted).

urban presumption (5 attaching entities) with an actual count average of 2.6 attaching entities, the telecom rate can be as much as 70 percent higher than the cable rate.⁴⁸ To “achieve the Commission’s goal of providing pole attachment rates that are close to uniform as possible, and to ensure that all attachers contribute similar costs to pole owners,” the Petitioners ask the Commission to address this gap between the intended effect of the cost allocators and their function as applied by ceasing to distinguish between urbanized and non-urbanized areas.⁴⁹

14. Specifically, the Petitioners ask the Commission either to clarify that 66 percent and 44 percent are mere illustrations of the new rule, or to revise the rule to “provide corresponding cost adjustments to other entity counts.”⁵⁰ The NCTA Petition presents a model rule with additional cost allocators for 4 and 2 attachments, each of which aligns costs with the Commission’s cable rate formula as effectively as the current rule does for the Commission’s presumptive averages of 5 urbanized and 3 non-urbanized attachments.⁵¹ In service areas where the number of attaching entities is not a whole number, petitioners’ proposed cost allocator would be interpolated from the allocators of the nearest whole numbers of attaching entities.⁵² On June 20, 2011, the Commission sought comment on the NCTA Petition.⁵³

15. On February 26, 2015, the Commission adopted the *Open Internet Order*, which, among other things, concluded that “retail broadband Internet access service is best understood today as an offering of a ‘telecommunications service.’”⁵⁴ The *Open Internet Order* made clear that it did “not itself require any party to increase the pole attachment rates it charges to attachers providing broadband Internet access service.”⁵⁵ A possible interpretation of the *Order*, however, could be that cable systems that also provide broadband Internet access service and previously were subject to the cable rate formula are now subject to the telecom rate formula. In the *Open Internet Order*, the Commission noted that Petitioners had already expressed concern that revisions to the telecom formula only fulfilled the Commission’s expressed intent in the limited circumstances when there are either 5 or 3 attaching entities on a pole.⁵⁶ The Commission stated in the *Open Internet Order* that, “[t]o the extent that there is a potential for an increase in pole attachment rates for cable operators that also provide broadband Internet access service, we are highly concerned about its effect on the positive investment incentives that arise from new providers’ access to pole infrastructure.”⁵⁷ In short, the Commission made plain that it took seriously parties’ concerns that reclassification could have unintended consequences for pole attachment rates, and

⁴⁸ *Id.* at 5-6.

⁴⁹ *Id.* at 6.

⁵⁰ *Id.* at 6.

⁵¹ *Id.* at Attach B (proposing cost allocators of 0.661 for 5 attachers; 0.556 for 4 attachers; 0.439 for 3 attachers; and 0.309 for 2 attachers).

⁵² *Id.* (“[I]n Service Areas where the number of Attaching Entities is not a whole number = $N \times (\text{Net Cost of a Bare Pole} \times \text{Carrying Charge Rate})$, where N is interpolated from the cost allocator associated with the nearest whole numbers of Attaching Entities.”).

⁵³ *Petitions for Reconsideration of Action in Rulemaking Proceeding*, WC Docket No. 07-245, GN Docket No. 09-51, Public Notice, Report No. 2931 (Cons. & Gov’t Affairs Bur. 2011); *A National Broadband Plan for Our Future*; Petition for Reconsideration, 76 Fed. Reg. 44495 (July 26, 2011).

⁵⁴ *Open Internet Order*, 30 FCC Rcd at 5734, para. 308.

⁵⁵ *Id.* at 5832-33, para. 482.

⁵⁶ *Id.* at 5833, para. 483.

⁵⁷ *Id.* at para. 484.

that this Petition might present an effective vehicle for giving the issue a closer look.⁵⁸ In light of this development, parties were asked to refresh the record with regard to the NCTA Petition.⁵⁹

III. DISCUSSION

16. We adopt the Petitioners' proposal to broaden the use of cost allocators in the telecom rate formula. Specifically, we add cost allocators for poles with 2 and 4 attaching entities to augment the current cost allocators that target poles with 3 and 5 attaching entities. We also provide that, for fractional attaching-entity averages, cost allocators are to be interpolated from the whole-number cost allocators. We take this step to further our goal of promoting consistent, cross-industry attachment rates that encourage deployment and adoption of broadband Internet access services by fulfilling the Commission's intent, expressed clearly in 2011 and upheld in court in 2013, to bring cable and telecom rates for pole attachments into parity at the cable-rate level.

A. The Petitioners' Proposal Solves the Problem of Rate Disparity

17. The Petitioners maintain, and we agree, that the cost allocators adopted in the *2011 Pole Attachment Order* perform as intended, but only if the actual average numbers of attaching entities coincide with the Commission's presumptive average numbers of attaching entities.⁶⁰ As NCTA recognizes, the cost allocators in the *2011 Pole Attachment Order* reflect and embody these presumptive averages.⁶¹ When 0.66 percent and .044 percent of fully-allocated costs are applied in tandem with the Commission's presumptions of 5 and 3 attaching entities in urban and non-urban areas, respectively, the results approximate cable rate formula outcomes, as intended.⁶²

18. There is widespread agreement that the real average number of attaching entities is regularly far lower than the Commission's presumptions,⁶³ and that this disparity causes rates calculated with the telecom rate formula to be around 70 percent higher than rates calculated with the cable rate formula.⁶⁴ NCTA also reports that, in reality, pole owners routinely rebut the Commission's presumptions with averages such as 2.6 attaching entities.⁶⁵ No commenter disputes NCTA's claim or

⁵⁸ *Id.* at paras. 483-84 & n.1415 (referencing the NCTA Petition).

⁵⁹ *Parties Asked to Refresh Record Regarding Petition to Reconsider Cost Allocators Used to Calculate the Telecom Rate for Pole Attachments*, WC Docket No. 07-245, GN Docket No. 09-51, Public Notice, 30 FCC Rcd 4615 (Wireline Comp. Bur. 2015), 80 Fed. Reg. 27626 (May 14, 2015).

⁶⁰ NCTA Petition at 5 ("The Commission wrote the illustration into rule, essentially addressing only the cases of the presumed three and five attaching entities."). The Commission has routinely used the presumptions when calculating applications of the telecom rate formula. *See Order and Further Notice*, 25 FCC Rcd at 11930, Appx. A, Pole Attachment Rates (showing 16 hypothetical telecom rate formula attachment rates with each rate calculated twice: once with 5 entities and once with 3 entities).

⁶¹ NCTA Petition at 5 (citing *2011 Pole Attachment Order*, 26 FCC Rcd at 5304-05, para. 149 and n.453), Attach. A (Utility Pole Attachment Rates, based on FERC Data).

⁶² *2011 Pole Attachment Order* 26 FCC Rcd at 5244, para. 8 ("This new telecom rate generally will recover the same portion of pole costs as the current cable rate.").

⁶³ *See* NCTA Petition at 5-6 (reporting that pole owners often rebut the Commission's presumptions with much lower average numbers, e.g., average of 2.6 attaching entities, which drives the telecom rate approximately 70 percent higher than the cable rate); *see, e.g.*, Coalition of Electric Utilities Reply at 7 ("[T]he fact that the average number of attaching entities used to calculate the Telecom Rate is often lower than presumptions set forth in the Commission's rules demonstrates that the numbers of service providers nationwide are not growing as the Commission anticipated.") (emphasis removed);

⁶⁴ Many commenters confirm NCTA's 70% higher rate estimate. *See, e.g.*, ITTA Comments at 4; ACA Comments at 3; COMPTTEL and Level 3 Comments at 2; Comcast Comments at 5-6.

⁶⁵ *See* Electric Utilities Reply at 4-5 (stating that utilities spend considerable time and money rebutting the presumptions). As NCTA observes, because most cable operators may become subject to the telecom rate, and

(continued...)

alleges that the number “2.6” is an outlier. Verizon reports several similarly frequent rebuttals to attacher numbers below three.⁶⁶ Averages of 2.6 attaching entities rebut both the urban and non-urbanized presumptions, which casts doubt not only on the credibility of the presumptions, but on the validity of the underlying urbanized/non-urbanized distinction as well. Rebuttals that consistently show lower average numbers based on tracking actual attachments may reflect the fact that, under our rules, service territories count as “urban” if any part of them is urban.⁶⁷ This approach dilutes the density of these nominally urban areas, and undercuts the Commission’s original assumption that such areas would likely have a higher average of attaching entities.⁶⁸

19. Recognizing that the rate reforms of 2011 have failed to align the results of the two pole attachment rate formulas as fully as intended, we adopt the Petitioners’ proposal as a template for corrective measures. By introducing new cost allocators of 0.31 percent and 0.56 percent for poles with 2 and 4 attaching entities respectively, with interpolated allocators between the closest whole numbers for fractional averages, we bring parity to pole attachment rates at the cable rate formula level.⁶⁹ The Petitioners’ proposed solution does not require us to revisit the presumptions themselves; these continue to perform as intended with the 66% and 44% cost allocators that the Commission adopted in 2011.⁷⁰ We therefore retain the presumptions for the same reasons the Commission adopted them in 2011: to “expedite the process” and to help utilities “avert the expense” of applying demographic categories.⁷¹ Broadening the effect of the cost allocation system as the NCTA Petition proposes will greatly reduce the

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because of the large number of associated attachments that are implicated, utilities would have increased incentives to rebut the Commission’s presumed number of attachers in areas where the utilities had not done so previously. NCTA PN Comments at 6. *See also* NCTA PN Reply at 9 (“cable operators are responsible for the substantial majority of pole attachments”) (citing *2011 Pole Attachment Order*, 26 FCC Rcd at 5305, para. 151). As a result, this could lead to pole rate increases not only for cable operators but also for pre-existing telecommunications carriers in those areas.

⁶⁶ Verizon PN Comments at 4-5 (reporting rebuttals of 2.4, 2.5, and 2.6). Comments that refresh the record in 2015 are referred to herein as “PN Comments.”

⁶⁷ *See* 47 C.F.R. section 1.1417(c) (“If any part of the utility’s service area within the state has a designation of urbanized (50,000 or higher population) by the Bureau of Census, United States Department of Commerce, then all of that service area shall be designated as urbanized for purposes of determining the presumptive average number of attaching entities.”).

⁶⁸ *2001 Reconsideration Order*, 16 FCC Rcd at 12139-40, paras. 70-72 (explaining that a higher presumption was warranted in urban areas “in which we expect both residential and business commercial competition to flourish,” and where “competitive services are increasing.”). The Commission credited the presumptions with little accuracy when it created them, noting that “in some states, and for some utilities, there may be no significant difference in the number of attaching entities for rural areas and for urban areas that are outside urbanized areas.” *2001 Reconsideration Order*, 16 FCC Rcd at 12138, para. 67. It was in later sample rate calculations that the Commission began to treat the presumptions as though they were reliable inputs. *See, e.g., Order and Further Notice*, 25 FCC Rcd at 11930, Appx. A, Pole Attachment Rates.

⁶⁹ NCTA Petition, Attach A. (illustrating that, at eight electric utilities, the proposed cost methodology produces telecom rates that approximate the cable rate equally well whether the average number of attachers is 5, 3, or 2.6).

⁷⁰ *Id.* at 5. No party suggests that the current presumptions should be revised. Given that the current, discredited urbanized/non-urbanized distinction replaced a prior failed attempt to divide territories into rural, urban, and urbanized service areas, it seems unlikely that new demographic proxies for numbers of attaching entities would be any more successful. *See 1998 Implementation Order*, 13 FCC Rcd at 6812, para. 77 (requiring each utility to determine a presumptive average for its rural, urban, and urbanized service areas); *2001 Reconsideration Order*, 16 FCC Rcd at 12136, para. 64 (finding that utilities had been unable to organize their territories into rural, urban, and urbanized areas); *2001 Reconsideration Order*, FCC Rcd 16 at 12139, paras. 69-70 (adopting rebuttable presumptive average numbers of attaching entities for urbanized and non-urbanized areas).

⁷¹ *2001 Reconsideration Order*, 16 FCC Rcd at 12139, para. 69-70.

effect of, and the need for, the rebuttals. This approach to defining “cost” for purposes of the telecom rate formula achieves results that are consistently close to the cable rate.⁷² The new system also satisfies the fundamental purposes for using presumptions: to reduce reporting and recordkeeping requirements, to minimize administrative burdens, and to provide a level of predictability and efficiency in calculating the appropriate rate.⁷³

B. The Reasons to Revise the Cost Allocation System

20. We adopt this multiple cost-allocator approach for the same reasons that motivated the initial (but ultimately incomplete) reforms in 2011: to advance the deployment and adoption of broadband Internet access, which remains a fundamental policy goal that guides our implementation of the telecom rate formula.⁷⁴ We recognize that pole rental rates are but one of many considerations underlying marketplace deployment decisions. That said, the Commission promotes broadband deployment on numerous fronts, and has sought public comment and advice on other measures to advance this overarching policy.⁷⁵ When discussing pole attachments policy, the Commission refers consistently to incentives for investment.⁷⁶ By the same token, it remains our policy to minimize disincentives to investment, including artificially high pole attachment rates.⁷⁷ Lower pole rental rates serve to encourage broadband investment,⁷⁸ and we continue to use our section 224 authority as one of the tools we bring to bear to on our broadband goals.⁷⁹ The Commission also continues to support and subsidize deployment

⁷² NCTA Petition, Attach A. (illustrating that, at eight electric utilities, the proposed cost methodology produces telecom rates that approximate the cable rate equally well whether the average number of attachers is 5, 3, or 2.6).

⁷³ *1998 Implementation Order*, 13 FCC Rcd at 6811, para. 74.

⁷⁴ *See, e.g., 2011 Pole Attachment Order*, 26 FCC Rcd at 5295, para. 126 (stating policy of removing pole attachment market distortions that affect attachers’ deployment decisions and increasing affordability and availability of services).

⁷⁵ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, 2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment, GN Docket No. 14-126, 30 FCC Rcd 1375 (2015) (*2015 Broadband Progress Report*). *See id.* at 1387-1389, para. 17 (listing nine Commission actions during 2014 aimed at expanding broadband deployment) and at 1460-1463, paras. 153-163 (Notice of Inquiry on Immediate Action to Accelerate Deployment).

⁷⁶ *See Further Notice*, 25 FCC Rcd at 11913, para. 118; (stating that increasing cable operators’ pole rental rates would come at the cost of increased broadband prices and reduced incentives for deployment); *2011 Pole Attachment Order*, 26 FCC Rcd at 5298, para. 135 (recognizing “the historical role that pole rental rates have played in supporting the investment in pole infrastructure”).

⁷⁷ *See Open Internet Order*, 30 FCC Rcd at 5319-20, para. 179 (explaining that “the absolute level of pole rental rates also is likely to be relevant to decisions regarding what services are provided”); *id.* at 5833, paras. 483-84 (stating concern that investment incentives could be affected by an increase in pole attachment rates).

⁷⁸ We remain persuaded that lower pole rental rates serve to encourage broadband investment. *See id.* and *infra* note 104.

⁷⁹ Indeed, in 2011 the Commission considered and rejected proposals that would have achieved greater uniformity in rates by increasing cable operators’ attachment rates, and we are not persuaded that a different determination is warranted now. *See, e.g., 2011 Pole Attachment Order*, 26 FCC Rcd at 5320, para. 180 & n.559. Given the policy balancing described in this Order, we likewise reject arguments that we should adopt other uniform rate options that yield rates materially above the cable rate. *See, e.g., Ameren et al.* PN Comments at 3-5, 17-19 (suggesting that the Commission consider a previously-identified option of a uniform rate above the cable rate but below the then-existing telecom rate); *Ameren et al.* PN Reply at 8 (same); UTC PN Reply at 3 (discussing a 2010 proposal to modify the presumptive number of attachers to be used in conjunction with the then-existing telecom rate rule and suggesting that “[t]he Commission might want to consider this idea again”).

of broadband Internet access in high-cost areas.⁸⁰ In contrast, increased pole attachment rates would ultimately be recovered from consumers, and could lead some consumers to cut back or even discontinue their service.⁸¹ Thus, we view pole attachment rate reform as part of the Commission's fundamental mission to advance the availability and adoption of broadband in America.

21. We also intend this action to avoid the unintended consequence of higher pole attachment rates for cable providers that also offer broadband Internet access service, in those cases where the utility rebuts the Commission's attaching party presumptions. Comcast, for example, asserts that "[a]bsent grant of the NCTA/COMPTEL Petition, a costly and time consuming process will ensue whereby utilities will seek to rebut the Commission's attaching entity presumptions, and cable operator attachers will then seek to refute the utilities' attachment studies."⁸² And NCTA observes that, because most cable operators may become subject to the telecom rate, and large numbers of associated attachments are implicated, utilities would have increased incentives to rebut the Commission's presumed number of attachers in areas where they had not done so previously.⁸³ As a result, this could lead to pole rate increases for both cable operators and pre-existing telecommunications carriers in those areas. In the *Open Internet Order*, the Commission acknowledged that reclassification could lead to attempted increases in pole attachment rates, and stated its intention to avoid such an increase.⁸⁴ Aligning rates produced by the two rate formulas forestalls this potential increase.⁸⁵

22. We also are concerned that unless we close what one commenter refers to as the "telecom formula loophole,"⁸⁶ the resulting rate disparity would, more broadly, frustrate the Commission's policy goals by artificially and incrementally deterring investment in states subject to Commission pole regulation in favor of investment in areas with more favorable state-regulated pole attachment regimes. As the Commission previously has observed, "[c]ommenters report that many [states that have elected to exercise jurisdiction over pole attachments in lieu of the Commission] apply a uniform rate for all attachments used to provide cable and telecommunications services, and have done so by establishing a rate identical or similar to the Commission's cable rate formula."⁸⁷ Thus, if the Commission's telecom rate frequently yielded rates materially above the cable rate, telecommunications service providers that operate in multiple states or are deciding where to enter the marketplace, would have an artificial disincentive to invest in states governed by the Commission's 2011 telecom rate rule relative to states that

⁸⁰ *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011) (*2011 USF/ICC Transformation Order*), *pets. for review denied sub nom.*, *In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014). See, e.g., *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order et al., 29 FCC Rcd 7051 (2014); *Connect America Fund*, WC Docket No. 10-90, Report and Order, 28 FCC Rcd 15060 (Wireline Comp. Bur. 2013).

⁸¹ *2015 Broadband Progress Report*, 30 FCC Rcd at 1428, para. 90 (relating adoption to "whether service is offered at an affordable price and with features and functionalities that cause consumers to want to purchase it").

⁸² Comcast Comments at 6.

⁸³ NCTA PN Comments at 6. See also NCTA PN Reply at 9 ("cable operators are responsible for the substantial majority of pole attachments") (citing *2011 Pole Attachment Order*, 26 FCC Rcd at 5305, para. 151).

⁸⁴ See *Open Internet Order*, 30 FCC Rcd at 5832, para. 482 ("[I]t is not the Commission's intent to see any increase in the rates for pole attachments paid by cable operators that also provide broadband Internet access service, and we caution utilities against relying on this decision to that end.>").

⁸⁵ While some utility commenters assert that cable operators have failed to pay the telecom rate even when required to do so in the past, there is no support for or quantification of the scope of any such issue to persuade us to reach a different conclusion regarding the likely impact on cable attachers. See, e.g., *Ameren et al.* PN Reply at 7-9.

⁸⁶ Comcast Comments at 3.

⁸⁷ *2011 Pole Attachment Order*, 26 FCC Rcd at 5319, para. 177.

established a uniform rate identical or similar to the Commission's cable rate formula.⁸⁸ Although our action in this Order will not guarantee complete state-to-state uniformity, seeking to address artificial marketplace distortions in the manner that we do here, rather than via a higher telecom rate, accords with our broadband mandate and our overall policy balancing in this context.⁸⁹

23. Moreover, the record developed here demonstrates that pole owners routinely rebut the Commission presumptions with averages close to 2.6 attachers. This means that the Commission's standard examples of telecom rates, which presuppose fully-allocated costs and use the Commission's presumptions, have seriously underestimated the pre-reform disparity between cable- and telecom-rate outcomes. In this proceeding, the Commission has compared estimated telecom costs of 11.2 percent in urban areas and 16.9 percent in non-urban areas with fixed cable costs of 7.4 percent.⁹⁰ Applying the 2.6 cost allocator that the record supports shows that the telecom rate formula cost estimate would have been 19.1 percent for both urban and rural areas. The discrepancy between the presumed numbers of attachers (5 in urban areas and 3 in rural areas) and actual numbers of attachers used in pole owner rebuttals and reported in the record (often at or close to 2.6) illustrates the substantial problem attachers face when applying the rate reform of the Commission's *2011 Pole Attachment Order*.

24. Along with the forgoing policy considerations, we continue to seek to balance the "legitimate concerns of pole owners and other parties" by preserving incentives to invest in poles and avoiding the imposition of an undue burden on utility ratepayers.⁹¹ In 2011, the Commission ultimately concluded that the level of recovery provided by the cable rate best balanced its broadband deployment mandates and the concerns of pole owners and utility ratepayers.⁹² Consistent with that analysis, we explain above that the cable rate frequently is lower than the telecom rate as it previously had been implemented by the Commission, and reducing the telecom rate to cable rate level would further numerous policy goals.⁹³ The Commission further observed that the cable rate had not produced a "shortage of pole capacity," and, therefore, approximating that rate in the telecom formula likely would not diminish pole owners' "incentives to invest in poles."⁹⁴ The Commission also found "persuasive the

⁸⁸ Although state-to-state investment decisions likely would be affected more by pole attachment rate levels, rather than the underlying methodology *per se*, we are persuaded that the rate yielded by section 1.1409(e)(2)(i) would, absent reform, introduce material artificial distortions. For example, Petitioners' illustrative calculations for eight utilities show that the rates yielded by section 1.1409(e)(2)(i) (2011) in the case of an average of 2.6 attachers in an urbanized area each would exceed the cable rate for any of the eight utilities. Petition for Reconsideration, Attach. A. Although the reforms we adopt would not fully eliminate differences in rates among utilities (in the example or otherwise), they address differences that would arise artificially purely as a result of our pole attachment regulations.

⁸⁹ We are not persuaded that our policy objectives regarding advanced services could be fully addressed by the application of sections 201-204 and 251-252 of the Act, even assuming they applied, nor do we find any basis to forego relying on section 224, insofar as it is an available statutory tool to advance those policies. Consequently, we do not find the potential availability of those other provisions of the Act after reclassification of broadband Internet access service to moot any policy grounds for the rule change we adopt, as some commenters contend. *See, e.g.,* CenterPoint Energy et al. PN Reply at 6.

⁹⁰ *See, e.g., Order and Further Notice*, 25 FCC Rcd at 11913-14, para. 119; *2011 Pole Attachment Order*, 26 FCC Rcd at 5295, para. 150 n.453.

⁹¹ *2011 Pole Attachment Order*, 26 FCC Rcd at 5243, para. 6, 5304-05 paras. 149, 151. As NCTA et al. point out, the opportunity to charge the rate yielded by the calculation in section 1.1409(e)(2)(i) thus is "designed to *benefit* the pole owner, not to deny it fair compensation, and the modification proposed by Petitioners preserves this approach." NCTA et al. Reply at 5-6.

⁹² *2011 Pole Attachment Order*, 26 FCC Rcd at 5243, para. 6, 5304-05 paras. 149, 151.

⁹³ *Id.* at 5316-17, 5319-20, paras. 173, 179.

⁹⁴ *Id.* at 5305, para. 151. *See also, e.g.,* Comcast PN Comments at 4 n.11.

views of consumer advocates . . . recommend[ing] that the cable rate ‘should be used for all pole attachments.’”⁹⁵

25. We thus remain persuaded that utility cost recovery at the level of the cable rate best balances the relevant policy considerations. Consequently, we reject arguments that the rule revision, which will more consistently and accurately ensure that the Commission’s policy goals are achieved, will somehow upset the Commission’s intended balance, unfairly burden utility ratepayers, or undermine the sharing of infrastructure costs.⁹⁶ Likewise, while some commenters observe that other aspects of the *2011 Pole Attachment Order* put downward pressure on the revenues electric utilities receive from incumbent LEC attachers,⁹⁷ the Commission already accounted for that likelihood in its weighing of policies and conclusion that it was appropriate to permit capital cost recovery at the same level as under the cable rate.⁹⁸

26. Utilities dismiss this policy balancing on several grounds, none of which we find persuasive. The Utilities Telecom Council (UTC) argues that pole attachment rental is insignificant compared to other operating costs of large cable companies.⁹⁹ Electric Utilities state that capital expenditure, and not pole attachment rental, drives deployment, and that pole attachment rental accounts for less than 2 percent of the cost of deploying fiber optic cable.¹⁰⁰ UTC argues that there has been only a slow rate of broadband deployment since the telecom rate was adjusted in 2011, which proves the futility of lowering pole attachment rates,¹⁰¹ and that any cost savings from lower pole attachment rates have not been passed on to consumers, but rather, as a result of industry consolidation, have been pocketed by providers instead.¹⁰²

27. We are skeptical that sums alleged to “unfairly and negatively impact utilities and their ratepayers”¹⁰³ are “insignificant”¹⁰⁴ in the context of broadband deployment. While the record does not include quantifiable information regarding the exact effect on deployment of pole attachment rates, insofar as keeping attachment rates reasonable for cable companies prevents them from shelving even a small number of projects, we would not consider that result “insignificant.”¹⁰⁵ There remains room for improvement in the rate of broadband expansion, and we cannot afford to dismiss the importance of even

⁹⁵ *2011 Pole Attachment Order*, 26 FCC Rcd at 5303-04, para. 147 (quoting comments from NASUCA).

⁹⁶ See, e.g., EEI/UTC Opposition at 12; Ameren *et al.* PN Comments at 9.

⁹⁷ See, e.g., Ameren *et al.* PN Comments at 12-13.

⁹⁸ *2011 Pole Attachment Order*, 26 FCC Rcd at 5304-05, paras. 149, 151 (expressing concern about adopting an approach that did not allow recovery of any capital costs among other things because “our regulation of rates for attachments by incumbent LECs could reduce the amount of costs that utilities are able to recover from other sources” and thus defining cost in a manner that the Commission expected “generally will recover a portion of the pole costs that is equal to the portion of costs recovered in the cable rate”).

⁹⁹ UTC PN Comments at 5.

¹⁰⁰ Electric Utilities PN Comments at 8. Utilities estimate that pole attachment rentals are less than 1% of a broadband provider’s operating expense. *Id.* at 5.

¹⁰¹ UTC PN Comments at 2.

¹⁰² *Id.* at 2.

¹⁰³ Electric Utilities PN Comments at 9.

¹⁰⁴ *Id.* at 7.

¹⁰⁵ See *Further Notice*, 25 FCC Rcd at 11913, para. 118; (stating that increasing cable operators’ pole rental rates would come at the cost of increased broadband prices and reduced incentives for deployment); *2011 Pole Attachment Order*, 26 FCC Rcd at 5298, para. 135 (recognizing “the historical role that pole rental rates have played in supporting the investment in pole infrastructure”).

potentially small increments.¹⁰⁶ Commenters state that cable companies continue to deploy facilities, and we intend to avert any destabilization of those plans that might arise from a large and sudden pole attachment rate increase.¹⁰⁷ We are particularly mindful of the potential for harm to rural areas, which are the least served areas in the nation, and where the most additional pole attachments are needed to reach additional customers.¹⁰⁸

28. Utilities further argue that granting the NCTA Petition would unfairly reduce their revenue from pole attachments.¹⁰⁹ They argue that the *2011 Pole Attachments Order* has already reduced their recovery from the telecommunications rate,¹¹⁰ and expect that their revenue from broadband-only Internet service providers will also decline.¹¹¹ We find these arguments unpersuasive. Telecommunications carriers account for only a little more than 10 percent of attaching entities.¹¹² Leveling their rate down to the cable rate disrupts settled expectations far less than leveling up the rental rate for the much greater number of cable attachments.¹¹³ Although it is true that the new system will tend to lower rates negotiated under the telecom rate formula, they will settle at the level the Commission aimed for in 2011, when its stated goal was to “minimize the difference in rental rates paid for attachments that are used to provide voice, data, and video services.”¹¹⁴

29. Utilities argue that increasing demand for pole space should lead to increased prices, and that any downward rate adjustment runs counter to economic principles.¹¹⁵ We attach no significance to this assertion. The express reason for the statutory imposition of cost-based, regulated rates is to bypass the economic principle that “public utilities by virtue of their size and exclusive control over access to

¹⁰⁶ *2015 Broadband Progress Report*, 30 FCC Rcd at 1378, paras. 4-6. (finding that advanced telecommunications services are not being advanced in a reasonable and timely fashion). The gap between Americans with and without access to 25 Mbps/3Mbps closed by only 3% in the year prior to the *2015 Broadband Progress Report*. *Id.* at para 4.

¹⁰⁷ NCTA PN Comments at 5-6 (stating that increased rates would dampen the incentive to expand in rural areas, where more poles are needed to reach customers). *But see, e.g.*, PN UTC Comments at 8 (questioning whether protecting cable companies from pole attachment rate increases will affect average consumers).

¹⁰⁸ NCTA reports that “Vyve Broadband, a small cable operator that serves predominantly rural areas, recently received notice from one electric utility that its telecommunications attachment rate was increasing to a level that is 81 percent higher than its cable attachment rate. The increase would cover over 27,000 poles, in an area where it takes more than three poles to reach each subscriber. Requiring a rural cable operator to pay this additional amount significantly increases the cost of operating its existing network and reduces its ability to expand the reach of that network to new customers.” NCTA PN Comments at 8.

¹⁰⁹ Electric Utilities PN Comments at 9.

¹¹⁰ Electric Utilities PN Comments at 11.

¹¹¹ Electric Utilities PN Comments at 11-12.

¹¹² Comments of Utilities Telecom Council, WC Docket No. 07-245 (filed Mar. 7, 2008) App. *The Problem with Pole Attachments: a White Paper* at 10 (reporting that, of attachments at regulated rates, 89% are CATV Attachments (cable) and 11% are CLEC Attachments (telecom)) (*UTC White Paper*).

¹¹³ *See* Electric Utilities Comments at 11-12 (stating that, since 2011, the reduction in the telecom rate has caused AEP, Georgia Power Company as an operating company subsidiary of Southern Company, and Oncor, to lose \$2,900,000, \$5,240,000, and \$820,000, respectively). Comparing these four-year totals to the \$150-\$200 million annual increases forecast by NCTA in a Jan. 22, 2015 letter illustrates the difference in scale between cable- and telecom-rate paying attachments. Letter from Steven F. Morris, Vice President and Associate General Counsel, NCTA, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, WC Docket No. 07-245, at 2 (Jan. 22, 2015) (estimating that reclassification of broadband Internet access could result in pole rent increases of \$150-\$200 million annually) (Jan. 22, 2015 NCTA Letter).

¹¹⁴ *2011 Pole Attachment Order*, 26 FCC Rcd at 5295, para. 126.

¹¹⁵ Electric Utilities PN Comments at 8.

pole lines, are unquestionably in a position to extract monopoly rents . . . in the form of unreasonably high pole attachment rates.”¹¹⁶ By enacting cost-based rate formulas, Congress has already accounted for the economics of scarcity that so favor pole owners. Attachment rates agreed to by broadband-only providers before reclassification may indeed be called into question, but that is because these entities are now within the ambit of Section 224, and not because we revise the method of cost allocation used in the telecom rate formula.¹¹⁷

30. Utilities claim that “downward pressure” on rates “weakens the predictability and timeliness of the access process” but this argument makes little sense.¹¹⁸ Attachers pay (and owners recover) the entire cost of access through make-ready fees paid before the attacher’s facilities are mounted on poles.¹¹⁹ Because access costs have already been recovered through make-ready fees, pole attachment rental rates are concerned solely with the pole owner’s recovery of operating costs; they should have nothing to do with the “predictability and timeliness” of access.¹²⁰ In any case, a “downward pressure” on rates to a parity with the cable rate formula level is precisely the outcome that the *2011 Pole Attachment Order* sought to achieve and that we intend this new cost allocation system to implement.¹²¹

C. The Commission Has Authority to Adopt the Revised Telecom Rate Rule

31. The modified telecom rate rule adopted in this Order is consistent with section 224(e) of the Act. The fundamental purpose of section 224(e) is to “ensure that a utility charges just, reasonable, and nondiscriminatory rates for pole attachments” by telecommunications carriers used to provide telecommunications services.¹²² As described above, in regulating cost-based telecom attachment rates under section 224(e), Congress granted the Commission substantial discretion to implement section 224(e) based on the agency’s policy expertise by leaving the definition of the relevant costs ambiguous.¹²³ Employing that policy expertise, we build upon the underpinnings of the statutory interpretation relied upon by the Commission in 2011 in the telecom rate rule adopted here.¹²⁴

32. The *2011 Pole Attachment Order* began by identifying a range of reasonable rates that could result from different definitions of “cost” for purposes of section 224(e).¹²⁵ Within that range of permissible outcomes, the telecom rate rule ultimately adopted in 2011 involved the comparison of the rate yielded by two calculations, with utilities permitted to charge the higher of the two. Section 1.1409(e)(2)(i) specifies the first calculation, which the Commission anticipated would approximate the

¹¹⁶ *2011 Pole Attachment Order*, 26 FCC Rcd at 5242, para. 4 (citing 1977 Senate Report at 13).

¹¹⁷ Electric Utilities PN Comments at 10-11. See 47 U.S.C § 224(e).

¹¹⁸ Electric Utilities PN Comments at 8.

¹¹⁹ See, e.g., *2011 Pole Attachment Order*, 26 FCC Rcd at 5301-02, para. 144.

¹²⁰ See, e.g., *id.*.

¹²¹ *Id.* at 5295, para. 126 (stating policy of removing pole attachment market distortions that affect attachers’ deployment decisions and increasing affordability and availability of services).

¹²² 47 U.S.C. § 224(e)(1).

¹²³ See *supra* para. 12; *2011 Pole Attachment Order*, 26 FCC Rcd at 5308, para. 156 *aff’d AEP*, 708 F.3d at 189-90.

¹²⁴ See, e.g., NCTA PN Comments at 7; COMPTTEL/Level 3 PN Comments at 4; NCTA PN Reply at 9-11; Jan. 22, 2015 NCTA Letter at 3; Letter from Joshua M. Bobeck, Counsel for Lighttower, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, GN Docket No. 09-51 at 3-5 (filed July 30, 2015). Because we adopt Petitioners’ primary proposal (referred to for convenience herein simply as “Petitioners’ proposal” or the like), we need not and do not adopt their alternative option for revising section 1.1409(e)(2)(i) of the rules. See Petition for Reconsideration at 7.

¹²⁵ *2011 Pole Attachment Order*, 26 FCC Rcd at 5299-301, paras. 138-45.

cable rate.¹²⁶ Section 1.1409(e)(2)(ii) specifies the second calculation, based on a cost-causation approach.¹²⁷

33. As a threshold matter, this Order leaves unaltered the section 1.1409(e)(2)(ii) ‘cost-causation’-based calculation. That calculation still will be performed whenever the Commission’s telecom rate rule is used, and even utility commenters concede that it does “not do away with apportioning the costs among all attaching entities” in accordance with section 224(e).¹²⁸ The definition of cost for purposes of that provision excludes capital costs and was designed to yield a rate that approached the incremental cost of attachment.¹²⁹

34. The question of whether, and to what extent, to allow utilities to go beyond the recovery permitted by the section 1.1409(e)(2)(ii) telecom rate calculation and recover some capital costs ultimately depends on a further policy evaluation. As the Commission explained in 2011, and as we reiterate above, our implementation of section 224 is guided in significant part by our mandate to encourage the deployment of broadband.¹³⁰ That policy, if overriding other considerations, might counsel in favor of relying solely on the rate yielded by the ‘cost-causation’ calculation in section 1.1409(e)(2)(ii), rather than permitting higher rates as just and reasonable under section 224(e).¹³¹ But the Commission also sought—and continues to seek—to balance the “legitimate concerns of pole owners and other parties” by preserving incentives to invest in poles and avoiding the imposition of an undue burden on utility ratepayers.¹³²

35. As described above, in 2011 the Commission adopted rules that it anticipated would result in a telecom rate that generally approximated the cable rate. In practice, however, the rule the Commission adopted has only poorly reflected the balancing of policy interests that the Commission anticipated attaining in 2011 because the facts on the ground differed significantly from the Commission presumptions upon which the 2011 rule was predicated.¹³³ As a result, telecom rates calculated based on the Commission’s rules frequently were higher than the levels the Commission generally sought to

¹²⁶ See *supra* para. 10.

¹²⁷ See *supra* para. 11.

¹²⁸ EEI/UTC PN Comments at 6.

¹²⁹ 2011 Pole Attachment Order, 26 FCC Rcd at 5300-03, paras. 142-45.

¹³⁰ 2011 Pole Attachment Order, 26 FCC Rcd at 5303-06, paras. 146-52, 5316-21, paras. 172-81; *supra* Section III.B. See also, e.g., *Gulf Power*, 534 U.S. at 339 (The Commission may implement section 224 in light of “Congress’ general instruction to the FCC to ‘encourage the deployment’ of broadband Internet capability.”) (quoting 47 U.S.C. § 1302(a)).

¹³¹ The D.C. Circuit observed in *AEP* that the utilities “do not contest the Commission’s view that” the ‘cost causation’ option under the telecom formula satisfies the lower bound cable rate, which “the constitutional bar on takings without just compensation generally allows [to be applied], subject to narrow exceptions” as found by an earlier decision by the U.S. Court of Appeals for the Eleventh Circuit. *AEP*, 708 F.3d at 189 (citing *Alabama Power Co. v. FCC*, 311 F.3d 1357, 1367-71 (11th Cir. 2002)).

¹³² 2011 Pole Attachment Order, 26 FCC Rcd at 5243, para. 6, 5304-05 paras. 149, 151. As NCTA et al. point out, the opportunity to charge the rate yielded by the calculation in section 1.1409(e)(2)(i) thus is “designed to benefit the pole owner, not to deny it fair compensation, and the modification proposed by Petitioners preserves this approach.” NCTA et al. Reply at 5-6.

¹³³ See *supra* Section III.A. This is not to say that the 2011 changes to the telecom rate rule did not advance the Commission’s policy goals at all or that the actions of utilities insofar as they were exercising their rights under the 2011 telecom rate rule somehow were unlawful or otherwise impermissible under that legal framework. See, e.g., *Ameren et al.* PN Reply at 3-5. Rather, we simply find on the record here that further revisions to the telecom rate rule are warranted to better advance our balancing of the policy considerations.

achieve as just and reasonable under section 224(e)—i.e., materially in excess of the cable rate.¹³⁴ The reclassification of broadband Internet access service as a telecommunications service brings this shortcoming into greater focus.¹³⁵ Adopting the changes to section 1.1409(e)(2)(i) proposed by Petitioners will bring the balance that the Commission anticipated achieving in 2011, which we likewise are persuaded is the appropriate outcome today.¹³⁶

36. Thus, we adopt Petitioners' proposal and modify section 1.1409(e)(2)(i) of the rules by redefining the ambiguous term "cost" as a percentage of fully allocated costs that depends on whether the average number of attaching entities in an area is 2, 3, 4, or 5.¹³⁷ The specific percentage of fully allocated costs that we adopt in each of those instances will yield a rate under section 1.1409(e)(2)(i) that more closely and consistently approximates the cable rate.¹³⁸

37. Although our definition of cost is based on an integer average number of attachers in an area, consistent with the Commission's efforts to ensure that it implements section 224(e) in a "readily administrable" manner,¹³⁹ the proposal we adopt incorporates a mechanism to allow parties, should they so choose, to continue to rely on non-integer average numbers of attachers in a service area by interpolating from the specified cost allocators in section 1.1409(e)(2)(i) of the rules in a manner that does not undermine the definition of cost adopted above.¹⁴⁰ In pertinent part, section 224(e)(2) is focused on

¹³⁴ See *supra* Section III.A.

¹³⁵ See *supra* Section III.B.

¹³⁶ See *supra* Sections III.A, B. See also, e.g., NCTA PN Reply at 10. The Commission is free to change its interpretation and implementation of the Act, as we are doing here in our revisions to section 1.1409(e)(2)(i) of the rules. See, e.g., *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). We thus reject suggestions that our adoption of a different approach in 1998 undercuts our ability to adopt the Petitioners' proposal as a "dramatic departure" from that earlier approach. See, e.g., EEI/UTC Opposition at 10-11.

¹³⁷ See *infra* Appendix A; (47 C.F.R. § 1.1409(e)(2)(i), as amended). Although commenters take issue with the specific average numbers of attachers identified by utilities, see, e.g., Comcast PN Comments at 6-7, there is wide agreement that the average number of attachers in a relevant area frequently is below three; is unlikely to approach five; or, at a minimum, that attachers are unlikely as a practical matter to be able rebut utility claims to the contrary. See, e.g., ACA PN Comments at 3; Comcast PN Comments at 6-7; Verizon PN Comments at 4-5; UTC PN Reply at 3; Frontier PN Reply at 3; Comcast Comments at 4; Letter from Daniel Brenner, counsel for Bright House *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, GN Docket No. 09-51 at 2 (filed Step. 16, 2011). As a result, contrary to the arguments of some commenters, we see no need to address in section 1.1409(e)(2)(i) of the rules what appears from the record to be the surpassingly unlikely scenario of a demonstrated average number of attachers in an area greater than five. See, e.g., Ameren *et al.* PN Comments at 14.

¹³⁸ See, e.g., Petition for Reconsideration at 6-7 & Attach. A. In particular, under the 2011 version of this rule, there was a 66% allocator in urbanized service areas (where the Commission presumed there were an average of 5 attaching entities) and a 44% allocator in non-urbanized service areas (where the Commission presumed there were an average of 3 attaching entities). 47 C.F.R. § 1.1409(e)(2)(i) (2014). Under the revised rule we adopt on reconsideration, the allocators will be as follows— 66.1% in service areas with an average of 5 attaching entities; 55.6% in service areas with an average of 4 attaching entities; 43.9% in service areas with an average of 3 attaching entities; and 30.9% in service areas with an average of 2 attaching entities. See *infra* Appendix A; (47 C.F.R. § 1.1409(e)(2)(i), as amended).

The relevant definition of cost is premised on the pole height and amount of useable and unusable space going unrebuted. See 47 C.F.R. § 1.1418 (specifying the rebuttable presumptions). Although, conceptually, rebuttal of those presumptions could result in rates that are slightly higher or lower than the cable rate, the record does not reveal any evidence or concerns—nor are we otherwise aware of any—that this difference under likely scenarios would materially undermine the policy balancing the Commission is seeking to achieve in ensuring just and reasonable rates under section 224(e).

¹³⁹ 2011 Pole Attachment Order, 26 FCC Rcd at 5304-05, para. 149.

¹⁴⁰ See *infra* Appendix A; (47 C.F.R. § 1.1409(e)(2)(i), as amended).

allocating the “cost”—however defined—of providing space on a pole other than useable space.¹⁴¹ Although a given pole only will have an integer number of attaching entities,¹⁴² for administrability the Commission has long permitted pole attachment rates to be calculated based on surveys or averages of the number of attaching entities in the relevant service area, which has the potential to yield an average number of attachers that is not an integer number.¹⁴³ The use of a non-integer number of attaching entities in conjunction with the new definition of cost adopted for areas with 2, 3, 4, or 5 average attaching entities in revised section 1.1409(e)(2)(i) of the rules would result in similar, even if not always as extensive, deviations from the cable rate as we found to result under the version of the rule adopted in 2011.¹⁴⁴ We conclude that such deviation is at odds with the balancing of policy interests we seek to achieve through our revisions to section 1.1409(e)(2)(i) and also anticipate that it would increase the likelihood of disputes.¹⁴⁵ We thus adopt the interpolation mechanism in Petitioners’ proposal, which will leave parties free to continue using non-integer average number of attachers should they choose to do so, without undermining our ability to ensure just and reasonable rates under section 224(e) in an administrable manner.

38. Insofar as the reclassification of broadband Internet access service results in most Commission-regulated attachments becoming subject to the telecom rate, that counsels in favor of our redefinition of cost, contrary to the claims of some commenters. We recognize that the *2011 Pole Attachment Order* cited the marketplace distortions resulting from disparate telecom and cable rates as part of the policy rationale for the telecom rate change adopted there. As identified there, these distortions led to competitive disparities arising from telecommunications carriers paying higher pole attachment rates than their cable operator competitors.¹⁴⁶ The distortions also created disincentives for cable operators to begin offering advanced services that could newly subject them to the telecom rate.¹⁴⁷ Some commenters argue that reclassification of broadband Internet access service, insofar as it results in most cable operators now being subject to the telecom rate, resolves concerns about marketplace distortions and leaves the Commission with little or no policy basis for revisiting the definition of “cost” to better ensure that the telecom rate is as low and close to uniform with the cable rate as possible.¹⁴⁸ We reject such claims for the reasons already explained above.¹⁴⁹ In particular, the current telecom rate could lead to a windfall for utilities by increasing rates for many attachments without any offsetting benefits to cable attachers. This not only would harm cable operators and their customers, but more broadly would

¹⁴¹ 47 U.S.C. § 224(e)(2).

¹⁴² See 47 C.F.R. §§ 1.1402(m) (defining “attaching entity”); 1.1417(b) (counting of attaching entities).

¹⁴³ See, e.g., 47 C.F.R. § 1.1417(d); *Amendment of Commission’s Rules and Policies Governing Pole Attachments; Implementation of Section 703(e) of the Telecommunications Act of 1996*, CS Docket Nos. 97-98, 97-151, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12139, paras. 69-70 (2001) (*2001 Reconsideration Order*) (discussing the options of utility-developed or Commission-specified presumed numbers of attaching entities).

¹⁴⁴ See, e.g., Petition for Reconsideration, Attach. A (comparing various rate calculations, including examples based on the 2.6 average number of attachers put forward by a utility).

¹⁴⁵ See, e.g., Comcast PN Comments at 6-7; Verizon PN Comments at 5-6; NCTA *et al.* Reply at 2, 6. Certain commenters assert that the Petitioners’ proposal will not be simple or expeditious to implement or could lead to increased disputes, but do not explain the basis for those assertions, instead largely reiterating their statutory objections. See, e.g., EEI/UTC Opposition at 5, 9-10. We find no basis to conclude that the revised version of section 1.1409(e)(2)(i) adopted here will be less simple or expeditious to implement than the version of the rule adopted in 2011, and as discussed above, we think that it likely will reduce, rather than increase, disputes.

¹⁴⁶ See, e.g., *2011 Pole Attachment Order*, 26 FCC Rcd at 5317-19, 5320-21, paras. 174-78, 181.

¹⁴⁷ *Id.* See, e.g., *2011 Pole Attachment Order*, 26 FCC Rcd at 5317-19, 5320-21, paras. 174-78, 181.

¹⁴⁸ See, e.g., CenterPoint Energy *et al.* PN Reply at 4-5.

¹⁴⁹ See *supra* Section III.B.

undermine the Commission’s broadband policies by creating artificial marketplace distortions and disincentives for investment. Indeed, the Commission made this point clear in the *Open Internet Order* when it stated, “[t]o the extent that there is a potential for an increase in pole attachment rates for cable operators that also provide broadband Internet access service, we are highly concerned about its effect on the positive investment incentives that [otherwise] arise from new providers’ access to pole infrastructure.”¹⁵⁰

39. We also disagree with the suggestions of some commenters that only certain types of policy considerations can form the basis for our interpretation and implementation of the ambiguous term “cost” in section 224(e). As the D.C. Circuit recognized in *AEP*, the Commission reasonably can rely on policy rationales in giving meaning to the term “cost.”¹⁵¹ We explain above the specific policy rationales for the approach we adopt here, and find no basis to conclude that those considerations cannot form a sufficient justification for the interpretation of the term cost in our implementation of section 224(e). For example, certain commenters assert that there is no “economic reason” for the adopted approach to defining cost, but do not explain what they mean by an “economic reason,” or why the policy considerations discussed above, including the economic effects of alternative approaches to defining cost, would not fall within that scope.¹⁵² Some commenters also criticize the Petitioners’ proposal for failing to provide a more favorable outcome for attachers in rural areas, but fail to explain why that is a necessary basis for interpreting the term “cost.”¹⁵³ To the extent that those comments are premised on certain policy arguments relied upon by the Commission in 2011 as part of its explanation of the specific definitions of cost adopted there, we find them unpersuasive.¹⁵⁴ We find for the reasons explained above that the version of section 1.1409(e)(2)(i) adopted in 2011 only poorly advanced the Commission’s more fundamental policy objectives, and to better advance those fundamental policy objectives, and for the other policy reasons relied on in this Order, we depart from our prior approach that relied on historical rules tied to urban/rural distinctions. Moreover, we are not revisiting how cost is defined under section 1.1409(e)(2)(i) to more consistently and accurately yield a rate the same or very similar to the cable rate as an end unto itself, but because that reflects the Commission’s intended policy balancing, and we reject suggestions that that is not a valid justification.¹⁵⁵ More broadly, because we explain in detail the legal

¹⁵⁰ *Open Internet Order*, 30 FCC Rcd at 5833, para. 484.

¹⁵¹ *AEP*, 708 F.3d at 189-90. See also *id.* at 190 (citing *Associated Gas Distribs. v. FERC*, 824 F.2d 981, 1009-12 (D.C. Cir. 1987) for the proposition that “within the framework of rates based on ‘cost,’ statutory mandates against rate discrimination did not generally bar an agency from allowing allocation of rates among classes of customers on the basis of” policy considerations—in that case, “elasticity of demand”). Given the precedent that “cost” can be defined based on policy considerations, and given the policy rationales identified above for our approach to defining cost here, we reject arguments that we need to identify prior instances of the same type of definitions of cost as we adopt here in order to adopt the Petitioners’ proposal. See, e.g., EEI/UTC Opposition at 8, 9.

¹⁵² See, e.g., EEI/UTC Opposition at 8. Moreover, we adopt a definition of cost recoverable through regulated pole rental rates that varies with the number of attachers based on the policy considerations explained in the preceding sections, and not based on an assumption that the fully allocated cost of a pole necessarily varies with the number of attachers, as some commenter allege. See, e.g., Letter from Eric B. Langley, Counsel to Ameren et al., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, GN Docket No. 09-51, at 2 (filed Oct. 8, 2015).

¹⁵³ See, e.g., EEI/UTC Opposition at 9.

¹⁵⁴ See, e.g., EEI/UTC Opposition at 8 (discussing the *2011 Pole Attachment Order*). Although EEI/UTC’s initial Opposition to the Petition for Reconsideration argued that adoption of Petitioners’ proposal would “remove any pretense of legitimacy that might be accorded to the two adjustment factors that the Commission has applied to urban and rural areas, and would make the rate formula even more vulnerable to attack on appeal,” EEI/UTC Opposition at 11, in fact the D.C. Circuit in *AEP* relied on the fundamental policy rationales that the Commission had used in adopting its 2011 rule in affirming that rule. See generally *AEP*, 708 F.3d at 189-90.

¹⁵⁵ See, e.g., EEI/UTC Opposition at 10.

and policy basis for our adoption of Petitioners' proposed revision to section 1.1409(e)(2)(i) of the rules, we reject general claims that adopting that proposal would be arbitrary and capricious.¹⁵⁶

40. Nor does our modification of the telecom rate rule render section 224(e)(2) of the Act a nullity, as some allege.¹⁵⁷ For one, the Commission's telecom rate rule requires a comparison of the output of two calculations, and as explained above, even utilities appear to concede that the cost-causation-based calculation in section 1.1409(e)(2)(ii) gives meaning to section 224(e)(2).¹⁵⁸ Moreover, under revised section 1.1409(e)(2)(i) the apportionment specified in section 224(e)(2) is given meaning because it is only by applying that apportionment to the definition of "cost" adopted above that the resulting rate will closely approximate the cable rate, and thus be just and reasonable under the analysis above.¹⁵⁹

41. We also reject claims that our approach to interpreting "cost" otherwise is at odds with Congressional intent and the text and structure of section 224.¹⁶⁰ The *2011 Pole Attachment Order* explained why the statute does not require the telecom rate necessarily to be higher than, or otherwise different from, the cable rate and we find nothing in the record here to undercut that analysis.¹⁶¹ We acknowledge some commenters' arguments that section 224(e)(2) could be read to suggest that Congress envisioned the telecom rate varying with the number of attachers, in contrast to our revised approach to defining cost in section 1.1409(e)(2)(i) of the rules, under which the resulting rate will be the same or very similar regardless of the number of attaching entities.¹⁶² At the same time, although section 224(e)(2) provides for costs to be apportioned in a manner that depends on the number of attachers, it left undefined what costs should be so apportioned.¹⁶³ This is in contrast to section 224(d)(1), which specifies both a cost-based rate methodology and the defined scope of costs to be used for purposes of the cable rate.¹⁶⁴ In particular, although, as some commenters observe, Congress did not simply mandate the cable rate for all attachments,¹⁶⁵ neither did it specify a definition of cost that would require an outcome under

¹⁵⁶ See, e.g., EEI/UTC Opposition at 10; Ameren *et al.* PN Comments at 14. To the extent that commenters also criticize the Petitioners' proposal as not based on "pole cost data," they do not explain how or why such data themselves should dictate the definition of "cost," as opposed to being used to implement a particular definition. See, e.g., EEI/UTC Opposition at 10.

¹⁵⁷ See, e.g., EEI/UTC Opposition at 6-7; Ameren *et al.* PN Comments at 14-15.

¹⁵⁸ See *supra* para. 33.

¹⁵⁹ See *infra* Appendix A; (47 C.F.R. § 1.1409(e)(2)(i), as amended). See also, e.g., NCTA PN Reply at 9-10; NCTA *et al.* Reply at 3-4.

¹⁶⁰ To the extent that some commenters contend that the adoption of Petitioners' proposal would be arbitrary and capricious for essentially the same reasons that they object to the proposal on statutory grounds, we reject them for the same reasons that we decline to adopt their statutory interpretation. See, e.g., EEI/UTC Opposition at 10-11.

¹⁶¹ *2011 Pole Attachment Order*, 26 FCC Rcd at 5313-15, paras. 167-71. See also *id.* at 5307-13, paras. 155-66 (discussing the text and legislative history of section 224). We thus reject any commenters' arguments that simply disagree with elements of that analysis. See, e.g., CenterPoint Energy *et al.* PN Reply at 3-4.

¹⁶² See, e.g., EEI/UTC Opposition at 5-7; EEI/UTC Reply at 24-25; CenterPoint Energy *et al.* PN Reply at 2-4. To the extent that Ameren *et al.* assert more broadly that the Commission cannot define cost in a manner that is linked to the number of attachers (whether or not the ultimate rate varies with the number of attachers), we likewise reject that claim. See, e.g., Ameren *et al.* PN Comments at 14. Nothing in the language of section 224 precludes the Commission from defining cost in a way that is linked to the number of attachers in the manner we do here, where doing so enables us to strike the right policy balance in defining "cost."

¹⁶³ 47 U.S.C. § 224(e)(2).

¹⁶⁴ 47 U.S.C. § 224(d). See also *AEP*, 708 F.3d at 188 ("Section 224(e), the statutory basis for the telecom rate, is in important respects less specific than § 224(d).").

¹⁶⁵ See, e.g., Ameren *et al.* PN Comments at 15-16.

section 224(e)(2) that would, in practice, always vary with the number of attaching entities. Congress thus permitted the Commission to implement section 224(e) in a manner that yielded rates that vary with the number of attachers—an outcome that would depart from the cable rate, notwithstanding the requirement in section 224(e)(1) that the rate be not only just and reasonable but also “nondiscriminatory.”¹⁶⁶ But while permitting such an outcome, we also conclude that Congress did not require such an outcome as mandatory given its use of the ambiguous term “cost.”¹⁶⁷

42. In implementing section 224(e) we consider the broader purposes of section 224, as also informed by other statutory goals and mandates. As in the *2011 Pole Attachment Order*, we find that our interpretation and implementation of section 224(e) here advances those objectives.¹⁶⁸ The Commission has concluded that “[t]he purpose of Section 224 of the Communications Act is to ensure that the deployment of communications networks and the development of competition are not impeded by private ownership and control of the scarce infrastructure and rights-of-way that many communications providers must use in order to reach customers.”¹⁶⁹ This also is borne out by the text of section 224, which emphasizes that the Commission’s fundamental role is to ensure just and reasonable rates, terms, and conditions of access.¹⁷⁰ Other statutory provisions likewise counsel in favor of such an understanding of section 224, as discussed in greater detail in the *2011 Pole Attachment Order* and above.¹⁷¹ For the reasons explained in the preceding discussion, we conclude that the revised telecom rate rule we adopt is necessary to ensure just and reasonable rates for pole access as a backstop for when private negotiations fail. Because we can achieve that outcome by how we define “cost” under section 224(e), while still formally giving meaning to all the language of that provision, we conclude that our adopted approach reasonably implements that provision as understood in the context of section 224 as a whole.

43. We also are not persuaded by arguments that section 224(e)(2) limits the costs to be borne by pole owners.¹⁷² As described above, the Commission’s fundamental responsibility under section 224(e) is to ensure that regulated rates “for pole attachments used by telecommunications carriers to provide telecommunications services” are just, reasonable, and nondiscriminatory.¹⁷³ Read in that context, we interpret section 224(e)(2) only to govern the apportionment of the “cost”—however defined—of unusable space in the rates pole owners charge to telecom attachers. It is true that the methodology used to calculate the apportionment of “cost” to a telecom attacher under section 224(e)(2) involves a calculation of what “all attaching entities” would bear assuming hypothetically that they all

¹⁶⁶ 47 U.S.C. § 224(e)(1).

¹⁶⁷ For the reasons previously stated in the *2011 Pole Attachment Order* and affirmed by the D.C. Circuit, *see, e.g., supra* paras. 12, 31, we reject commenters’ arguments insofar as they are premised on the view that “cost” must mean fully allocated cost or on the view that the Commission lacks significant discretion in interpreting and applying that term. *See, e.g.,* EEI/UTC Opposition at 5-8, 7; EEI/UTC Reply at 24-25; CenterPoint Energy *et al.* PN Reply at 3.

¹⁶⁸ *See 2011 Pole Attachment Order*, 26 FCC Rcd at 5316-21, paras. 172-81. *See also, e.g.,* NCTA PN Reply at 10 & n.39.

¹⁶⁹ *1998 Implementation Order*, 13 FCC Rcd. at 6780, para. 2 (citing 1977 Senate Report at 19, 20). *See also id.* at 6794, para. 31 (“The purpose of the amendments to Section 224 made by the 1996 Act was similar to the purpose behind Section 224 when it was first enacted in 1978, *i.e.*, to remedy the inequitable position between pole owners and those seeking pole attachments.”) (also citing 1977 Senate Report at 19, 20).

¹⁷⁰ 47 U.S.C. § 224(b)(1), (d)(1), (e)(1). *See also* 47 U.S.C. § 224(c) (allowing states to elect to regulate rates, terms and conditions of access in lieu of the Commission).

¹⁷¹ *See, e.g., 2011 Pole Attachment Order*, 26 FCC Rcd at 5316-17, para. 173 (discussing 1996 Act provisions); *supra* Section III.B .

¹⁷² *See, e.g.,* CenterPoint Energy *et al.* PN Reply at 3 n.11.

¹⁷³ *See, e.g., supra* para. 42; 47 U.S.C. § 224(e)(1).

bore an equal apportionment of such cost. But it does not actually govern the cost to be borne by entities other than telecom attachers—whether the pole owner or other attachers.¹⁷⁴

D. The Revisions to the Telecom Rate Rule Are Procedurally Proper

44. Adopting this change to section 1.1409(e)(2)(i) of the rules is procedurally proper. Following the Commission's 2010 *Further Notice* seeking comment on "establish[ing] rental rates for pole attachments that are as low and close to uniform as possible, consistent with section 224 of the Act,"¹⁷⁵ the 2011 *Pole Attachment Order* revised the telecom rate rule in a manner that the Commission anticipated would reflect its balancing of policy concerns.¹⁷⁶ The timely filed Petition for Reconsideration identified flaws in the Commission's factual assumptions underlying section 1.1409(e)(2)(i) of the rules as adopted in the 2011 *Pole Attachment Order* that would cause that rule, in practice, to only poorly reflect the Commission's intended balancing of policy objectives.¹⁷⁷ The Petitioners thus proposed that the Commission, on reconsideration, revise that rule in a manner that "increases the certainty that pole rates will be as close as possible to the cable rate, meets the Commission's intended purposes, and makes the calculation more readily administrable by eliminating the need to distinguish urbanized and non-urbanized areas."¹⁷⁸ Given that clear nexus to the 2011 *Pole Attachment Order*, we find the request in the Petition for Reconsideration to be squarely within the scope of the order from which reconsideration is sought, and we reject arguments to the contrary.¹⁷⁹ Furthermore, for the reasons discussed in the preceding section, we find merit in the Petitioners' arguments, and thus conclude it is in the public interest not only to consider their Petition but also to grant their requested reconsideration.¹⁸⁰

45. We also reject claims that additional notice and comment is needed before we can proceed under the theory that the action in this Order effectively would modify sections 1.1417(c) and (d) of the rules.¹⁸¹ Section 1.1417(c) specifies the Commission's rebuttable presumptions of 5 attaching entities in urbanized areas and 3 attaching entities in non-urbanized areas.¹⁸² Section 1.1417(d) describes

¹⁷⁴ Indeed, under *CenterPoint et al.*'s proposed reading, section 224(e)(2) and (3) seemingly would govern the costs actually to be borne in practice by all attaching entities—not only telecom attachers and pole owners, but also other third party attachers, including non-communications attachers. Such an outcome is at odds with section 224's focus on ensuring just and reasonable pole access for defined categories of attachers. *See, e.g.*, 47 U.S.C. § 224(a)(4), (b)(1), (d)(1), (e)(1). In support of their argument, *CenterPoint et al.* cite a discussion in paragraph 59 of the 2001 *Reconsideration Order*, but the actual decision made in that paragraph bore only on what entities to count for purposes of the calculation to be performed under section 224(e)(2), and in that regard is not inconsistent with our interpretation above. *CenterPoint et al.* PN Reply at 3 n.11. To the extent that paragraph 59 of the 2001 *Reconsideration Order* also could be read to suggest that the right outcome, as a matter of statutory interpretation, is one consistent with what *CenterPoint et al.* advocate here, we disavow that position both for the reasons stated in the text and because, in pertinent part, the 2001 *Reconsideration Order* places mistaken reliance on a portion of the Conference Report for the 1996 Act describing the pole attachment provisions in the House bill. *Compare 2001 Reconsideration Order*, 16 FCC Rcd at 12133-34, para. 59 n.204 (quoting a description of the House bill from the Conference Report) with, *e.g.*, 2011 *Pole Attachment Order*, 26 FCC Rcd at 5311-13, paras. 162-66 (discussing legislative history of section 224, and rejecting utilities' proposed reliance on legislative history associated with the House bill).

¹⁷⁵ *Further Notice*, 25 FCC Rcd at 11874, para. 20. *See generally id.* at 11909-24, paras. 110-42.

¹⁷⁶ *See supra* para. 34.

¹⁷⁷ Petition for Reconsideration at 4-7.

¹⁷⁸ *Id.* at 6-7.

¹⁷⁹ *See, e.g.*, EEI/UTC Opposition at 3.

¹⁸⁰ *See, e.g.*, NCTA et al. Reply at 7-8. We thus reject arguments that we should not consider the facts or arguments raised in the Petition for Reconsideration. *See, e.g.*, EEI/UTC Opposition at 3.

¹⁸¹ *See, e.g.*, Ameren et al. PN Comments at 16-17.

¹⁸² 47 C.F.R. § 1.1417(c).

how a utility can instead establish its own presumptive average number of attaching entities, subject to rebuttal.¹⁸³ As a threshold matter, we are not persuaded by commenters' claims that the Petitioners' proposed revision to section 1.1409(e)(2)(i) would render those rules "moot."¹⁸⁴ Under the utilities' own theory, the Commission-specified presumptions in section 1.1417(c) would have increased, rather than diminished, significance when performing the section 1.1409(e)(2)(i) calculation because it would obviate the need for utilities to expend the effort to develop their own presumptive average numbers of attachers if they believe that variation in the number of attachers would not matter.¹⁸⁵ Further, although the result of the calculation in section 1.1409(e)(2)(i) frequently will be higher than that yielded by the cost-causation-based calculation in section 1.1409(e)(2)(ii), our rules provide for both to be performed, with the possibility that there will be cases where the section 1.1409(e)(2)(ii) calculation is controlling. The outcome under section 1.1409(e)(2)(ii) unquestionably does vary with the number of attaching entities, and thus the utilities' ability to develop their own presumptive number of attaching entities under section 1.1417(d) remains important where the cost-causation-based calculation would be, or could be, controlling.¹⁸⁶

46. Although we are not persuaded that any implications of our change to section 1.1409(e)(2)(i) of the rules for sections 1.1417(c) and (d) constitute substantive rule changes, even assuming *arguendo* that they were viewed in that manner, we find there was adequate notice and opportunity to comment. As noted above, the Commission's 2010 *Further Notice* sought comment on "establish[ing] rental rates for pole attachments that are as low and close to uniform as possible, consistent with section 224 of the Act," seeking comment on particular alternative approaches and variations that might be adopted consistent with the Commission's statutory responsibilities.¹⁸⁷ For example, the *Further Notice* included requests for comment on a proposal to revise the telecom rate rule so that it was the higher of a rate equal to the cable rate or a cost-causation-based rate, including regarding the administrability of such an approach and how it would relate to other Commission policies.¹⁸⁸ Flowing from that *Further Notice*, the 2011 *Pole Attachment Order* adopted revisions to the telecom rate rule, and the Petition for Reconsideration requested reconsideration of the resulting rule in various respects, all within the scope of the underlying *Order*.¹⁸⁹ The Commission sought comment on the Petition for Reconsideration at the time it was filed, and provided a further opportunity to comment on the requested rule changes subsequent to the *Open Internet Order*.¹⁹⁰ We conclude that any implications for

¹⁸³ 47 C.F.R. § 1.1417(d).

¹⁸⁴ Ameren *et al.* PN Comments at 17; Ameren *et al.* PN Reply at 2.

¹⁸⁵ See Ameren *et al.* PN Comments at 17. See also, *e.g.*, Ameren *et al.* PN Reply at 4-5 (asserting that rebutting the presumptions requires time and money).

¹⁸⁶ 47 C.F.R. § 1409(e)(2)(ii). To the extent that utilities have in the past found it beneficial to elect, under section 1.1417(d) of the rules, to rebut the presumed number of attachers, we conclude that they have already sufficiently benefitted from such past actions under the rules that applied at the time. Further, insofar as they undertook such activities in the last few years, they did so against the backdrop of the pending Petition for Reconsideration seeking a change to the calculation under section 1.1409(e)(2)(ii). We thus reject suggestions that past, unquantified efforts utilities have undertaken to rebut the presumed number of attachers counsels against any rule change that might somehow diminish the future value of those past efforts. See, *e.g.*, Ameren *et al.* PN Reply at 4-5.

¹⁸⁷ *Further Notice*, 25 FCC Rcd at 11874, para. 20, 11909-24, paras. 110-42, 11929, para. 158.

¹⁸⁸ *Id.* at 11923-24, paras. 140-41.

¹⁸⁹ We note that "the subject matter of petitions for reconsideration of Commission action must relate to the scope of the matters addressed in the underlying proceeding." *Implementation of Section 302 of the Telecommunications Act of 1996 Open Video Systems*, CS Docket No. 96-46, Order on Reconsideration, 13 FCC Rcd 14553, 14559, para. 13 (1998). Although the Petition for Reconsideration was at times worded in terms of a 'clarification' of the 2011 rules as one option, it unambiguously was requesting a change to the codified rule. See generally Petition for Reconsideration.

¹⁹⁰ See *supra* notes 55 and 61.

the continuing significance of section 1.1417(c) and (d) resulting from our adoption of the Petitioners' proposal should have been understood to be within the scope of issues subject to comment—indeed, commenters themselves appear to suggest that the implications for section 1.1417(c) and (d) are a necessary and unavoidable consequence of the adoption of that proposal.¹⁹¹ As a result, we concluded that even assuming *arguendo* that notice and comment were required regarding the effects of a change in section 1.1409(e)(2)(i) on the presumption rules in section 1.1417(c) and (d), that was satisfied here.¹⁹²

IV. PROCEDURAL MATTERS

A. Paperwork Reduction Act Analysis

47. This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4).

B. Regulatory Flexibility Analysis

48. As required by the Regulatory Flexibility Act of 1980 (RFA),¹⁹³ the Commission includes in Appendix B a Supplemental Final Regulatory Flexibility Analysis (FRFA) relating to this Order on Reconsideration.

C. Congressional Review Act

49. The Commission will send a copy of the Order on Reconsideration, including the FRFA, in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act.¹⁹⁴

V. ORDERING CLAUSES

50. Accordingly, IT IS ORDERED that pursuant to sections 1, 4(i), 4(j), 201(b), 224, 251(b)(4), and 303(r), of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201(b), 224, 251(b)(4), 303(r), this Order on Reconsideration IS ADOPTED.

51. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), 201(b), 224, and 303(r), of the Communications Act, as amended, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201(b), 224, 303(r), that the Petition for Reconsideration or Clarification filed by the National Cable and Telecommunications Association, COMPTel, and tw telecom inc., is GRANTED to the extent indicated herein, and otherwise is DISMISSED.

52. IT IS FURTHER ORDERED that Part 1 of the Commission's rules IS AMENDED as set forth in Appendix A.

¹⁹¹ See, e.g., Ameren et al. PN Comments at 16-17.

¹⁹² Given our findings that action is procedurally appropriate, is within our existing authority, and is warranted by the record here, we likewise are not persuaded that, as a policy matter, we should elect to proceed by first issuing a new Notice of Proposed Rulemaking, as some suggest. See, e.g., Ameren et al. PN Comments at 17. For those same reasons, we reject arguments that we should defer taking the steps adopted here pending further action by Congress. See, e.g., Ameren et al. PN Comments at 16.

¹⁹³ The RFA, see 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

¹⁹⁴ See 5 U.S.C. § 801(a)(1)(A).

53. IT IS FURTHER ORDERED that, pursuant to sections 1.4(b)(1) and 1.103(a) of the Commission's rules, 47 CFR §§ 1.4(b)(1), 1.103(a), this Order on Reconsideration SHALL BE EFFECTIVE 30 days after publication of a summary in the Federal Register.

54. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Order on Reconsideration, including the Supplemental Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Final Rule

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

1.1409 Commission consideration of the complaint.

* * * * *

(e) * * *

(2) * * *

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

$$\text{Rate} = \text{Space Factor} \times \text{Cost}$$

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).”~~

in Service Areas where the number of Attaching Entities is 5 = 0.66 x (Net Cost of a Bare Pole x Carrying Charge Rate)

in Service Areas where the number of Attaching Entities is 4 = 0.56 x (Net Cost of a Bare Pole x Carrying Charge Rate)

in Service Areas where the number of Attaching Entities is 3 = 0.44 x (Net Cost of a Bare Pole x Carrying Charge Rate)

in Service Areas where the number of Attaching Entities is 2 = 0.31 x (Net Cost of a Bare Pole x Carrying Charge Rate)

in Service Areas where the number of Attaching Entities is not a whole number = N x (Net Cost of a Bare Pole x Carrying Charge Rate), where N is interpolated from the cost allocator associated with the nearest whole numbers above and below the number of Attaching Entities.

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

- (ii) * * * * *

APPENDIX B

Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),

2. ¹ an Initial Regulatory Flexibility Analysis (IRFA) was included in the *Order and Further Notice* in WC Docket No. 07-245 and GN Docket No. 09-51.² The Commission sought written public comment on the proposals in these dockets, including comment on the IRFA. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.³

A. Need for, and Objectives of, the Proposed Rules

3. In this *Order on Reconsideration*, the Commission further implements its policy of bringing parity to pole attachment rates at or near the 47 C.F.R. § 1.1409(e)(1) cable rate formula level, including rates that are calculated using the 47 C.F.R. § 1.1409(d)(2) telecom rate formula. The *2011 Pole Attachment Order* adopted cost allocators in the telecom rate formula that were intended to closely approximate the treatment of cost in the cable rate formula. However, these allocators perform successfully only where poles have 5 attaching entities (0.66 percent of cost) or 3 attaching entities (0.44 percent of cost). To build on that limited success, the Commission now adds cost allocators for poles with 2 attaching entities (0.31 percent of costs) and 4 attaching entities (0.56 percent of cost). When the average number of attaching entities is a fraction, the applicable cost allocator will be interpolated from the two closest whole numbers. In this way, this *Order on Reconsideration* spares cable operators that also provide a telecommunications service (e.g., broadband Internet access service) from having to pay attachment rates that would be approximately 70 percent higher than the rate they pay under the existing rules. Pole attachment rate parity at the cable rate level also harmonizes regulatory treatment between Commission-regulated states and states that set their own pole attachment rates, which prevents any deterrence to investment in Commission-regulated states. By keeping pole attachment rates unified and low, the Commission furthers its overarching goal to accelerate deployment of broadband by removing barriers to infrastructure investment.

B. Summary of the Significant Issues Raised by the Public Comments in Response to the IRFA and Summary of the Assessment of the Agency of Such Issues

4. No comments relating to any of the IRFAs have been filed since the *2011 Pole Attachment Order*. In making the determinations reflected in the *Order on Reconsideration*, we have considered the impact of our actions on small entities.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules May Apply

5. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules and policies, if adopted.⁴ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."⁵ In addition, the term "small business" has

¹ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§601–12, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

² See *Order and Further Notice*, 25 FCC Rcd at 11939-57, Appx. D.

³ See 5 U.S.C. § 604.

⁴ 5 U.S.C. § 603(b)(3).

⁵ 5 U.S.C. § 601(6).

the same meaning as the term “small business concern” under the Small Business Act.⁶ A “small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.⁷

6. *Small Businesses.* As of 2011, there are a total of approximately 28.2 million small businesses, according to the SBA.⁸

7. *Small Organizations.* As of 2007, there are approximately 1.6 million small organizations.⁹ A “small organization” is generally “any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.”¹⁰

8. *Small Governmental Jurisdictions.* The term “small governmental jurisdiction” is defined generally as “governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.”¹¹ Census Bureau data for 2011 indicate that there were 90,056 local governmental jurisdictions in the United States.¹² We estimate that, of this total, 89,327 entities were “small governmental jurisdictions.”¹³ Thus, we estimate that most governmental jurisdictions are small.

9. We have included small incumbent local exchange carriers in this present RFA analysis. As noted above, a “small business” under the RFA is one that, inter alia, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and “is not dominant in its field of operation.”¹⁴ The SBA’s Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not “national” in scope.¹⁵ We have therefore included small incumbent local

⁶ 5 U.S.C. § 601(3) (incorporating by reference the definition of “small-business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

⁷ 15 U.S.C. § 632.

⁸ See SBA, Office of Advocacy, “Frequently Asked Questions,” <http://web.sba.gov/faqs> (March 2014) (accessed Jan. 2009).

⁹ Independent Sector, *The New Nonprofit Almanac & Desk Reference* (2002).

¹⁰ 5 U.S.C. § 601(4).

¹¹ 5 U.S.C. § 601(5).

¹² The 2011 Census Data for small governmental organizations are not presented based on the size of the population in each organization. As stated above, there were 90,056 local governmental organizations in 2011. As a basis for estimating how many of these 90,056 local organizations were small, we note that there were a total of 729 cities and towns (incorporated places and civil divisions) with populations over 50,000. See <http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>. If we subtract the 729 cities and towns that exceed the 50,000 population threshold, we conclude that approximately 789,237 are small.

¹³ We assume that the villages, school districts, and special districts are small, and total 48,558. See U.S. Census Bureau, *Statistical Abstract of the United States: 2006*, section 8, p. 273, Table 417. For 2002, Census Bureau data indicate that the total number of county, municipal, and township governments nationwide was 38,967, of which 35,819 were small. *Id.*

¹⁴ 15 U.S.C. § 632.

¹⁵ Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of “small-business concern,” which the RFA incorporates into its own definition of “small business.” See 15 U.S.C. § 632(a) (“Small Business Act”); 5 U.S.C. § 601(3) (“RFA”). SBA regulations interpret “small business concern” to include the concept of dominance on a national basis. See 13 C.F.R. § 121.102(b).

exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

10. *Incumbent Local Exchange Carriers ("ILECs")*. Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.¹⁶ According to Commission data,¹⁷ 1,311 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,311 carriers, an estimated 1,024 have 1,500 or fewer employees and 287 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our proposed action.

11. *Competitive Local Exchange Carriers ("CLECs"), Competitive Access Providers ("CAPs"), "Shared-Tenant Service Providers," and "Other Local Service Providers."* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.¹⁸ According to Commission data,¹⁹ 1005 carriers have reported that they are engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 1005 carriers, an estimated 918 have 1,500 or fewer employees and 87 have more than 1,500 employees. In addition, 16 carriers have reported that they are "Shared-Tenant Service Providers," and all 16 are estimated to have 1,500 or fewer employees. In addition, 89 carriers have reported that they are "Other Local Service Providers." Of the 89, all have 1,500 or fewer employees. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, "Shared-Tenant Service Providers," and "Other Local Service Providers" are small entities that may be affected by our proposed action.

12. *Interexchange Carriers ("IXCs")*. Neither the Commission nor the SBA has developed a small business size standard specifically for providers of interexchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.²⁰ According to Commission data,²¹ 300 carriers have reported that they are engaged in the provision of interexchange service. Of these, an estimated 268 have 1,500 or fewer employees and 32 have more than 1,500 employees. Consequently, the Commission estimates that the majority of IXCs are small entities that may be affected by our proposed action.

13. *Wireless Telecommunications Carriers (except satellite)*. This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular phone services, paging services, wireless Internet access,

¹⁶ 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 517110.

¹⁷ FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, "*Trends in Telephone Service*" at Table 5.3, Page 5-5 (Aug. 2008) ("*Trends in Telephone Service*"). This source uses data that are current as of November 1, 2006.

¹⁸ 13 C.F.R. § 121.201, NAICS code 517110.

¹⁹ "*Trends in Telephone Service*" at Table 5.3.

²⁰ 13 C.F.R. § 121.201, NAICS code 517110.

²¹ "*Trends in Telephone Service*" at Table 5.3.

and wireless video services.²² The appropriate size standard under SBA rules is for the category Wireless Telecommunications Carriers (except satellite). For that category, a business is small if it has 1,500 or fewer employees.²³ For this category, census data for 2007 show that there were 1,383 firms that operated for the entire year.²⁴ Of this total, 1368 firms had employment of fewer than 1000 employees. The Census data about firms employing more than 1000 employees does not identify the number of firms that employed 1500 employees or less.²⁵ Thus under this category and the associated small business size standard, the Commission estimates that the majority of wireless telecommunications carriers (except satellite) are small entities that may be affected by rules proposed in the Notice.²⁶

14. *Wireless Telecommunications Carriers (except Satellite)*. Since 2007, the Census Bureau has placed wireless firms within this new, broad, economic census category.²⁷ Prior to that time, such firms were within the now-superseded categories of "Paging" and "Cellular and Other Wireless Telecommunications."²⁸ Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.²⁹ Because Census Bureau data are not yet available for the new category, we will estimate small business prevalence using the prior categories and associated data. For the category of Paging, data for 2002 show that there were 807 firms that operated for the entire year.³⁰ Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more.³¹ For the category of Cellular and Other Wireless Telecommunications, data for 2002 show that there were 1,397 firms that operated for the entire year.³² Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more.³³ Thus, we estimate that the majority of wireless firms are small.

²² U.S. Census Bureau, North American Industry Classification System, Definition of "Wireless Telecommunications Carriers (except Satellite)," NAICS code 517210, available at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517210&search=2007%20NAICS%20Search>.

²³ See 13 C.F.R. § 121.201, NAICS code 517210.

²⁴ U.S. Census Bureau, *2007 Economic Census of the United States*, Table EC0751SSSZ5, Information: Subject Series - Establishment and Firm Size: Employment Size of Firms for the United States: 2007, NAICS Code 517210, available at http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_51SSSZ5&prodType=table

²⁵ *Id.* Available census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with "1,000 employees or more."

²⁶ *Id.*

²⁷ U.S. Census Bureau, 2007 NAICS Definitions, "517210 Wireless Telecommunications Categories (Except Satellite)"; <http://www.census.gov/naics/2007/def/ND517210.HTM#N517210>.

²⁸ U.S. Census Bureau, 2002 NAICS Definitions, "517211 Paging"; <http://www.census.gov/epcd/naics02/def/NDEF517.HTM>; U.S. Census Bureau, 2002 NAICS Definitions, "517212 Cellular and Other Wireless Telecommunications"; <http://www.census.gov/epcd/naics02/def/NDEF517.HTM>.

²⁹ 13 C.F.R. § 121.201, NAICS code 517210 (2007 NAICS). The now-superseded, pre-2007 C.F.R. citations were 13 C.F.R. § 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS).

³⁰ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 5, NAICS code 517211 (issued Nov. 2005).

³¹ *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with "1000 employees or more."

³² U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 5, NAICS code 517212 (issued Nov. 2005).

³³ *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with "1000 employees or more."

15. *Wireless Telephony.* Wireless telephony includes cellular, personal communications services, and specialized mobile radio telephony carriers. As noted, the SBA has developed a small business size standard for Wireless Telecommunications Carriers (except Satellite).³⁴ Under the SBA small business size standard, a business is small if it has 1,500 or fewer employees.³⁵ According to Trends in telephone Service data, 413 carriers reported that they were engaged in wireless telephony.³⁶ Of these, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees.³⁷ Therefore, more than half of these entities can be considered small.

16. *Broadband Personal Communications Service.* The broadband personal communications services ("PCS") spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission has created a small business size standard for Blocks C and F as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.³⁸ For Block F, an additional small business size standard for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.³⁹ These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA.⁴⁰ No small businesses within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 "small" and "very small" business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F.⁴¹ In 1999, the Commission reaucted 155 C, D, E, and F Block licenses; there were 113 small business winning bidders.⁴²

17. In 2001, the Commission completed the auction of 422 C and F Broadband PCS licenses in Auction 35. Of the 35 winning bidders in this auction, 29 qualified as "small" or "very small" businesses.⁴³ Subsequent events, concerning Auction 35, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant. In 2005, the Commission completed an auction of 188 C block licenses and 21 F block licenses in Auction 58. There were 24 winning bidders for 217 licenses.⁴⁴ Of the 24 winning bidders, 16 claimed small business status and won 156 licenses. In 2007, the Commission completed an auction of 33 licenses in the A, C, and F Blocks in

³⁴ 13 C.F.R. § 121.201, NAICS code 517210.

³⁵ *Id.*

³⁶ Trends in Telephone Service, tbl. 5.3

³⁷ *Id.*

³⁸ See *Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, Report and Order, 11 FCC Rcd 7824, 7850–52, paras. 57–60 (1996) ("PCS Report and Order"); see also 47 C.F.R. § 24.720(b).

³⁹ See *PCS Report and Order*, 11 FCC Rcd at 7852, para. 60.

⁴⁰ See *Alvarez Letter 1998*.

⁴¹ FCC News, "Broadband PCS, D, E and F Block Auction Closes," No. 71744 (rel. Jan. 14, 1997).

⁴² See "C, D, E, and F Block Broadband PCS Auction Closes," *Public Notice*, 14 FCC Rcd 6688 (WTB 1999).

⁴³ See "C and F Block Broadband PCS Auction Closes; Winning Bidders Announced," *Public Notice*, 16 FCC Rcd 2339 (2001).

⁴⁴ See "Broadband PCS Spectrum Auction Closes; Winning Bidders Announced for Auction No. 58," *Public Notice*, 20 FCC Rcd 3703 (2005).

Auction 71.⁴⁵ Of the 14 winning bidders, six were designated entities.⁴⁶ In 2008, the Commission completed an auction of 20 Broadband PCS licenses in the C, D, E and F block licenses in Auction 78.⁴⁷

18. *Advanced Wireless Services.* In 2008, the Commission conducted the auction of Advanced Wireless Services ("AWS") licenses.⁴⁸ This auction, which as designated as Auction 78, offered 35 licenses in the AWS 1710-1755 MHz and 2110-2155 MHz bands ("AWS-1"). The AWS-1 licenses were licenses for which there were no winning bids in Auction 66. That same year, the Commission completed Auction 78. A bidder with attributed average annual gross revenues that exceeded \$15 million and did not exceed \$40 million for the preceding three years ("small business") received a 15 percent discount on its winning bid. A bidder with attributed average annual gross revenues that did not exceed \$15 million for the preceding three years ("very small business") received a 25 percent discount on its winning bid. A bidder that had combined total assets of less than \$500 million and combined gross revenues of less than \$125 million in each of the last two years qualified for entrepreneur status.⁴⁹ Four winning bidders that identified themselves as very small businesses won 17 licenses.⁵⁰ Three of the winning bidders that identified themselves as a small business won five licenses. Additionally, one other winning bidder that qualified for entrepreneur status won 2 licenses.

19. *Narrowband Personal Communications Services.* In 1994, the Commission conducted an auction for Narrowband PCS licenses. A second auction was also conducted later in 1994. For purposes of the first two Narrowband PCS auctions, "small businesses" were entities with average gross revenues for the prior three calendar years of \$40 million or less.⁵¹ Through these auctions, the Commission awarded a total of 41 licenses, 11 of which were obtained by four small businesses.⁵² To ensure meaningful participation by small business entities in future auctions, the Commission adopted a two-tiered small business size standard in the Narrowband PCS Second Report and Order.⁵³ A "small business" is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$40 million.⁵⁴ A "very small business" is an entity that,

⁴⁵ See "Auction of Broadband PCS Spectrum Licenses Closes; Winning Bidders Announced for Auction No. 71," *Public Notice*, 22 FCC Rcd 9247 (2007).

⁴⁶ *Id.*

⁴⁷ See Auction of AWS-1 and Broadband PCS Licenses Rescheduled For August 13, 3008, Notice of Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures For Auction 78, *Public Notice*, 23 FCC Rcd 7496 (2008) ("AWS-1 and Broadband PCS Procedures Public Notice").

⁴⁸ See AWS-1 and Broadband PCS Procedures Public Notice, 23 FCC Rcd 7496. Auction 78 also included an auction of Broadband PCS licenses.

⁴⁹ *Id.* at 23 FCC Rcd at 7521–22.

⁵⁰ See "Auction of AWS-1 and Broadband PCS Licenses Closes, Winning Bidders Announced for Auction 78, Down Payments Due September 9, 2008, FCC Forms 601 and 602 Due September 9, 2008, Final Payments Due September 23, 2008, Ten-Day Petition to Deny Period", *Public Notice*, 23 FCC Rcd 12749–65 (2008).

⁵¹ *Implementation of Section 309(j) of the Communications Act – Competitive Bidding Narrowband PCS*, Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 10 FCC Rcd 175, 196, para. 46 (1994).

⁵² See "Announcing the High Bidders in the Auction of ten Nationwide Narrowband PCS Licenses, Winning Bids Total \$617,006,674," *Public Notice*, PNWL 94-004 (rel. Aug. 2, 1994); "Announcing the High Bidders in the Auction of 30 Regional Narrowband PCS Licenses; Winning Bids Total \$490,901,787," *Public Notice*, PNWL 94-27 (rel. Nov. 9, 1994).

⁵³ *Amendment of the Commission's Rules to Establish New Personal Communications Services*, Narrowband PCS, Second Report and Order and Second Further Notice of Proposed Rule Making, 15 FCC Rcd 10456, 10476, para. 40 (2000) ("Narrowband PCS Second Report and Order").

⁵⁴ *Narrowband PCS Second Report and Order*, 15 FCC Rcd at 10476, para. 40.

together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$15 million.⁵⁵ The SBA has approved these small business size standards.⁵⁶ A third auction was conducted in 2001. Here, five bidders won 317 (Metropolitan Trading Areas and nationwide) licenses.⁵⁷ Three of these claimed status as a small or very small entity and won 311 licenses.

20. *Cellular Radiotelephone Service.* Auction 77 was held to resolve one group of mutually exclusive applications for Cellular Radiotelephone Service licenses for unserved areas in New Mexico.⁵⁸ Bidding credits for designated entities were not available in Auction 77.⁵⁹ In 2008, the Commission completed the closed auction of one unserved service area in the Cellular Radiotelephone Service, designated as Auction 77. Auction 77 concluded with one provisionally winning bid for the unserved area totaling \$25,002.⁶⁰

21. *Fixed Microwave Services.* Fixed microwave services include common carrier,⁶¹ private operational-fixed,⁶² and broadcast auxiliary radio services.⁶³ At present, there are approximately 22,015 common carrier fixed licensees and 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. The Commission has not created a size standard for a small business specifically with respect to fixed microwave services. For purposes of this analysis, the Commission uses the SBA small business size standard for the category Wireless Telecommunications Carriers (except Satellite), which is 1,500 or fewer employees.⁶⁴ The Commission does not have data specifying the number of these licensees that have no more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of fixed microwave service licensees that would qualify as small business concerns under the SBA's small business size standard. Consequently, the Commission estimates that there are 22,015 or fewer common carrier fixed licensees and 61,670 or fewer private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services that may be small and may be affected by the rules and policies proposed herein. We note, however, that the common carrier microwave fixed licensee category includes some large entities.

⁵⁵ *Id.*

⁵⁶ *See Alvarez Letter 1998.*

⁵⁷ *See* "Narrowband PCS Auction Closes," *Public Notice*, 16 FCC Rcd 18663 (WTB 2001).

⁵⁸ *See* Closed Auction of Licenses for Cellular Unserved Service Area Scheduled for June 17, 2008, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 77, *Public Notice*, 23 FCC Rcd 6670 (2008).

⁵⁹ *Id.* at 6685.

⁶⁰ *See* Auction of Cellular Unserved Service Area License Closes, Winning Bidder Announced for Auction 77, Down Payment due July 2, 2008, Final Payment due July 17, 2008, *Public Notice*, 23 FCC Rcd 9501 (2008).

⁶¹ *See* 47 C.F.R. § 101 *et seq.* for common carrier fixed microwave services (except Multipoint Distribution Service).

⁶² Persons eligible under parts 80 and 90 of the Commission's Rules can use Private Operational-Fixed Microwave services. *See* 47 C.F.R. Parts 80 and 90. Stations in this service are called operational-fixed to distinguish them from common carrier and public fixed stations. Only the licensee may use the operational-fixed station, and only for communications related to the licensee's commercial, industrial, or safety operations.

⁶³ Auxiliary Microwave Service is governed by Part 74 of Title 47 of the Commission's Rules. *See* 47 C.F.R. Part 74. This service is available to licensees of broadcast stations and to broadcast and cable network entities. Broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile television pickups, which relay signals from a remote location back to the studio.

⁶⁴ 13 C.F.R. § 121.201, NAICS code 517210.

22. *Local Multipoint Distribution Service.* Local Multipoint Distribution Service ("LMDS") is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.⁶⁵ The auction of the 986 LMDS licenses began and closed in 1998. The Commission established a small business size standard for LMDS licenses as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.⁶⁶ An additional small business size standard for "very small business" was added as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.⁶⁷ The SBA has approved these small business size standards in the context of LMDS auctions.⁶⁸ There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. In 1999, the Commission re-auctioned 161 licenses; there were 32 small and very small businesses winning that won 119 licenses.

23. *Rural Radiotelephone Service.* The Commission has not adopted a size standard for small businesses specific to the Rural Radiotelephone Service.⁶⁹ A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio System ("BETRS").⁷⁰ In the present context, we will use the SBA's small business size standard applicable to Wireless Telecommunications Carriers (except Satellite), *i.e.*, an entity employing no more than 1,500 persons.⁷¹ There are approximately 1,000 licensees in the Rural Radiotelephone Service, and the Commission estimates that there are 1,000 or fewer small entity licensees in the Rural Radiotelephone Service that may be affected by the rules and policies proposed herein.

24. *Broadband Radio Service and Educational Broadband Service.* Broadband Radio Service systems, previously referred to as Multipoint Distribution Service ("MDS") and Multichannel Multipoint Distribution Service ("MMDS") systems, and "wireless cable," transmit video programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service ("BRS") and Educational Broadband Service ("EBS") (previously referred to as the Instructional Television Fixed Service ("ITFS")).⁷² In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than \$40 million in the previous three calendar years.⁷³ The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas ("BTAs"). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction

⁶⁵ See *Rulemaking to Amend Parts 1, 2, 21, 25, of the Commission's Rules to Redesignate the 27.5–29.5 GHz Frequency Band, Reallocate the 29.5–30.5 Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rule Making, 12 FCC Rcd 12545, 12689–90, para. 348 (1997) ("*LMDS Second Report and Order*").

⁶⁶ See *LMDS Second Report and Order*, 12 FCC Rcd at 12689–90, para. 348.

⁶⁷ See *id.*

⁶⁸ See *Alvarez to Phythyon Letter 1998*.

⁶⁹ The service is defined in § 22.99 of the Commission's Rules, 47 C.F.R. § 22.99.

⁷⁰ BETRS is defined in §§ 22.757 and 22.759 of the Commission's Rules, 47 C.F.R. §§ 22.757 and 22.759.

⁷¹ 13 C.F.R. § 121.201, NAICS code 517210.

⁷² *Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, MM Docket No. 94-131 and PP Docket No. 93-253, Report and Order, 10 FCC Rcd 9589, 9593, para. 7 (1995) ("*MDS Auction R&O*").

⁷³ 47 C.F.R. § 21.961(b)(1).

winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent BRS licensees that are considered small entities.⁷⁴ After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 BRS licensees that are defined as small businesses under either the SBA or the Commission's rules. In 2009, the Commission conducted Auction 86, the sale of 78 licenses in the BRS areas.⁷⁵ The Commission offered three levels of bidding credits: (i) a bidder with attributed average annual gross revenues that exceed \$15 million and do not exceed \$40 million for the preceding three years (small business) will receive a 15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed \$3 million and do not exceed \$15 million for the preceding three years (very small business) will receive a 25 percent discount on its winning bid; and (iii) a bidder with attributed average annual gross revenues that do not exceed \$3 million for the preceding three years (entrepreneur) will receive a 35 percent discount on its winning bid.⁷⁶ Auction 86 concluded in 2009 with the sale of 61 licenses.⁷⁷ Of the ten winning bidders, two bidders that claimed small business status won 4 licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses.

25. In addition, the SBA's Cable Television Distribution Services small business size standard is applicable to EBS. There are presently 2,032 EBS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities.⁷⁸ Thus, we estimate that at least 1,932 licensees are small businesses. Since 2007, Cable Television Distribution Services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies."⁷⁹ The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. To gauge small business prevalence for these cable services we must, however, use current census data that are based on the previous category of Cable and Other Program Distribution and its associated size standard; that size standard was: all such firms having \$13.5 million or less in annual receipts.⁸⁰ According to Census Bureau data for 2002, there were a total of 1,191 firms in this previous category that operated for the entire year.⁸¹ Of this total, 1,087 firms had annual

⁷⁴ 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standard.

⁷⁵ Auction of Broadband Radio Service (BRS) Licenses, Scheduled for October 27, 2009, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 86, *Public Notice*, 24 FCC Rcd 8277 (2009).

⁷⁶ *Id.* at 8296.

⁷⁷ Auction of Broadband Radio Service Licenses Closes, Winning Bidders Announced for Auction 86, Down Payments Due November 23, 2009, Final Payments Due December 8, 2009, Ten-Day Petition to Deny Period, *Public Notice*, 24 FCC Rcd 13572 (2009).

⁷⁸ The term "small entity" within SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)–(6). We do not collect annual revenue data on EBS licensees.

⁷⁹ U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers" (partial definition); <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

⁸⁰ 13 C.F.R. § 121.201, NAICS code 517110.

⁸¹ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005).

receipts of under \$10 million, and 43 firms had receipts of \$10 million or more but less than \$25 million.⁸² Thus, the majority of these firms can be considered small.

26. *Cable Television Distribution Services.* Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies."⁸³ The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. To gauge small business prevalence for these cable services we must, however, use current census data that are based on the previous category of Cable and Other Program Distribution and its associated size standard; that size standard was: all such firms having \$13.5 million or less in annual receipts.⁸⁴ According to Census Bureau data for 2002, there were a total of 1,191 firms in this previous category that operated for the entire year.⁸⁵ Of this total, 1,087 firms had annual receipts of under \$10 million, and 43 firms had receipts of \$10 million or more but less than \$25 million.⁸⁶ Thus, the majority of these firms can be considered small.

27. *Cable Companies and Systems.* The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers, nationwide.⁸⁷ Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard.⁸⁸ In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.⁸⁹ Industry data indicate that, of 6,635 systems nationwide, 5,802 systems have fewer than 10,000 subscribers, and an additional 302 systems have 10,000-19,999 subscribers.⁹⁰ Thus, under this second size standard, most cable systems are small.

28. *Cable System Operators.* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000."⁹¹ The Commission has determined that an operator serving fewer than 677,000

⁸² *Id.* An additional 61 firms had annual receipts of \$25 million or more.

⁸³ U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers" (partial definition); <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

⁸⁴ 13 C.F.R. § 121.201, NAICS code 517110.

⁸⁵ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005).

⁸⁶ *Id.* An additional 61 firms had annual receipts of \$25 million or more.

⁸⁷ 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of \$100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

⁸⁸ These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, "Top 25 Cable/Satellite Operators," pages A-8 & C-2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006*, "Ownership of Cable Systems in the United States," pages D-1805 to D-1857.

⁸⁹ 47 C.F.R. § 76.901(c).

⁹⁰ Warren Communications News, *Television & Cable Factbook 2008*, "U.S. Cable Systems by Subscriber Size," page F-2 (data current as of Oct. 2007). The data do not include 851 systems for which classifying data were not available.

⁹¹ 47 U.S.C. § 543(m)(2); see 47 C.F.R. § 76.901(f) & nn.1-3.

subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.⁹² Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard.⁹³ We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million,⁹⁴ and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

29. *Open Video Systems.* The open video system (OVS) framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming services by local exchange carriers.⁹⁵ The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,⁹⁶ OVS falls within the SBA small business size standard covering cable services, which is “Wired Telecommunications Carriers.”⁹⁷ The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. To gauge small business prevalence for such services we must, however, use current census data that are based on the previous category of Cable and Other Program Distribution and its associated size standard; that size standard was: all such firms having \$13.5 million or less in annual receipts.⁹⁸ According to Census Bureau data for 2002, there were a total of 1,191 firms in this previous category that operated for the entire year.⁹⁹ Of this total, 1,087 firms had annual receipts of under \$10 million, and 43 firms had receipts of \$10 million or more but less than \$25 million.¹⁰⁰ Thus, the majority of cable firms can be considered small. In addition, we note that the Commission has certified some OVS operators, with some now providing service.¹⁰¹ Broadband service providers (“BSPs”) are currently the only significant holders of OVS certifications or local OVS franchises.¹⁰² The Commission does not have financial or employment information regarding the entities authorized to provide OVS, some of which may not yet be operational. Thus, again, at least some of the OVS operators may qualify as small entities.

⁹² 47 C.F.R. § 76.901(f); see Public Notice, *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, DA 01-158 (Cable Services Bureau, Jan. 24, 2001).

⁹³ These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, “Top 25 Cable/Satellite Operators,” pages A-8 & C-2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006*, “Ownership of Cable Systems in the United States,” pages D-1805 to D-1857.

⁹⁴ The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority’s finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission’s rules. See 47 C.F.R. § 76.909(b).

⁹⁵ 47 U.S.C. § 571(a)(3)–(4). See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Thirteenth Annual Report*, 24 FCC Rcd 542, 606 para. 135 (2009) (“*Thirteenth Annual Cable Competition Report*”).

⁹⁶ See 47 U.S.C. § 573.

⁹⁷ U.S. Census Bureau, 2007 NAICS Definitions, “517110 Wired Telecommunications Carriers”; <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

⁹⁸ 13 C.F.R. § 121.201, NAICS code 517110.

⁹⁹ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005).

¹⁰⁰ *Id.* An additional 61 firms had annual receipts of \$25 million or more.

¹⁰¹ A list of OVS certifications may be found at <http://www.fcc.gov/mb/ovs/csovscer.html>.

¹⁰² See *Thirteenth Annual Cable Competition Report*, 24 FCC Rcd at 606–07 para. 135. BSPs are newer firms that are building state-of-the-art, facilities-based networks to provide video, voice, and data services over a single network.

30. *Cable Television Relay Service.* This service includes transmitters generally used to relay cable programming within cable television system distribution systems. This cable service is defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies."¹⁰³ The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. To gauge small business prevalence for cable services we must, however, use current census data that are based on the previous category of Cable and Other Program Distribution and its associated size standard; that size standard was: all such firms having \$13.5 million or less in annual receipts.¹⁰⁴ According to Census Bureau data for 2002, there were a total of 1,191 firms in this previous category that operated for the entire year.¹⁰⁵ Of this total, 1,087 firms had annual receipts of under \$10 million, and 43 firms had receipts of \$10 million or more but less than \$25 million.¹⁰⁶ Thus, the majority of these firms can be considered small.

31. *Multichannel Video Distribution and Data Service.* MVDDS is a terrestrial fixed microwave service operating in the 12.2-12.7 GHz band. The Commission adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits. It defined a very small business as an entity with average annual gross revenues not exceeding \$3 million for the preceding three years; a small business as an entity with average annual gross revenues not exceeding \$15 million for the preceding three years; and an entrepreneur as an entity with average annual gross revenues not exceeding \$40 million for the preceding three years.¹⁰⁷ These definitions were approved by the SBA.¹⁰⁸ On January 27, 2004, the Commission completed an auction of 214 MVDDS licenses (Auction No. 53). In this auction, ten winning bidders won a total of 192 MVDDS licenses.¹⁰⁹ Eight of the ten winning bidders claimed small business status and won 144 of the licenses. The Commission also held an auction of MVDDS licenses on December 7, 2005 (Auction 63). Of the three winning bidders who won 22 licenses, two winning bidders, winning 21 of the licenses, claimed small business status.¹¹⁰

¹⁰³ U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers" (partial definition); <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

¹⁰⁴ 13 C.F.R. § 121.201, NAICS code 517110.

¹⁰⁵ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005).

¹⁰⁶ *Id.* An additional 61 firms had annual receipts of \$25 million or more.

¹⁰⁷ *Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range; Amendment of the Commission's Rules to Authorize Subsidiary Terrestrial Use of the 12.2-12.7 GHz Band by Direct Broadcast Satellite Licenses and their Affiliates; and Applications of Broadwave USA, PDC Broadband Corporation, and Satellite Receivers, Ltd. to provide A Fixed Service in the 12.2-12.7 GHz Band*, ET Docket No. 98-206, Memorandum Opinion and Order and Second Report and Order, 17 FCC Rcd 9614, 9711, para. 252 (2002).

¹⁰⁸ See Letter from Hector V. Barreto, Administrator, U.S. Small Business Administration, to Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, WTB, FCC (Feb.13, 2002).

¹⁰⁹ See "Multichannel Video Distribution and Data Service Auction Closes," Public Notice, 19 FCC Rcd 1834 (2004).

¹¹⁰ See "Auction of Multichannel Video Distribution and Data Service Licenses Closes; Winning Bidders Announced for Auction No. 63," Public Notice, 20 FCC Rcd 19807 (2005).

32. *Internet Service Providers.* The 2007 Economic Census places these firms, whose services might include voice over Internet protocol (VoIP), in either of two categories, depending on whether the service is provided over the provider's own telecommunications connections (e.g. cable and DSL, ISPs), or over client-supplied telecommunications connections (e.g. dial-up ISPs). The former are within the category of Wired Telecommunications Carriers,¹¹¹ which has an SBA small business size standard of 1,500 or fewer employees.¹¹² The latter are within the category of All Other Telecommunications,¹¹³ which has a size standard of annual receipts of \$25 million or less.¹¹⁴ The most current Census Bureau data for all such firms, however, are the 2002 data for the previous census category called Internet Service Providers.¹¹⁵ That category had a small business size standard of \$21 million or less in annual receipts, which was revised in late 2005 to \$23 million. The 2002 data show that there were 2,529 such firms that operated for the entire year.¹¹⁶ Of those, 2,437 firms had annual receipts of under \$10 million, and an additional 47 firms had receipts of between \$10 million and \$24,999,999.¹¹⁷ Consequently, we estimate that the majority of ISP firms are small entities.

33. *Electric Power Generation, Transmission and Distribution.* The Census Bureau defines this category as follows: "This industry group comprises establishments primarily engaged in generating, transmitting, and/or distributing electric power. Establishments in this industry group may perform one or more of the following activities: (1) operate generation facilities that produce electric energy; (2) operate transmission systems that convey the electricity from the generation facility to the distribution system; and (3) operate distribution systems that convey electric power received from the generation facility or the transmission system to the final consumer."¹¹⁸ This category includes Electric Power Distribution, Hydroelectric Power Generation, Fossil Fuel Power Generation, Nuclear Electric Power Generation, and Other Electric Power Generation. The SBA has developed a small business size standard for firms in this category: "A firm is small if, including its affiliates, it is primarily engaged in the generation, transmission, and/or distribution of electric energy for sale and its total electric output for the preceding fiscal year did not exceed 4 million megawatt hours."¹¹⁹ According to Census Bureau data for 2002, there were 1,644 firms in this category that operated for the entire year.¹²⁰ Census data do not track electric output and we have not determined how many of these firms fit the SBA size standard for small, with no more than 4 million megawatt hours of electric output. Consequently, we estimate that 1,644 or fewer firms may be considered small under the SBA small business size standard.

¹¹¹ U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers", <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

¹¹² 13 C.F.R. § 121.201, NAICS code 517110 (updated for inflation in 2008).

¹¹³ U.S. Census Bureau, 2007 NAICS Definitions, "517919 All Other Telecommunications"; <http://www.census.gov/naics/2007/def/ND517919.HTM#N517919>.

¹¹⁴ 13 C.F.R. § 121.201, NAICS code 517919 (updated for inflation in 2008).

¹¹⁵ U.S. Census Bureau, "2002 NAICS Definitions, "518111 Internet Service Providers"; <http://www.census.gov/epcd/naics02/def/NDEF518.HTM>.

¹¹⁶ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 4, NAICS code 518111 (issued Nov. 2005).

¹¹⁷ An additional 45 firms had receipts of \$25 million or more.

¹¹⁸ U.S. Census Bureau, 2002 NAICS Definitions, "2211 Electric Power Generation, Transmission and Distribution"; <http://www.census.gov/epcd/naics02/def/NDEF221.HTM>.

¹¹⁹ 13 C.F.R. § 121.201, NAICS codes 221111, 221112, 221113, 221119, 221121, 221122, footnote 1.

¹²⁰ U.S. Census Bureau, 2002 Economic Census, Subject Series: Utilities, "Establishment and Firm Size (Including Legal Form of Organization)," Table 4, NAICS codes 221111, 221112, 221113, 221119, 221121, 221122 (issued Nov. 2005).

34. *Natural Gas Distribution.* This economic census category comprises: “(1) establishments primarily engaged in operating gas distribution systems (e.g., mains, meters); (2) establishments known as gas marketers that buy gas from the well and sell it to a distribution system; (3) establishments known as gas brokers or agents that arrange the sale of gas over gas distribution systems operated by others; and (4) establishments primarily engaged in transmitting and distributing gas to final consumers.”¹²¹ The SBA has developed a small business size standard for this industry, which is: all such firms having 500 or fewer employees.¹²² According to Census Bureau data for 2002, there were 468 firms in this category that operated for the entire year.¹²³ Of this total, 424 firms had employment of fewer than 500 employees, and 18 firms had employment of 500 to 999 employees.¹²⁴ Thus, the majority of firms in this category can be considered small.

35. *Water Supply and Irrigation Systems.* This economic census category “comprises establishments primarily engaged in operating water treatment plants and/or operating water supply systems.”¹²⁵ The SBA has developed a small business size standard for this industry, which is: all such firms having \$6.5 million or less in annual receipts.¹²⁶ According to Census Bureau data for 2002, there were 3,830 firms in this category that operated for the entire year.¹²⁷ Of this total, 3,757 firms had annual sales of less than \$5 million, and 37 firms had sales of \$5 million or more but less than \$10 million.¹²⁸ Thus, the majority of firms in this category can be considered small.

D. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

36. The new rule concerns a cost allocation method that parties use in a formula when negotiating just and reasonable pole attachment rental rates. Application of the cost allocation rule is expanded but not altered from the cost allocation rule that parties currently use. We expect the cost of complying with the revised cost allocation rule to be minimal, and compliance costs do not significantly differ from requirements in place before the adoption of this *Order on Reconsideration*.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

37. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include (among others) the following four alternatives: (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small

¹²¹ U.S. Census Bureau, 2007 NAICS Definitions, “221210 Natural Gas Distribution”; <http://www.census.gov/epcd/naics02/def/ND221210.HTM>.

¹²² 13 C.F.R. § 121.201, NAICS code 221210.

¹²³ U.S. Census Bureau, 2002 Economic Census, Subject Series: Utilities, “Establishment and Firm Size: 2002 (Including Legal Form of Organization),” Table 5, NAICS code 221210 (issued November 2005).

¹²⁴ *Id.* An additional 26 firms had employment of over 1,000 employees.

¹²⁵ U.S. Census Bureau, 2007 NAICS Definitions, “221310 Water Supply and Irrigation Systems” (partial definition); <http://www.census.gov/naics/2007/def/ND221310.HTM>.

¹²⁶ 13 C.F.R. § 121.201, NAICS code 221310.

¹²⁷ U.S. Census Bureau, 2002 Economic Census, Subject Series: Utilities, “Establishment and Firm Size: 2002 (Including Legal Form of Organization),” Table 4, NAICS code 221310 (issued November 2005).

¹²⁸ *Id.* An additional 36 firms had annual sales of \$10 million or more.

entities.¹²⁹ Cost allocation methodologies used in pole attachment rate formulas are by nature the same for all entities that use them, regardless of size. No party suggested that the Commission develop alternative approaches to cost allocation based on entity size.

F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

38. None.

¹²⁹ 5 U.S.C. § 603(c).

APPENDIX C**Pleadings****Comments: 2015 Public Notice to Refresh the Record:**

Ameren Corp., American Electric Power Service Corp., Duke Energy Corp., Oncor Electric Delivery Company LLC, Southern Company, Tampa Electric Company
Comcast Corporation
COMPTEL and Level 3 Communications, LLC
Crown Castle International Corp.
ITTA – The Voice of Mid-Size Communications Companies
PCIA – The Wireless Infrastructure Association and The HetNet Forum
The American Cable Association
The National Cable & Telecommunications Association
The Utilities Telecom Council
Verizon

Reply to 2015 Public Notice to Refresh the Record:

Ameren Corp., American Electric Power Service Corp., Duke Energy Corp., Oncor Electric Delivery Company LLC, Southern Company, Tampa Electric Company.
CenterPoint Energy Houston Electric, LLC, Dominion Virginia Power, Florida Power & Light Company, and UGI Utilities - Electric Division
Frontier Communications Corporation
NTCA–The Rural Broadband Association
PCIA – The Wireless Infrastructure Association and The HetNet Forum
The American Cable Association
The National Cable & Telecommunications Association
The Utilities Telecom Council

Reply to 2011 Petition for Reconsideration:

Comcast Corporation

Opposition to 2011 Petition for Reconsideration:

The Edison Electric Institute and the Utilities Telecom Council

Reply to Opposition to 2011 Petition for Reconsideration:

The National Cable & Telecommunications Association, COMPTEL, and tw telecom inc.

**CONCURRING STATEMENT OF
COMMISSIONER AJIT PAI**

Re: *Implementation of Section 224 of the Act*, WC Docket No. 07-245; *A National Broadband Plan for Our Future*, GN Docket No. 09-51.

In February, when the Commission scrapped the twenty-year bipartisan consensus that we should allow the Internet to flourish unfettered by government regulation, it was clear that decision would discourage investment in broadband networks, especially in rural America. And we've already seen marketplace evidence that Internet service providers are pulling back.

One reason: the rising cost of pole attachments. Before Internet service providers (ISPs) can offer service to customers, they must string fiber optics, coaxial cables, and other wires on utility poles and through underground conduit. The rates for such attachments are determined by one of two formulas set forth in section 224 of the Communications Act. The first applies to "cable television systems" and has been historically lower (the cable rate). The second applies to "telecommunications services" and has been historically higher (the telecom rate). By reclassifying Internet access service as a telecommunications service, the Commission gave utilities the go-ahead to charge the higher telecom rate to cable and other non-telecom ISPs, costing American consumers up to \$200 million a year

¹ in higher prices and slowing the deployment of high-speed broadband.

Today, the Commission starts to repair some of this damage by lowering the telecom rate to the cable rate. That's a good thing for all broadband providers and their consumers.

But our work here is not done. *For one*, the *Order* may be vulnerable in court because the legal rationale for this new, lower rate is rather odd. To achieve its result, the *Order* interprets the word "cost" in the telecom rate² to mean whatever percentage of capital and operating expenses is needed to equate the telecom and cable rates for any number of pole attachments.³ So if there are five pole attachments, the *Order* interprets "cost" in the telecom rate to mean 66% of capital and operating expenses; if there are two pole attachments, "cost" means 31% of those expenses.⁴ The *Order's* interpretation of the same word ("cost") in the same provision (the telecom rate) to mean different things in different circumstances appears to violate the canon of consistency.⁵ And the result that the two statutory formulas always arrive at the same rate appears to violate the canon against surplusage.⁶

¹ See Letter from Steven F. Morris, Vice President and Associate General Counsel, NCTA, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, WC Docket No. 07-245, at 2 (Jan. 22, 2015).

² Communications Act § 224(e)(2)–(3) (explaining how utilities must "apportion the cost of providing space on a pole duct, conduit, or right-of-way" among attaching telecommunications carriers).

³ *Order* at para. 36.

⁴ New Rule 1.1409(e)(2)(i) (establishing percentages for two, three, four, and five attaching entities and stating that if the number of attaching entities is not a whole number, the percentage must be interpolated from the percentages associated with the nearest whole numbers).

⁵ See *Clark v. Martinez*, 543 U.S. 371, 378 (2005) ("To give these same words a different meaning for each category would be to invent a statute rather than interpret one."); cf. Frank Costanza and Elaine Benes, *Seinfeld*, "The Little Kicks" (1996) (Frank: "What the hell does that mean?" Elaine: "That means whatever the hell you want it to mean."), available at <https://www.youtube.com/watch?v=R95tj5O0voU>. Notably, we interpret the same word ("cost") in that same provision (the telecom rate) to have yet another meaning in certain circumstances with our cost-causation-based principle. See *Order* at para. 33; 47 C.F.R. § 1.1409(e)(2)(ii).

⁶ See *Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("We are thus reluctant to treat statutory terms as surplusage in any setting." (internal quotation marks and brackets omitted)). Although the *Order* points to our cost-causation-based principle in rule 1.1409(e)(2)(ii) to suggest the rates will sometimes diverge, Congress itself included a cost-

(continued...)

For another, even after the *Order*, ISPs and their customers will be paying too much for pole attachments. That's because the new telecom rate still includes payments for the capital expenses of the pole owner even when the pole owner has already recovered them separately.⁷

As such, I would have preferred a different course. I believe the word "cost" in the telecom rate should be read to exclude all capital expenses. This interpretation would lower pole attachment rates even further, reducing broadband prices and spurring deployment. And it would comport with the canons of statutory construction, interpreting the word "cost" consistently regardless of the number of pole attachments and ensuring that neither the telecom rate nor the cable rate is surplusage.

Because the *Order* does not adopt this interpretation, I can only concur, holding out hope that the courts will allow us to mitigate the higher pole attachment rates that the reclassification order made possible.⁸

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causation-based principle in the cable rate. *See* Communications Act § 224(d)(1) (setting the cable rate so that "it assures a utility the recovery of not less than the additional costs of providing pole attachments").

⁷ *See Implementation of Section 224 of the Act; A National Broadband Plan for our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5301, para. 143 (2011) ("[I]f rearrangement or bracketing is performed to accommodate a new attachment, the new attacher is responsible for those costs. Likewise, pole owner recovers the entire capital cost of a new pole through make-ready charges from the new attacher when a new pole is installed to enable the attachment." (internal footnote omitted)).

⁸ *Cf. American Electric Power Service Corp. v. FCC*, 708 F.3d 183, 190 (D.C. Cir. 2013) (giving the Commission broad deference to interpret the word "cost" in the telecom rate).