

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**THE CITY OF PORTLAND,
OREGON**

Petitioner,

v.

UNITED STATES OF AMERICA

and

**FEDERAL COMMUNICATIONS
COMMISSION**

Respondents

Case No. ____

**PETITION FOR REVIEW
of Order of the Federal
Communications Commission**

Pursuant to Section 402(a) of the Communications Act of 1934, as amended (the “Communications Act”), 47 U.S.C. § 151 *et seq.*, and Sections 2342(1) and 2344 of Title 28 of the United States Code, 28 U.S.C. §§ 2342, 2344; and in accordance with Federal Rules of Appellate Procedure 15, the City of Portland, Oregon (the “City”), hereby petitions for review of the Declaratory Ruling of the Federal Communications Commission (“FCC”) in the attached Third Report and Order and Declaratory Ruling , *In the Matter of Accelerating Wireless Broadband Deployment By Removing Barriers to Infrastructure Investment*, FCC 18-111, WT Docket No. 17-79 (the “Ruling”), which, *inter alia*, finds that state and local *de facto* and *de jure* moratoria on broadband wireline or wireless deployment, including

restrictions on the weight of trucks permitted on roads, violate 47 U.S.C. §§ 253(a) and are not generally saved from preemption by 47 U.S.C. §253(c). The Ruling was adopted on August 2, 2018, and released on August 3. The Declaratory Ruling was not published in the Federal Register and was effective upon its release.¹

Venue is proper in this Court under 28 U.S.C. § 2343. The City is located in this judicial circuit. On June 17, 2017, the City filed comments in the FCC proceeding which led to the Ruling, as part of a coalition of local governments.

The Ruling exceeds the FCC's statutory authority; is arbitrary and capricious and an abuse of discretion; and is otherwise contrary to law, including the Constitution of the United States. The City respectfully requests that this Court hold unlawful, vacate, enjoin, and set aside the Declaratory Ruling; and grant such other relief as it may deem appropriate.

Respectfully submitted,

/s/ Joseph Van Eaton
Joseph Van Eaton
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October 2, 2018

¹ The Third Report and Order was published in the Federal Register on September 14, 2018. 83 FR 46812.

CORPORATE DISCLOSURE STATEMENT

Pursuant to the United States Court of Appeals for the Ninth District Rule 26.1 and Federal Rule of Appellate Procedure 26.1, City of Portland, Oregon respectfully states it is a governmental agency and therefore exempt from Rule 26.1.

Respectfully submitted,

/s/ Joseph Van Eaton

Joseph Van Eaton

Best Best & Krieger LLP

CERTIFICATE OF SERVICE

I hereby certify that, on October 2, 2018, I sent copies of the forgoing Petition for Review via first class mail to the following parties:

Thomas M. Johnson, Jr.
General Counsel
Federal Communications Commission
445 12th Street, S.W.
Room 8-A741
Washington DC 20554

The Honorable Jeff Sessions
Attorney General of the United States
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington DC 20530

In lieu of service to all other participants in the underlying proceeding, please see the attached Motion seeking waiver of the service requirements under FRAP 15(c)(1-3) and Ninth Circuit Local Rule 15(c)(1-3).

/s/ Joseph Van Eaton
Joseph Van Eaton
Best Best & Krieger LLP

October 2, 2018

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

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

THIRD REPORT AND ORDER AND DECLARATORY RULING

Adopted: August 2, 2018

Released: August 3, 2018

By the Commission: Chairman Pai and Commissioners O’Rielly and Carr issuing separate statements;
Commissioner Rosenworcel approving in part, dissenting in part and issuing a statement.

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I. INTRODUCTION

1. Today, we continue our efforts to promote broadband deployment by speeding the process and reducing the costs of attaching new facilities to utility poles.¹ Now, more than ever, access to this vital infrastructure must be swift, predictable, safe, and affordable, so that broadband providers can continue to enter new markets and deploy facilities that support high-speed broadband. Pole access also is essential to the race for 5G because mobile and fixed wireless providers are increasingly deploying innovative small cells on poles and because these wireless services depend on wireline backhaul.² Indeed, an estimated 100,000 to 150,000 small cells will be constructed by the end of 2018, and these numbers are projected to reach 455,000 by 2020 and 800,000 by 2026.³

2. In today's order, we take one large step and several smaller steps to improve and speed the process of preparing poles for new attachments, or "make ready."⁴ Make-ready generally refers to the modification or replacement of a utility pole, or of the lines or equipment on the utility pole, to accommodate additional facilities on the pole. Consistent with the recommendations of the Broadband Deployment Advisory Committee (BDAC),⁵ we fundamentally shift the framework for the vast majority of attachments governed by federal law by adopting a new pole attachment process that includes "one-touch make-ready" (OTMR), in which the new attacher performs all make-ready work. OTMR speeds and reduces the cost of broadband deployment by allowing the party with the strongest incentive—the new attacher—to prepare the pole quickly by performing all of the work itself, rather than spreading the work across multiple parties. By some estimates, OTMR alone could result in approximately 8.3 million incremental premises passed with fiber and about \$12.6 billion in incremental fiber capital expenditures.⁶ We exclude from OTMR new attachments that are more complicated or above the "communications space" of a pole, where safety and reliability risks can be greater, but we make significant incremental improvements to our rules governing such attachments to speed the existing process, promote accurate billing, and reduce the likelihood of coordination failures that cause unwarranted delay.

3. We also adopt other improvements to our pole attachment rules. To provide certainty to all parties and reduce the costs of deciphering our old decisions, we codify and refine our existing precedent that requires utilities to allow "overlapping," which helps maximize the usable space on the

¹ Consistent with section 224 of the Communications Act of 1934, as amended (the Act), we use the term "pole attachment" to encompass "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility," unless otherwise dictated by context. See 47 U.S.C. § 224(a)(4). In the specific context of pole attachment timelines, we use the term "pole attachment" to refer only to utility poles (and not to attachments to ducts, conduits, or rights of way). See 47 CFR § 1.1411(a).

² See Crown Castle Wireline NPRM Comments at 1-2; Mobilitie Wireline NPRM Comments at 7-8; Sprint Wireline NPRM Comments at 10, 39-40.

³ *Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling*, WT Docket No. 16-421, Public Notice, 31 FCC Rcd 13360, 13363-64 (WTB 2016).

⁴ See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket Nos. 96-98, 95-185, Order on Reconsideration, 14 FCC Rcd 18049, 18056 n.50 (1999).

⁵ See Letter from Paul D'Ari, Designated Federal Officer, Broadband Deployment Advisory Committee, FCC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84 (filed July 3, 2018), at Attach. Broadband Deployment Advisory Committee, FCC, *Report of the Competitive Access to Broadband Infrastructure Working Group* at 18-31 (2018), <https://ecfsapi.fcc.gov/file/107030255502405/Competitive%20Access%20to%20Broadband%20Infrastructure%20Report.pdf> (BDAC January 2018 Recommendations).

⁶ See Letter from Thomas J. Navin, Counsel to Corning, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-84, at Attach. A; Ed Naef and Alex King, CMA Strategy Consulting, *Assessing the Impact of Removing Regulatory Barriers on Next Generation Wireless and Wireline Broadband Infrastructure Investment: Annex 1, Model Sensitivities* at 5-6 (filed Feb. 26, 2018) (Corning Economic Study).

pole. We clarify that new attachers are not responsible for the costs of repairing preexisting violations of safety or other codes or utility construction standards discovered during the pole attachment process. And we eliminate outdated disparities between the pole attachment rates incumbent local exchange carriers (LECs) must pay compared to other similarly-situated telecommunications attachers.

4. Finally, we address two forms of state and local regulatory barriers to the deployment of wireline and wireless facilities. In the Report and Order, we make clear that we will preempt, on a case-by-case basis, state and local laws that inhibit the rebuilding or restoration of broadband infrastructure after a disaster. In today's Declaratory Ruling, we conclude that state and local moratoria on telecommunications services and facilities deployment are barred by section 253(a) of the Act because they "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."⁷ Barring deployment deprives the public of better services and more broadband options, yet a small but growing number of localities have adopted moratoria in various forms. We put an end to such regulatory barriers.

II. BACKGROUND

5. Section 224 of the Act grants us broad authority to regulate attachments to utility-owned and -controlled poles, ducts, conduits, and rights-of-way.⁸ The Act authorizes us to prescribe rules to: ensure that the rates, terms, and conditions of pole attachments are just and reasonable;⁹ require utilities¹⁰ to provide nondiscriminatory access to their poles, ducts, conduits, and rights-of-way to telecommunications carriers and cable television systems (collectively, attachers);¹¹ provide procedures for resolving pole attachment complaints;¹² govern pole attachment rates for attachers;¹³ and allocate make-ready costs among attachers and utilities.¹⁴ The Act exempts from our jurisdiction those pole attachments in states that have elected to regulate pole attachments themselves.¹⁵ Pole attachments in thirty states are currently governed by our rules.

6. Our rules take into account the many purposes of utility poles and how an individual pole is divided into various "spaces" for specific uses.¹⁶ Utility poles often accommodate equipment used to

⁷ 47 U.S.C. § 253(a).

⁸ See 47 U.S.C. § 224(b)(1). The placement and use of utility infrastructure also are governed by local, state, and federal safety rules, as well as by industry standards such as those set forth in the National Electric Safety Code (NESC). The NESC is a set of standards published by the Institute of Electrical and Electronics Engineers (IEEE) for the safe installation, operation, and maintenance of electric power and communications systems. *2017 National Electrical Safety Code (C2-2017)*, IEEE (2017).

⁹ 47 U.S.C. §§ 224(b)(1)-(2).

¹⁰ The Act defines a utility as a "local exchange carrier or an electric, gas, water, steam, or other public utility, . . . who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications." 47 U.S.C. § 224(a)(1). However, for purposes of pole attachments, a utility does not include any railroad, any cooperatively-organized entity, or any entity owned by a federal or state government. *Id.*

¹¹ 47 U.S.C. § 224(f). The Act allows utilities that provide electric service to deny access to their poles, ducts, conduits, or rights-of-way because of "insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes." *Id.* at § 224(f)(2).

¹² 47 U.S.C. § 224(b)(1).

¹³ 47 U.S.C. §§ 224(d)-(e).

¹⁴ 47 U.S.C. §§ 224(b), (h)-(i).

¹⁵ See 47 U.S.C. § 224(c). To date, twenty states and the District of Columbia have opted out of Commission regulation of pole attachments in their jurisdictions. *States That Have Certified That They Regulate Pole Attachments*, WC Docket No. 10-101, Public Notice, 25 FCC Rcd 5541, 5541-42 (WCB 2010).

¹⁶ 47 CFR §§ 1.1411(e), (i); 1.1412(a). The citations to the rules throughout this Order and Appendix A reflect the renumbering of Part 1, subpart J of Title 47 of the Code of Federal Regulations as adopted by the Commission in

provide a variety of services, including electric power, telephone, cable, wireline broadband, and wireless.¹⁷ Accommodating a variety of services on the same pole benefits the public by minimizing “unnecessary and costly duplication of plant for all pole users.”¹⁸ Different vertical portions of the pole serve different functions.¹⁹ The bottom of the pole generally is unusable for most types of attachments, although providers of wireless services and facilities sometimes attach equipment associated with distributed antenna systems (DAS) and other small wireless facilities to the portion of the pole near the ground.²⁰ Above that, the lower usable space on a pole—the “communications space”—houses low-voltage communications equipment, including fiber, coaxial cable, and copper wiring.²¹ The topmost portion of the pole, the “electric space,” houses high-voltage electrical equipment.²² Work in the electric space generally is considered more dangerous than work in the communications space.²³ Historically, communications equipment attachers used only the communications space; however, mobile wireless providers increasingly are seeking access to areas above the communications space, including the electric space, to attach pole-top small wireless facilities.²⁴

7. When a new attacher seeks access to a pole, it is necessary to evaluate whether adding the attachment will be safe and whether there is room for it.²⁵ In many cases, existing attachments must be moved to make room for the new attachment. In some cases, it is necessary to install a larger pole to accommodate a new attachment.²⁶ Our current rules, adopted in 2011, prescribe a multi-stage process for placing new attachments on utility poles:

- Application Review and Survey. The new attacher applies to the utility for pole access. Once the application is complete, the utility has 45 days in which to make a decision on the application and complete any surveys to determine whether and where attachment is feasible

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July 2018. See *Amendment of Procedural Rules Governing Formal Complaint Proceedings Delegated to the Enforcement Bureau*, EB Docket No. 17-245, Report and Order, FCC 18-96, Appx. A (July 18, 2018).

¹⁷ See Letter from H. Russell Frisby, Jr., Counsel to Edison Electric Institute (EEI), to Marlene Dortch, Secretary, FCC, WC Docket No. 17-84, at Attach. Duke Energy, *What’s on an electric utility pole?* (filed Oct. 3, 2017) (EEI Oct. 3, 2017 Wireline *Ex Parte* Letter).

¹⁸ S. REP. NO. 95-580, at 13 (1977), as reprinted in 1978 U.S.C.C.A.N. 109, 121.

¹⁹ See Florida Public Service Commission, *What’s on a Utility Pole?* (2018), <http://www.psc.state.fl.us/ConsumerAssistance/UtilityPole> (last visited June 27, 2018); see also EEI Oct. 3, 2017 Wireline *Ex Parte* Letter at Attach. *Pole Attachments: Safety and Reliability*, at 4.

²⁰ See EEI Oct. 3, 2017 Wireline *Ex Parte* Letter at Attach. *Pole Attachments: Safety and Reliability*; Crown Castle Wireline NPRM Comments at 5.

²¹ See Florida Public Service Commission, *What’s on a Utility Pole?* (2018), <http://www.psc.state.fl.us/ConsumerAssistance/UtilityPole> (last visited June 27, 2018); see also EEI Oct. 3, 2017 Wireline *Ex Parte* Letter at Attach. Duke Energy, *What’s on an electric utility pole?*

²² See Florida Public Service Commission, *What’s on a Utility Pole?* (2018), <http://www.psc.state.fl.us/ConsumerAssistance/UtilityPole> (last visited June 27, 2018); see also EEI Oct. 3, 2017 Wireline *Ex Parte* Letter at Attach. Duke Energy, *What’s on an electric utility pole?*

²³ See Coalition of Concerned Utilities (CCU) Wireline NPRM Comments at 28-29; Texas Office of Public Utility Counsel Wireline NPRM Comments at 4; EEI Wireline NPRM Reply at 23; Alliant Energy Corp. et al. (Midwest Electric Utilities) Wireline NPRM Reply at 25-28.

²⁴ See Crown Castle Wireline NPRM Comments at 18.

²⁵ See American Cable Association (ACA) Wireline NPRM Reply at 18; Ameren et al. (Electric Utilities) Wireline NPRM Reply at 17.

²⁶ See Google Fiber Wireline NPRM Comments at 7.

and what make-ready is required.²⁷ The utility may take an additional 15 days for large orders.²⁸ Our current rules allow new attachers in the communications space to perform surveys when the utility does not meet its deadline.²⁹

- Estimate. The utility must provide an estimate of all make-ready charges within 14 days of receiving the results of the survey.³⁰
- Attacher Acceptance. The new attacher has 14 days or until withdrawal of the estimate by the utility, whichever is later, to approve the estimate and provide payment.³¹
- Make-Ready. The existing attachers are required to prepare the pole within 60 days of receiving notice from the utility for attachments in the communications space (105 days in the case of larger orders) or 90 days for attachments above the communications space (135 days in the case of larger orders).³² A utility may take 15 additional days after the make-ready period ends to complete make-ready itself.³³ Our current rules allow new attachers in the communications space to perform make-ready work themselves using a utility-approved contractor when the utility or existing attachers do not meet their deadlines.³⁴

8. A number of commenters allege that pole attachment delays and the high costs of attaching to poles have deterred them from deploying broadband.³⁵ For example, Nittany Media's CTO explains that "[o]ver the past 4 years I have seen a tremendous increase in the costs of fiber construction. Although material and labor costs have remained stable and even in some cases become more efficient, pole attachment costs have increased exponentially."³⁶ Commenters in particular point to the make-ready stage of our current timeline as the largest source of high costs and delays in the pole attachment process.³⁷ In response to these types of concerns and to promote broadband deployment, two localities and one

²⁷ 47 CFR § 1.1411(c).

²⁸ 47 CFR §§ 1.1411(c), (g).

²⁹ 47 CFR § 1.1411(i).

³⁰ 47 CFR § 1.1411(d).

³¹ 47 CFR §§ 1.1411(d)(1)-(2).

³² 47 CFR §§ 1.1411(e)(1)(ii), (e)(2)(ii). A "larger order" is "the lesser of 3000 poles or 5 percent of the utility's poles in a state." 47 CFR § 1.1411(g)(3).

³³ 47 CFR §§ 1.1411(e)(1)(iv), (e)(2)(iv).

³⁴ 47 CFR § 1.1411(e)(1)(v).

³⁵ See, e.g., Crown Castle Wireline NPRM Comments at 4-10; Google Fiber Wireline NPRM Comments at 2; Lighttower Wireline NPRM Comments at I, 2; Mobilitie Wireline NPRM Comments at 8-11; see also INCOMPAS Wireline NPRM Comments at 6 ("The existing rules, while adopted with the right objectives, are insufficient for modern infrastructure."); Fiber Broadband Association (FBA) Wireline NPRM Comments at 4 ("Yet, six years after the 2011 Pole Attachment Order, the FBA's service provider members still find that substantial problems persist in seeking access to poles. In too many instances, pole owners simply ignore the Commission's mandated timelines.").

³⁶ Letter from Michael H. Hain, CTO, Nittany Media, Inc., to Marlene Dortch, Secretary, FCC, WC Docket No. 17-84, at 1 (filed June 15, 2017). See also FBA Wireline NPRM Comments at 3 (stating that FBA "encourages the Commission to adopt reforms that will improve efficiency by addressing practices of many pole owners and existing attachers that delay and increase the cost of pole access"); Google Fiber Wireline NPRM Comments at 2 ("[S]taging make-ready in sequential 60-day notice periods . . . results in delay and increased costs . . . These problems, in turn, hinder—and may even foreclose entirely—the deployment of new networks and expansion of broadband service."); Lighttower Wireline NPRM Comments at i ("Lighttower has experienced barriers [to deploying wired broadband infrastructure] due to a lack of cost transparency.").

³⁷ See Letter from Katharine R. Saunders, Managing Associate General Counsel, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84 (filed Nov. 13, 2017) (Verizon Nov. 13, 2017 Wireline *Ex Parte* Letter), at

state—Louisville, Kentucky;³⁸ Nashville, Tennessee;³⁹ and the State of West Virginia⁴⁰—adopted their own versions of OTMR where the new attachers perform all the required make-ready work.

9. As part of its commitment to speeding broadband deployment, the Commission established the BDAC in January 2017 to advise on how best to remove barriers to broadband deployment, such as delays in new pole attachments.⁴¹ Earlier this year, the BDAC recommended that the Commission take a series of actions to promote competitive access to broadband infrastructure, including adopting OTMR for simple attachments in the communications space and making incremental improvements to the Commission’s pole attachment process for complex and non-communications space attachments.⁴²

10. We are also committed to using all the tools at our disposal to speed the restoration of infrastructure after disasters. Disasters such as the 2017 hurricanes can have debilitating effects on communications networks,⁴³ and one of our top priorities is assisting in the rebuilding of network infrastructure in the wake of such events.⁴⁴ We have also made clear our commitment to ensuring that our own federal regulations do not impede restoration efforts.⁴⁵

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Attach. Nicholas Vantzelfde, Managing Partner, Communications Media Advisors, LLC, *Perspectives on the Current State of Make Ready and the Potential Impact of a One-Touch Make-Ready Policy*, at 4 (2017) (CMA Report) (“Expediting the make-ready process can reduce payback periods and thus spur increased investment for next-generation networks. The current process is inefficient; impeding broadband deployment and creating additional burdens for pole owners.”); Letter from Karen Reidy, Vice President, Regulatory Affairs, INCOMPAS, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2 (filed Dec. 20, 2017) (“[T]he current [make-ready] approach—with its sequential make-ready performed by different parties—results in substantial delays, lack of predictability, higher costs, and reduced fiber network expansion.”); CCU Wireline NPRM Comments at 11; Google Fiber Wireline NPRM Comments at 9; BDAC January 2018 Recommendations at 19-20.

³⁸ See Louisville Ordinance No. O-427-15, § 116.72(D)(2). In March 2017, the United States District Court for the Western District of Kentucky allowed several challenges to the Louisville OTMR ordinance to proceed. See *Insight Kentucky Partners II, L.P. v. Louisville/Jefferson Cty. Metro Gov’t*, 2017 WL 1193065 (W.D. Ky. Aug. 16, 2017).

³⁹ See Nashville Ordinance No. BL2016-343, § 13.18.020 (A). In November 2017, the United States District Court for the Middle District of Tennessee found that the Nashville OTMR ordinance was preempted by federal law and permanently enjoined the City of Nashville and Davidson County, TN from applying the ordinance to private parties. See *BellSouth Telecomm., LLC v. Metro. Gov’t of Nashville and Davidson Cty., Tenn.*, 2017 WL 5641145 (M.D. Tenn. Nov. 21, 2017).

⁴⁰ See W. VA. Code § 31G (2017). In June 2018, after both West Virginia and Frontier, which challenged the West Virginia OTMR statute, agreed that the Commission’s pole attachment rules preempt West Virginia OTMR statute, the United States District Court for the Southern District of West Virginia granted Frontier’s motion for summary judgment and permanently enjoined the West Virginia OTMR statute. See *Frontier West Virginia Inc., et al. v. Gov. Jim Justice II, et al., West Virginia Cable Telecomm. Ass’n, Inc. v. James C. Justice, Jr., et al.*, Civil Action Nos. 2:17-cw-03560, 2:17-cv-03609, Memorandum Opinion and Order (S.D.W. Va. June 14, 2018).

⁴¹ See FCC, Broadband Deployment Advisory Committee, Organization, Charter, <https://www.fcc.gov/sites/default/files/bdac-charter.pdf> (last visited June 28, 2018).

⁴² See BDAC January 2018 Recommendations at 19, 21.

⁴³ See Letter from Sandra E. Torres López, Chairwoman, Puerto Rico Telecommunications Regulatory Board, to Ajit Pai, Chairman, FCC, WC Docket No. 10-90, at 1 (filed Dec. 13, 2017) (estimating that Hurricanes Irma and Maria caused approximately \$1.5 billion of damage to Puerto Rico’s communications network).

⁴⁴ See, e.g., *Uniendo a Puerto Rico Fund and the Connect USVI Fund*, WC Docket No. 18-143, et al., Order and Notice of Proposed Rulemaking, FCC 18-57 (May 29, 2018) (establishing the Uniendo a Puerto Rico Fund and the Connect USVI Fund to rebuild, improve and expand voice and broadband networks in Puerto Rico and the U.S. Virgin Islands).

⁴⁵ See, e.g., *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking, 32 FCC Rcd 11128, 11157-59, paras. 71-78 (2017) (*Wireline Infrastructure Order*); *Accelerating Wireline Broadband*

11. The Commission initiated this proceeding on April 20, 2017 by adopting a *Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment* seeking comment on a number of potential regulatory reforms to our rules and procedures to accelerate deployment of next-generation networks and services.⁴⁶ The Commission sought comment on, among other things, speeding the pole attachment timeline;⁴⁷ alternative pole attachment processes, including OTMR;⁴⁸ and creating a presumption that the incumbent LEC attachers pay the same pole attachment rate as other telecommunications attachers.⁴⁹ The Commission also sought comment on whether moratoria on the deployment of telecommunications facilities are inconsistent with section 253(a) of the Act.⁵⁰

12. On November 16, 2017, the Commission adopted a *Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking* enacting reforms to better enable providers to invest in next generation networks.⁵¹ Among other proposals, the *Further Notice of Proposed Rulemaking* sought comment on the treatment of overloading by utilities⁵² and what actions the Commission can take to facilitate the rebuilding and repairing of broadband infrastructure after natural disasters.⁵³

III. REPORT AND ORDER

13. Based on the record in this proceeding, we amend our pole attachment rules to facilitate faster, more efficient broadband deployment. Further, we address state and local legal barriers to rebuilding networks after disasters. But, at the outset, we emphasize that parties are welcome to reach bargained solutions that differ from our rules.⁵⁴ Our rules provide processes that apply in the absence of a negotiated agreement, but we recognize that they cannot account for every distinct situation and encourage parties to seek superior solutions for themselves through voluntary privately-negotiated solutions.⁵⁵ In addition, we recognize that some states will seek to build on the rules that we adopt herein in order to serve the particular needs of their communities. As such, nothing here should be construed as

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Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84, Second Report and Order, FCC 18-74, paras. 58-59 (June 8, 2018) (*Second Wireline Infrastructure Order*) (streamlining network change procedures where *force majeure* event necessitates a network change).

⁴⁶ *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, 32 FCC Rcd 3266 (2017) (*Wireline Infrastructure Notice*).

⁴⁷ *Id.* at 3268-70, paras. 7-12.

⁴⁸ *Id.* at 3270-76, paras. 13-31.

⁴⁹ *Id.* at 3279-80, paras. 44-46.

⁵⁰ *Id.* at 3297, para. 102.

⁵¹ *See generally Wireline Infrastructure Order*.

⁵² *See id.* at 11188-89, paras. 160-62.

⁵³ *See id.* at 11194, paras. 178-79.

⁵⁴ *See* CCU Wireline NPRM Comments at 18 (encouraging that “utilities and attachers be free to agree on their own one-touch make-ready process”).

⁵⁵ We therefore reject a clarification requested by Crown Castle that would limit the scope of mutually bargained-for attachment solutions. *See* Letter from Kenneth J. Simon, Senior Vice President and General Counsel, Crown Castle, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, WT Docket No. 17-79, at 4 (filed July 25, 2018) (Crown Castle July 25, 2018 Wireline *Ex Parte* Letter) (requesting that the “Commission should clarify that its rules serve as a floor, and that just as state requirements must not conflict with the new rules, negotiated agreements must incorporate the new rules as a baseline and build upon, rather than replace, them”); *cf.* Letter from Mindy E. Hartstein, Director, Hawaiian Electric Co., Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2 (filed July 25, 2018) (Hawaiian Electric July 25, 2018 Wireline *Ex Parte* Letter) (“[W]here parties have reached bargained solutions that differ from the Draft Order . . . the terms of a collaborative, negotiated agreement control.”).

altering the ability of a state to exercise reverse preemption of our pole attachment rules.⁵⁶

A. Speeding Access to Poles

14. Most fundamentally, we amend our rules to allow new attachers⁵⁷ with simple wireline attachments in the communications space to elect an OTMR-based pole attachment process that places them in control of the work necessary to attach their equipment, and we improve our existing attachment process for other, more complex attachments. We summarize these changes, as well as our prior rules, in the table below:⁵⁸

⁵⁶ See 47 U.S.C. § 224(c).

⁵⁷ We define a new attacher as a cable television system or telecommunications carrier requesting to attach new or upgraded facilities (e.g., equipment or lines) to a pole owned or controlled by a utility. See *infra* Appx. A, 47 CFR § 1.1411(a)(2). Therefore, new attachers include existing attachers that need to upgrade their facilities with new attachments.

⁵⁸ This table is a summary for informational purposes only, and it sacrifices nuance for brevity. The text of this *Report and Order* (excluding the table) and the rules in Appendix A set forth our binding determinations.

Federal Communications Commission

FCC 18-111

Phase	Prior Rules	OTMR-Based Regime	Enhanced Non-OTMR Regime
<i>Review of Application for Completeness</i>	Vague definition of complete application can lead to delays. No timeline for utility to determine whether application is complete. <i>47 CFR § 1.1411(c)</i>	Revised definition of complete application makes it clear what must be included in application. A utility has 10 business days to determine whether an application is complete; the utility must specify any deficiencies and has limited time to review resubmitted applications. <i>Appx. A §§ 1.1411(c)(1), (j)(1)(ii)</i>	
<i>Review of Whether to Grant Complete Application; Survey</i>	The utility has 45 days to decide whether to grant a complete application and to complete any surveys. The utility has an additional 15 days for large orders. <i>47 CFR § 1.1411(c)</i>	The utility has 15 days to decide whether to grant a complete application. The new attacher conducts the survey and determines its timing. <i>Appx. A § 1.1411(j)(2), (j)(3)</i>	Largely same as prior rules, except that the utility must take certain steps to facilitate survey participation by new and existing attachers. <i>Appx. A § 1.1411(c)(3)</i>
<i>Estimate</i>	The utility must provide an estimate of the make-ready charges within 14 days of receiving the survey results. <i>47 CFR § 1.1411(d)</i>	N/A – no estimate stage	Same as prior rules, except the estimate must detail basis for charges. <i>Appx. A § 1.1411(d)</i>
<i>Attacher Acceptance</i>	The attacher has 14 days or until withdrawal of the estimate by the utility, whichever is later, to approve the estimate and provide payment. <i>47 CFR § 1.1411(d)(i)-(ii)</i>	N/A – no acceptance stage	Same as prior rules. <i>Appx. A § 1.1411(d)(2)</i>
<i>Make-Ready</i>	The existing attachers must prepare the pole within 60 days of receiving notice from the utility in the communications space (105 days for larger orders) or 90 days in the above the communications space (135 days for larger orders). A utility may take 15 additional days after the make-ready period to complete make-ready itself. <i>47 CFR § 1.1411(e)(1)(ii), (e)(1)(iv), (e)(2)(ii), (e)(2)(iv)</i>	The new attacher performs all work in as little as one trip. The new attacher must provide 15 days' notice to existing attachers before commencing work, and this notice period may run concurrently with the utility's review of whether to grant the application. The new attacher must notify existing attachers within 15 days after completion of work on a pole so that existing attachers can inspect the work. <i>Appx. A § 1.1411(j)(4)</i>	The existing attachers prepare the pole within 30 days in the communications space (75 days for larger orders) or 90 days above the communications space (135 days for larger orders). A utility may take 15 additional days after the make-ready period to complete make-ready itself for work outside the communications space. <i>Appx. A § 1.1411(e)(1)(ii), (e)(2)(ii), (e)(2)(iv)</i>
<i>Self-Help Remedy</i>	New attachers in the communications space may perform work themselves when the deadlines are not met. <i>47 CFR § 1.1411(i)</i>	N/A	New attachers in any part of the pole may perform work themselves when the deadlines are not met. We take steps to strengthen the self-help remedy. <i>Appx. A § 1.1411(i)(2)</i>

15. No matter the attachment process, we encourage all parties to work cooperatively to meet deadlines, perform work safely, and address any problems expeditiously. Utilities, new attachers, and

existing attachers agree that cooperation among the parties works best to make the pole attachment process proceed smoothly and safely.⁵⁹

1. New OTMR-Based Pole Attachment Process

16. We adopt a new pole attachment process that new attachers can elect that places them in control of the surveys, notices, and make-ready work necessary to attach their equipment to utility poles. With OTMR as the centerpiece of this new pole attachment regime, new attachers will save considerable time in gaining access to poles (with accelerated deadlines for application review, surveys, and make-ready work) and will save substantial costs with one party (rather than multiple parties) doing the work to prepare poles for new attachments. A better aligning of incentives for quicker and less expensive attachments will serve the public interest through greater broadband deployment and competitive entry.

a. Applicability and Merits of OTMR Regime

17. We adopt the BDAC's recommendation and amend our rules to allow new attachers to elect OTMR for simple make-ready for wireline attachments in the communications space on a pole.⁶⁰ We define simple make-ready as the BDAC does, i.e., make-ready where "existing attachments in the communications space of a pole could be transferred without any reasonable expectation of a service outage or facility damage and does not require splicing of any existing communication attachment or relocation of an existing wireless attachment."⁶¹ Commenters state that simple make-ready work does not raise the same level of safety concerns as complex make-ready or work above the communications space on a pole.⁶² There is substantial support in the record, both from utilities and attachers, for allowing OTMR for simple make-ready;⁶³ and because this option will apply to the substantial majority of pole

⁵⁹ See, e.g., CCU Wireline NPRM Comments at 3-4; Midwest Electric Utilities Wireline NPRM Comments at 18; CenterPoint Energy Houston Electric, LLC et al. (POWER Coalition) Wireline NPRM Comments at 9-10; AT&T Wireline NPRM Reply at 4 n.4.

⁶⁰ See BDAC January 2018 Recommendations at 21.

⁶¹ *Id.* at 20.

⁶² See, e.g., ExteNet Systems, Inc. (ExteNet) Wireline & Wireless NPRM Comments at 54-55; FBA Wireline NPRM Comments at 5 n.12, 8; AT&T Wireline NPRM Reply at 8-9; Letter from Kristine Laudadio Devine, Counsel to Google Fiber, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2 (filed June 4, 2018) (Google Fiber June 4, 2018 Wireline *Ex Parte* Letter); Letter from Charles A. Zdebski and Brett H. Freedson, Counsel to CenterPoint Energy Houston Electric, LLC and Florida Power & Light Co., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2 (filed Feb. 13, 2018) (CenterPoint Energy/FPL Feb. 13, 2018 Wireline *Ex Parte* Letter); Letter from Eben M. Wyman, Principal, Power & Communication Contractors Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at [2] (filed Nov. 30, 2017) (PCCA Nov. 30, 2017 Wireline *Ex Parte* Letter).

⁶³ See CCU Wireline NPRM Comments at 17-18; Computing Technology Industry Association (COMPTIA) Wireline NPRM Comments at 2-3; EEI Wireline NPRM Comments at 32; Electric Utilities Wireline NPRM Comments at 7; FBA Wireline NPRM Comments at 5; Level 3 Wireline NPRM Comments at 2-3; POWER Coalition Wireline NPRM Comments at 10; Utilities Technology Council (UTC) Wireline NPRM Reply at 17-21; AT&T Wireline NPRM Reply at 7-8; CPS Energy Wireline NPRM Reply at 8-9; Google Fiber Wireline NPRM Reply at 1-2; Verizon Wireline NPRM Reply at 4-9; Letter from Angie Kronenberg, Chief Advocate & General Counsel, INCOMPAS, to Marlene Dortch, Secretary, FCC, WC Docket No. 17-84 et al., at Attach. 3 (filed Feb. 13, 2018) (INCOMPAS Feb. 13, 2018 Wireline *Ex Parte* Letter); Letter from Brett Heather Freedson, Counsel to CenterPoint Energy Houston Electric, LLC et al., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, Attach. 1 (filed May 25, 2018) (CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter); Letter from Debbie Goldman, Telecommunications Policy Director, Communications Workers of America, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2 (filed Feb. 6, 2018) (CWA Feb. 6, 2018 Wireline *Ex Parte* Letter); Letter from Lonnie R. Stephenson, International President, IBEW, to Marlene Dortch, Secretary, FCC, WC Docket No. 17-84, at 2 (filed Jan. 30, 2018) (IBEW Jan. 30, 2018 Wireline *Ex Parte* Letter); Letter from Lisa R.

attachment projects,⁶⁴ it will speed broadband deployment. We also follow the BDAC's recommendation and do not provide an OTMR option for more complex projects in the communications space or for any projects above the communications space at this time.⁶⁵

18. Our new rules define "complex" make-ready, as the BDAC does, as "[t]ransfers and work within the communications space that would be reasonably likely to cause a service outage(s) or facility damage, including work such as splicing of any communication attachment or relocation of existing wireless attachments."⁶⁶ We consider "[a]ny and all wireless activities, including those involving mobile, fixed, and point-to-point wireless communications and wireless internet service providers[] . . . to be . . . complex."⁶⁷ We agree with Verizon that the term "wireless activities" does not include a wireless attacher's work on its wireline backhaul facilities, which is no different than wireline work done by other attachers.⁶⁸ While the BDAC recommendation did not explicitly address the treatment of pole replacements, we interpret the definition of complex make-ready to include all pole replacements as well. We agree with commenters that pole replacements are usually not simple or routine and are more likely to cause service outages or facilities damage,⁶⁹ and thus we conclude that they should fall into the complex category of work.

19. There is substantial support from commenters in the record for not using OTMR for complex make-ready work at this time.⁷⁰ We agree that we should exclude these more challenging

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Youngers, Executive Director, Fiber Broadband Association (FBA), to Marlene Dortch, Secretary, FCC, WC Docket No. 17-84, at 2-3 (filed July 20, 2018) (FBA July 20, 2018 Wireline *Ex Parte* Letter).

⁶⁴ According to AT&T, approximately 80 percent of current make-ready work is "simple." See Letter from Ola Oyefusi, Director, Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at Attach. *Accelerating Wireline Broadband Deployment: Presentation – Pole Attachment Process with OTMR* at 2 (filed Jan. 22, 2018). See also Letter from Eric B. Langley, Counsel to Electric Utilities, to Marlene Dortch, Secretary, FCC, WC Docket No. 17-84, at 2 (filed Mar. 19, 2018) (Electric Utilities Mar. 19, 2018 Wireline *Ex Parte* Letter) (stating that "more than 80[] [percent] of make-ready poles require communications space make-ready only"). We recognize that in the future, it is likely that less than 80 percent of make-ready work will be eligible for OTMR as wireless carriers ramp up non-simple 5G deployments. See, e.g., AT&T Wireline NPRM Comments at 8 (stating that "[i]ndustry-wide 5G network deployment is expected to involve 10 to 100 times more antenna locations than 4G or 3G."); EEI Wireline NPRM Comments at 29 (asserting that "[i]t can be expected that an increase in the volume of wireless attachment requests due to 5G deployments will exacerbate pole attachment delays due to the complex nature of the installations and the number of poles involved.").

⁶⁵ See BDAC January 2018 Recommendations at 21-22, 27.

⁶⁶ *Id.* at 20.

⁶⁷ *Id.* We deny Crown Castle's request to exclude wireless activity in the communications space from the definition of complex make-ready. See Crown Castle July 25, 2018 Wireline *Ex Parte* Letter at 4-5. We find that the BDAC carefully analyzed the impact of wireless pole attachment work and correctly concluded that such work is complex. See BDAC January 2018 Recommendations at 19-23, 27, 29-31.

⁶⁸ Letter from Katharine R. Saunders, Managing Associate General Counsel, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 6-7 (filed July 26, 2018) (Verizon July 26, 2018 Wireline OTMR *Ex Parte* Letter). Consistent with the definition of "complex," a wireless attacher's work on its wireline facilities is complex if it is the work reasonably likely to cause a service outage or facility damage.

⁶⁹ See Letter from Kristine Laudadio Devine, Counsel to Google Fiber, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2 (filed Apr. 12, 2018) (Google Fiber Apr. 12, 2018 Wireline *Ex Parte* Letter); Midwest Electric Utilities Wireline NPRM Reply at 25-26; Puget Sound Energy Wireline NPRM Comments at 7-8.

⁷⁰ See, e.g., Charter Communications, Inc. (Charter) Wireline & Wireless NPRM Comments at 55; FBA Wireline NPRM Comments at 5 n.12; Google Fiber Wireline NPRM Comments at 5-6; Level 3 Wireline NPRM Comments at 3; POWER Coalition Wireline NPRM Comments at 11; Texas Office of Public Utility Counsel Wireline NPRM Comments at 4; Letter from Frank S. Simone, Vice President-Federal Regulatory, AT&T, and Debbie Goldman, Telecommunications Policy Director, Communications Workers of America, to Marlene H. Dortch, Secretary, FCC,

attachments from OTMR at this time to minimize the likelihood and impact of service disruption. In particular, cutting or splicing of existing wires on a pole has the heightened potential to result in a network outage.⁷¹ We also recognize that wireless attachments involve unique physical and safety complications that existing attachers must consider (e.g., wireless configurations cover multiple areas on a pole, considerably more equipment is involved, RF impacts must be analyzed), thus increasing the challenges of using an accelerated, single-party process at this time.⁷²

20. The new OTMR process also will not be available for work above the communications space, including the electric space.⁷³ Many utility commenters argue that work above the communications space, which mainly involves wireless attachments, frequently impacts electrical facilities and that such work should fall to the utilities to manage and complete.⁷⁴ We recognize that work above the communications space may be more dangerous for workers and the public and that impacts of electric outages are especially severe.⁷⁵ Therefore, we find at this time that the value of control by existing attachers and utilities over infrastructure above the communications space outweighs the benefits of allowing OTMR for these attachments. Based on the foregoing analysis, we decline Verizon's request to allow OTMR for complex make-ready and work above the communications space.⁷⁶ We recognize that by not providing an OTMR option above the communications space for the time being, we are not permitting OTMR as an option for small cell pole-top attachments necessary for 5G deployment. We take this approach because there is broad agreement that more complex projects and all projects above the communications space may raise substantial safety and continuity of service concerns.⁷⁷ At the same time, we adopt rules aimed at mitigating the safety and reliability concerns about the OTMR process we adopt today, and we are optimistic that once parties have more experience with OTMR, either they will by contract or we will by rule expand the reach of OTMR.⁷⁸ In the meantime, we find that the benefits of moving incrementally by providing a right to elect OTMR only in the communications space and only for simple wireline projects outweigh the costs.

21. We agree with commenters that argue that OTMR is substantially more efficient for new attachers, current attachers, utilities, and the public than the current sequential make-ready approach set

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WC Docket No. 17-84, GN Docket No. 17-83, at 1 (filed Jan. 16, 2018) (AT&T-CWA Jan. 16, 2018 Wireline *Ex Parte* Letter); CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at 1.

⁷¹ See Google Fiber Apr. 12, 2018 Wireline *Ex Parte* Letter at 2.

⁷² See CCU Wireline NPRM Comments at 27-28; EEI Wireline NPRM Comments at 28-29; Midwest Electric Utilities Wireline NPRM Comments at 28-29; American Public Power Association (APPA) Wireline NPRM Reply at 28.

⁷³ This accords with the BDAC's recommendations. See BDAC January 2018 Recommendations at 21-22.

⁷⁴ See CCU Wireline NPRM Comments at 28; EEI Wireline NPRM Comments at 28-29; Electric Utilities Wireline NPRM Comments at 6; Midwest Electric Utilities Wireline NPRM Comments at 30; POWER Coalition Wireline NPRM Comments at 11; Puget Sound Energy Wireline NPRM Comments at 5; Texas Office of Public Utility Counsel Wireline NPRM Comments at 4; UTC Wireline NPRM Comments at 13.

⁷⁵ See, e.g., CCU Wireline NPRM Comments at 28-29; Electric Utilities Wireline NPRM Comments at 8-9; Puget Sound Energy Wireline NPRM Comments at 4; Texas Office of Public Utility Counsel Wireline NPRM Comments at 4; EEI Wireline NPRM Reply at 20; Midwest Electric Utilities Wireline NPRM Reply at 24-26.

⁷⁶ See Letter from Katharine R. Saunders, Managing Associate General Counsel, Verizon, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, WC Docket No. 17-84, at 4 (filed Mar. 8, 2018) (Verizon Mar. 8, 2018 Wireline *Ex Parte* Letter).

⁷⁷ See, e.g., CCU Wireline NPRM Comments at 28-29; EEI Wireline NPRM Comments at 28; Texas Office of Public Utility Counsel Wireline NPRM Comments at 4; Midwest Electric Utilities Wireline NPRM Reply at 25-26; APPA Wireline NPRM Reply at 28; AT&T-CWA Jan. 16, 2018 Wireline *Ex Parte* Letter at 2; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at 2.

⁷⁸ See FBA July 20, 2018 Wireline *Ex Parte* Letter at 3.

forth in our rules.⁷⁹ We agree with Next Centuries Cities that “OTMR facilitates deployment and reduces barriers to access, which leads to increased broadband deployment, decreased costs for consumers, and increased service speeds.”⁸⁰ Indeed, Corning estimates that OTMR for wireline deployments could result in over eight million additional premises passed with fiber and about \$12.6 billion in incremental fiber capital expenditures.⁸¹ Although we do not at this time provide for an OTMR option for pole-top small cell deployment, OTMR will facilitate the rollout of 5G services because mobile services depend on wireline backhaul, and OTMR will expedite the buildout of wireline backhaul capacity.⁸² Utilities such as Ameren and Oncor Electric agree that “[OTMR] in the communications space is the most effective vehicle for the Commission to make large strides in speeding the deployment of broadband.”⁸³

22. OTMR speeds broadband deployment by better aligning incentives than the current multi-party process.⁸⁴ It puts the parties most interested in efficient broadband deployment—new attachers—in a position to control the survey and make-ready processes.⁸⁵ The misaligned incentives in

⁷⁹ See Computer & Communications Industry Association (CCIA) Wireline & Wireless NPRM Comments at 17; Letter from Christopher Shipley, Attorney and Policy Advisor, INCOMPAS, to Marlene Dortch, Secretary, FCC, Docket Nos. 17-84 et al., at 2 (filed Apr. 20, 2018) (INCOMPAS April 20, 2018 Wireline *Ex Parte* Letter); Letter from Karen Reidy, Vice President, Regulatory, INCOMPAS, to Marlene Dortch, Secretary, FCC, Docket Nos. 17-84, at 1 (filed July 22, 2018) (INCOMPAS July 22, 2018 Wireline *Ex Parte* Letter); Letter from Kristine Laudadio Devine, Counsel to Google Fiber Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 1-2 (filed Feb. 1, 2018) (Google Fiber Feb. 1, 2018 Wireline *Ex Parte* Letter); Electric Utilities Mar. 19, 2018 Wireline *Ex Parte* Letter at 2.

⁸⁰ Next Century Cities Wireline NPRM Comments at 7; see also Google Fiber Feb. 1, 2018 Wireline *Ex Parte* Letter at 1 (“OTMR will allow new attachers to pay for one trip to the pole instead of several, facilitate streamlined engagement of contractors, reduce duplication of effort, and eliminate the need to pay pass-through administrative costs of existing attachers—all factors that make deployment of new networks expensive and slow.”); BDAC January 2018 Recommendations at 19, 31 (“The rules should provide pole attachers with a single-contractor, single-trip solution for simple make-ready work [in the communications space] which expedites make-ready work”); Corning Economic Study at 28-29 (asserting that under sequential make-ready, a pole with four attachers means four different parties are completing make-ready at four different times, “a wasteful process as each touch can add up to \$450 in costs[]” for the new attacher); CCIA Wireline & Wireless NPRM Comments at 17 (“OTMR reduces the cost and [increases the] speed of deployment of new networks by maximizing efficiency”); CPS Energy Wireline NPRM Reply at 14 (“CPS Energy has worked with industry stakeholders to develop an innovative OTMR process that effectively and efficiently facilitates access to poles in a manner that protects the legitimate interests of CPS Energy, new entrants, and existing attaching entities.”); INCOMPAS April 20, 2018 Wireline *Ex Parte* Letter at 2; Electric Utilities Mar. 19, 2018 Wireline *Ex Parte* Letter at 1 (OTMR “in the communications space is the most effective vehicle for the Commission to make large strides in speeding the deployment of broadband.”).

⁸¹ See Corning Economic Study at 5.

⁸² See Google Fiber Wireline NPRM Comments at 4; Verizon Wireline NPRM Comments at 2.

⁸³ Electric Utilities Mar. 19, 2018 Wireline *Ex Parte* Letter at 1.

⁸⁴ See CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at 2 (“From the perspective of the IOUs, this common sense approach also appropriately places the burden of coordinating make-ready work on the communications entity that ultimately will benefit from use of the pole.”); Letter from Katharine R. Saunders, Managing Associate General Counsel, Verizon, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79, WC Docket No. 17-84, at 2-3 (filed June 21, 2018) (Verizon June 21, 2018 Wireline *Ex Parte* Letter) (describing the buildout in West Virginia of wireline backhaul for Verizon’s wireless network where it “faced multiple and extensive delays at every step of the make-ready process as existing attachers repeatedly missed deadlines. This meant that there were often teams of workers ready to complete the build who were sidelined as they waited for existing attachers to finish their respective moves. This not only delayed deployment significantly but also drove up our costs as we waited for the ability to build.”).

⁸⁵ See CMA Report at 10, 12; COMPTIA Wireline NPRM Comments at 3; Electric Utilities Wireline NPRM Comments at 5; ExteNet Wireline & Wireless NPRM Comments at 54-55; Google Fiber Wireline NPRM

the current process often result in delay by current incumbents and utilities and high costs for new attachers as a result of the coordination of sequential make-ready work performed by different parties.⁸⁶ As Google Fiber points out, under the current process, if the lowest attacher on the pole (usually the incumbent LEC) moves its wires and equipment to accommodate a new attachment at the end of the existing 60-day make-ready period, then the entire pole attachment process is derailed because multiple existing attachers still have to perform make-ready on their equipment, despite the fact that the make-ready deadline contemplated in our rules has lapsed.⁸⁷ Because existing attachers lack an incentive to accommodate new attachers quickly, these delays in sequential attachment are all too common.⁸⁸ OTMR eliminates this problem.

23. We also agree with commenters that OTMR will benefit municipalities and their residents by reducing closures and disruptions of streets and sidewalks.⁸⁹ Unlike sequential make-ready work, which results in a series of trips to the affected poles by each of the attachers and repeated disruptions to vehicular traffic, OTMR's single trip to each affected pole will reduce the number of such disruptions.⁹⁰

24. We also agree with those commenters that argue that an OTMR-based regime will benefit utilities.⁹¹ The record indicates that many utilities that own poles are not comfortable with their current responsibilities for facilitating attachments in the communications space.⁹² By shifting responsibilities from the utility to the new attacher to survey the affected poles, determine the make-ready work to be done, notify affected parties of the required make-ready work, and perform the make-ready work, our new

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Comments at 11; INCOMPAS Wireline NPRM Comments at 9-10; Next Century Cities Wireline NPRM Comments at 6; FBA July 20, 2018 Wireline *Ex Parte* Letter at 2; INCOMPAS July 22, 2018 Wireline *Ex Parte* Letter at 1.

⁸⁶ See CMA Report at 1-2, 6-8, 12; INCOMPAS Feb. 13, 2018 Wireline *Ex Parte* Letter Attach. 2-3; Verizon June 21, 2018 Wireline *Ex Parte* Letter at 2; see also CCU Wireline NPRM Comments at 11-12; Google Fiber Wireline NPRM Comments at 11-12; BDAC January 2018 Recommendations at 19-20.

⁸⁷ See Google Fiber Feb. 1, 2018 Wireline *Ex Parte* Letter at 3; see also Letter from Katharine R. Saunders, Managing Associate General Counsel, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, WT Docket No. 17-79, at 3 (filed July 2, 2018) (Verizon July 2, 2018 Wireline *Ex Parte* Letter) (stating that "if make-ready is necessary to accommodate a new attachment that will be placed at the top of the communications space, then existing attachers will move their facilities downward proceeding sequentially from the lowest attacher in the communications space to the highest attacher in the communications space").

⁸⁸ See CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at 2 (stating that "a formidable disincentive exists for an incumbent communications attacher to cooperate in a process that ultimately will bring direct competition within its service footprint"); CCU Wireline NPRM Comments at 11; CMA Report at 1-2; INCOMPAS Feb. 13, 2018 Wireline *Ex Parte* Letter at Attach. at 2-3; Verizon June 21, 2018 Wireline *Ex Parte* Letter at 2; BDAC January 2018 Recommendations at 19-20.

⁸⁹ See Electric Utilities Wireline NPRM Comments at 8; ExteNet Wireline & Wireless NPRM Comments at 54-55; FBA Wireline NPRM Comments at 6-8; INCOMPAS Wireline NPRM Comments at 9; Next Century Cities Wireline NPRM Comments at 6; Verizon Nov. 13, 2017 Wireline *Ex Parte* Letter at 2; PCCA Nov. 30, 2017 Wireline *Ex Parte* Letter at 2; Google Fiber Feb. 1, 2018 Wireline *Ex Parte* Letter at 1-2.

⁹⁰ See, e.g., ExteNet Wireline & Wireless NPRM Comments at 54-55; INCOMPAS Wireline NPRM Comments at 9; Verizon July 2, 2018 Wireline *Ex Parte* Letter at 3.

⁹¹ See, e.g., EEI Wireline NPRM Comments at 32; FBA Wireline NPRM Comments at 7; CPS Energy Wireline NPRM Reply at 6-7; Verizon Nov. 13, 2017 Wireline *Ex Parte* Letter at 2; INCOMPAS April 20, 2018 Wireline *Ex Parte* Letter at 2.

⁹² See, e.g., EEI Wireline NPRM Comments at 21-22; Electric Utilities Wireline NPRM Comments at 5-6; POWER Coalition Wireline NPRM Comments at 11-12; UTC Wireline NPRM Reply at 18; Verizon July 2, 2018 Wireline *Ex Parte* Letter at 3.

OTMR regime will alleviate utilities of the burden of overseeing the process for most new attachments and of some of the costs of pole ownership.⁹³

25. While giving the new attacher control drives the substantial benefits of an OTMR regime, it also raises concerns among some utilities and existing attachers. But we are not convinced by the arguments made by some commenters that OTMR will allow make-ready work to be performed by new attachers that lack adequate incentives to perform quality work, and therefore will increase the likelihood of harm to equipment integrity and public safety.⁹⁴ As other commenters explain, the new attacher and its chosen contractor have an incentive to perform quality work in order to limit risk, keep workers safe, and avoid tort liability for damages caused by substandard work.⁹⁵ We also adopt several safeguards herein that incentivize the new attacher and its contractor to perform work correctly.⁹⁶

26. In addition, some commenters raise concerns that OTMR may not protect public safety “given the real prospects for serious injuries to [lineworkers] and the public[;]”⁹⁷ ensure “the reliability and security of the electric grid[;]”⁹⁸ and maintain the safety and reliability of existing attachers’ facilities in order to prevent service outages.⁹⁹ We are not persuaded, however, by the anecdotal evidence offered in support of these commenters’ concerns.¹⁰⁰ For example, Charter cites problems with third-party

⁹³ See FBA Wireline NPRM Comments at 8; CPS Energy Wireline NPRM Reply at 6-7; UTC Wireline NPRM Reply at 18; Verizon Nov. 13, 2017 Wireline *Ex Parte* Letter at 2; INCOMPAS April 20, 2018 Wireline *Ex Parte* Letter at 2.

⁹⁴ See AT&T Wireline NPRM Comments at 16; Charter Wireline & Wireless NPRM Comments at 39; Comcast Wireline & Wireless NPRM Comments at 20; EEI Wireline NPRM Comments at 31; Frontier Wireline NPRM Comments at 18; NCTA Wireline & Wireless NPRM Comments at 16; POWER Coalition Wireline NPRM Comments at 12; CCU Wireline NPRM Reply at 2-6; CenturyLink Wireline NPRM Reply at 15-16; Communications Workers of America (CWA) Wireline NPRM Reply at 1; AT&T-CWA Jan. 16, 2018 Wireline *Ex Parte* Letter at 2; Letter from Elizabeth Andrion, Charter Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, GN Docket No. 17-83, at 1 (filed Feb. 5, 2018) (Charter Feb. 5, 2018 Wireline *Ex Parte* Letter); Letter from Brian Thorn, CWA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 1 (filed July 26, 2018).

⁹⁵ See CMA Report at 10-13; CPS Energy Wireline NPRM Reply at 10-11, 20, 23; Google Fiber Wireline NPRM Reply at 8; PCCA Nov. 30, 2017 Wireline *Ex Parte* Letter at 2.

⁹⁶ See *infra* sections III.A.1.b., III.A.1.c.

⁹⁷ EEI Wireline NPRM Comments at 12; *see also, e.g.*, BDAC January 2018 Recommendations at 19 (“The rules also should balance every community’s interest in safety and continuous service.”); AT&T Wireline NPRM Comments at 15 (stating that OTMR should preserve the safety of the public and workers).

⁹⁸ EEI Wireline NPRM Comments at 12; *see also, e.g.*, POWER Coalition Wireline NPRM Comments at 11 (stating that OTMR “must be limited to ensure that workers on the pole are not exposed to, and do not create unsafe conditions, or act in a manner that threatens the reliability of electric infrastructure”); CCU Wireline NPRM Reply at 2-3 (“Contractors in the electric space working under the direction of communications companies could injure themselves, create hazards to subsequent pole workers or the public at large, cause electrical outages or reliability concerns, or damage electric service facilities on the poles.”).

⁹⁹ See CenturyLink Wireline NPRM Comments at 15; Charter Wireline & Wireless NPRM Comments at 39; Comcast Wireline & Wireless NPRM Comments at 20; Frontier Wireline NPRM Comments at 18; NCTA Wireline & Wireless NPRM Comments at 15-16.

¹⁰⁰ See *e.g.*, AT&T Wireline NPRM Comments at 16 (“[U]napproved contractors have caused outages to AT&T wireline facilities in Tennessee, Kentucky, Florida, Georgia, and North Carolina. In 2016, AT&T suffered four outages in the Nashville area that were caused by an attacher’s unapproved contractors’ underground boring operations, one of which resulted in a major 911 outage.”); Comcast Wireline & Wireless NPRM Comments at 21-22 (“Comcast has experienced this dynamic firsthand in Nashville, where, at last count, roughly 40 percent of the instances of make-ready work performed by Google Fiber contractors on Comcast’s equipment violated requirements set forth in the National Electrical Safety Code[.]”) (emphasis removed). NCTA’s contention that we must rely on the anecdotal evidence in the record is misplaced. See NCTA July 18, 2018 Wireline *Ex Parte* Letter at 2 n.5. While the anecdotes raised in the record are important reminders of the need for new attachers to take great

contractor work on its equipment in San Antonio and in Kansas City.¹⁰¹ CPS Energy contends, however that rather than being an indictment of OTMR, Charter's anecdotes instead show that an OTMR process can work as intended to speed broadband deployment without sacrificing safety or network integrity.¹⁰² We agree. As CPS Energy points out, its OTMR process ensured that Charter received notice of the completion of make-ready and received adequate opportunity to perform a post-make-ready inspection.¹⁰³ It was during the inspection that Charter discovered problems with the make-ready work performed by the new attacher, at which point it had the opportunity to report any make-ready problems discovered during the inspection to the new attacher for remediation.¹⁰⁴ As CPS Energy notes, its OTMR process "worked as designed: Charter experienced no outages."¹⁰⁵ The process we adopt today assures these same safeguards.¹⁰⁶

27. We are committed to ensuring that our approach to pole attachments preserves the safety of workers and the public and protects the integrity of existing electric and communications infrastructure. As an initial matter, we follow the BDAC's recommendation that all complex work and work above the communications space, where reliability and safety risks can be greater, will not be eligible for the new OTMR process.¹⁰⁷ In addition, we take several steps to promote coordination among the parties and ensure that new attachers perform work safely and reliably, thereby significantly mitigating the potential drawbacks of OTMR. First, we require new attachers to use a utility-approved contractor to perform OTMR work, except when the utility does not provide a list of approved contractors, in which case new attachers must use qualified contractors.¹⁰⁸ This requirement addresses existing attachers' apprehension about unfamiliar contractors working on their facilities¹⁰⁹ and also guards against delays that result when utilities fail to maintain approved contractor lists.¹¹⁰ Second, we require new attachers to provide advance notice and allow representatives of existing attachers and the utility a reasonable opportunity to be present when surveys and OTMR work are performed¹¹¹ in order to

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care in protecting poles and the existing equipment on those poles while carrying out OTMR, these examples fail to demonstrate a pattern of new attacher carelessness with regard to third-party equipment, and contrary to NCTA's assertion, they do not constitute "ample evidence" of a "substantial number of incidents, including 911 outages." *Id.*

¹⁰¹ See Charter Wireline & Wireless NPRM Comments at 39-44 (noting NESC violations discovered after OTMR performed on its equipment and after make-ready).

¹⁰² See CPS Energy Wireline NPRM Reply at 23; see also Google Fiber June 4, 2018 Wireline *Ex Parte* Letter at 1 ("The mere fact that, at some point, errors were made by someone in performing make-ready work does not implicate the safety and efficiency of a well-structured OTMR regime.").

¹⁰³ CPS Energy Wireline NPRM Reply at 23.

¹⁰⁴ See *id.*; see also Google Fiber Wireline NPRM Reply at 12 n.24 (noting that in Nashville, "Comcast inspected the work before it was completed, and upon receiving notice of the violations, Google Fiber made corrections as required."); PCCA Nov. 30, 2017 Wireline *Ex Parte* Letter at 2 ("[W]e believe OTMR can be, and already is[,] performed in the field safely and efficiently.").

¹⁰⁵ CPS Energy Wireline NPRM Reply at 23.

¹⁰⁶ See *infra* section III.A.1.c.

¹⁰⁷ See BDAC January 2018 Recommendations at 21-22, 27.

¹⁰⁸ See *infra* section III.A.1.b. (describing the required contractor qualifications).

¹⁰⁹ See, e.g., AT&T Wireline NPRM Comments at 16; Charter Wireline & Wireless NPRM Comments at 39; Comcast Wireline & Wireless NPRM Comments at 21.

¹¹⁰ See ACA Wireline NPRM Reply at 24-25.

¹¹¹ We decline to adopt NCTA and CWA's request that we find that new attachers should be responsible for any expenses associated with the costs incurred by existing attachers if they decide to double-check the work performed by the new attacher's contractors, including any post-make-ready inspections. See NCTA July 18, 2018 Wireline *Ex Parte* Letter at 2, 4; CWA July 26, 2018 Wireline *Ex Parte* Letter at 4. One of the core benefits of OTMR—cost savings—would be jeopardized if new attachers were responsible for the costs of doing the work itself and

encourage new attachers to perform quality work and to provide the utility and existing attachers an opportunity for oversight to protect safety and prevent equipment damage.¹¹² Third, we require new attachers to allow existing attachers and the utility the ability to inspect and request any corrective measures soon after the new attacher performs the OTMR work to address existing attachers' and utilities' concerns that the new attacher's contractor may damage equipment or cause an outage without their knowledge and with no opportunity for prompt recourse.¹¹³

28. Finally, as an additional safeguard to prevent substantial service interruptions or danger to the public or workers, we allow existing attachers and utilities to file a petition with the Commission, to be considered on an expedited, adjudicatory case-by-case basis, requesting the suspension of a new attacher's OTMR privileges due to a pattern or practice of substandard, careless, or bad faith conduct when performing attachment work.¹¹⁴ Such petition shall be placed on public notice, and the new attacher will have an opportunity to address the allegations of substandard, careless, or bad faith conduct and to explain how it plans to eliminate any such conduct in the future. In those instances where the Commission finds that suspension is warranted, the Commission will suspend the privileges for a length of time appropriate based on the conduct at issue, up to and including permanent suspension.¹¹⁵

29. We disagree with NCTA's contention that these safeguards do not adequately protect

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reimbursing the monitoring and inspection expenses of potentially multiple existing attachers. As other commenters explain, new attachers should not be responsible for "existing attachers' 'elective' costs – that is, their costs to attend the joint survey or be present when make-ready is performed." Letter from Kristine Laudadio Devine, Counsel to Google Fiber Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2 (filed July 23, 2018) (Google Fiber July 23, 2018 Wireline *Ex Parte* Letter); *see also* Verizon July 26, 2018 Wireline OTMR *Ex Parte* Letter at 7.

¹¹² *See* ACA Wireline NPRM Comments at 16-17; *see also, e.g.*, Charter Wireline & Wireless NPRM Comments at 39-44 ("Charter's experience has been that the work done under [a] one-touch policy is only as effective as the contractor performing the work and the quality and timeliness of the initial notice that Charter receives."); Comcast Wireline & Wireless NPRM Comments at 20-22; NCTA Wireline NPRM Comments at 15-16 ("[T]hese ordinances generally provide little or no advance notice to an existing provider that its facilities will be moved, little or no opportunity to perform the work even when notice is provided, no ability to select the contractor that performs the work on behalf of the new entrant, and limited ability to inspect and remediate (and no indemnification requirement) if the work is done poorly. The effect of these provisions is to jeopardize the safety and quality of service of existing providers."); AT&T Wireline NPRM Reply at 9 ("Under AT&T's OTMR proposal, existing attachers are provided 30 days after notice to make these determinations and to invoke their right to the existing 60-day make-ready period if complex make-ready is required."). We disagree with CenturyLink's assertion that giving an existing attacher the right to be present when make-ready is performed "does not meaningfully protect the interests of a pole owner or existing attacher" because "such uncompensated activities are unlikely to be a prudent use of a pole owner's or existing attacher's resources." Letter from Nicholas G. Alexander, Associate General Counsel, CenturyLink, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket 17-84, at 4-5 (filed July 23, 2018) (CenturyLink July 23, 2018 Wireline *Ex Parte* Letter). We find that if utilities and existing attachers have significant safety or network reliability concerns with an OTMR project, they will have an adequate incentive to exercise the right to be present.

¹¹³ *See, e.g.*, Charter Wireline & Wireless NPRM Comments at 56-57; Comcast Wireline & Wireless NPRM Comments at 21-23; NCTA Wireline & Wireless NPRM Reply at 16-17.

¹¹⁴ Such a petition right should address the concerns of existing attachers that claim they have no recourse if new attachers abuse the OTMR process. *See, e.g.*, NCTA July 18, 2018 Wireline *Ex Parte* Letter at 2; CWA July 26, 2018 Wireline *Ex Parte* Letter at 4.

¹¹⁵ We decline proposals to codify a complaint right under the pole attachment rules for existing attachers for violations of the OTMR rules. *See* Letter from Steven F. Morris, Vice President & Associate General Counsel, NCTA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2, 4 (filed July 18, 2018) (NCTA July 18, 2018 Wireline *Ex Parte* Letter); Letter from Debbie Goldman, Telecommunications Policy Director, Communications Workers of America, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 4 (filed July 26, 2018) (CWA July 26, 2018 *Ex Parte* Letter). In addition to being able to file petitions as described above, existing attachers may file informal complaints regarding alleged OTMR rules violations.

existing attachers from substandard work performed on their equipment by third-party contractors.¹¹⁶ At every step in the OTMR process, the safeguards we adopt give existing attachers an opportunity to monitor third-party work and raise any concerns they might have—either to the new attacher or to the utility. Far from being voiceless in their concerns about third-party work, as NCTA contends,¹¹⁷ existing attachers can take their reservations about new attacher workmanship and contractor qualifications to the utility, which, as the pole owner and an attacher on the pole, has the incentive to act on such concerns.

30. We recognize that we cannot fully align the incentives of new attachers with those of existing attachers and utilities, but we find that the significant benefits of faster, cheaper, more efficient broadband deployment from this new OTMR process outweigh any costs that remain for most pole attachments. We expect the OTMR regime we adopt today to speed broadband deployment without substantial service interruptions or danger to the public or workers. To the extent that it exceeds our expectations, we may consider expanding the availability of our OTMR process where it is safe to do so.¹¹⁸ Conversely, if new attachers fail to prevent physical harm or outages, we will not hesitate to revisit whether to maintain an OTMR option.

31. We note that even where an attachment qualifies for our new OTMR process, there may be instances where a new attacher prefers to use our existing pole attachment timeline because, for instance, the new attacher prefers a process where existing attachers are responsible for moving their own equipment rather than the new attacher.¹¹⁹ Therefore, we permit new attachers to elect our existing pole attachment regime (as modified herein) rather than the new OTMR process.¹²⁰

32. *Rejecting Non-OTMR Solutions.* We reject proposals advanced in the record to reform the pole attachment timeline—specifically, “right-touch, make-ready”¹²¹ and NCTA’s “Accelerated and Safe Access to Poles” (“ASAP”) proposal—which merely modify the current framework rather than using OTMR.¹²² We find that compared to our OTMR approach, these approaches have much more limited benefits because they rely on diffuse responsibility among parties that lack the new attacher’s incentive to ensure that the work is done quickly, cost-effectively, and properly.¹²³ Moreover, they would

¹¹⁶ See NCTA July 18, 2018 Wireline *Ex Parte* Letter at 2-3.

¹¹⁷ *Id.*

¹¹⁸ Corning estimates that applying OTMR to 5G attachments would result in an additional 5.9 million incremental premises passed and about \$8.8 billion in associated capital expenditures. Corning Economic Study at 5-6.

¹¹⁹ See Verizon Nov. 13, 2017 Wireline *Ex Parte* Letter at 2 (“Attachers who do not elect to use OTMR would be able to continue to use the existing pole attachment timeframes and processes.”).

¹²⁰ We reject requests that OTMR should be made a part of our existing pole attachment process. See Letter from Phillip Moeller, Executive Vice President, EEI, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2-3 (filed July 26, 2018) (EEI July 26, 2018 Wireline *Ex Parte* Letter) (“By creating a separate OTMR process, the Commission would make the pole attachment process administratively burdensome and overly complicated which may eliminate some of the intended benefits of this policy.”); Letter of David D. Rines, Counsel to Xcel Energy Services Inc. and Alliant Energy Corp., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2-3 (filed July 26, 2018) (Xcel/Alliant July 26, 2018 Wireline *Ex Parte* Letter). Because OTMR is an elective new process with its own requirements and obligations, we find that it requires distinct procedures and rules from our existing pole attachment procedures.

¹²¹ See Comcast Wireline & Wireless NPRM Reply at 10-11 (proposing right-touch, make-ready, which allows existing attachers to perform make-ready sequentially within a designated time period and relies on fines and other penalties to encourage existing attachers to meet their deadlines).

¹²² See Letter from Steven F. Morris, Vice President & Associate General Counsel, NCTA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84 (filed Mar. 5, 2018) (NCTA Mar. 5, 2018 Wireline *Ex Parte* Letter) (setting forth “ASAP” proposal, which shortens existing pole attachment timeline, particularly for utilities).

¹²³ See CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at 3; Letter from Kristine Laudadio Devine, Counsel to Google Fiber, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 4 (filed Mar. 14, 2018)

“do nothing to solve the numerous separate climbs and construction stoppages in the public-rights-of-way” resulting from sequential make-ready.¹²⁴ We also agree with AT&T that adopting a penalties-based approach is more likely to promote conflict than speedier deployment.¹²⁵

33. We also agree with commenters that the ASAP proposal would put unrealistic time pressure on existing attachers and utilities.¹²⁶ For example, NCTA recommends: (1) an expedited 15-day period for utilities to both complete their review of pole attachment applications and conduct the appropriate pole surveys; and (2) a seven-day period for presenting the new attacher with an estimate of make-ready charges.¹²⁷ As the Electric Utilities explain, “NCTA’s recent ‘ASAP’ proposal seeks to cut critical engineering review and addresses steps in the access process that are not part of the problem.”¹²⁸ While a more compressed pole attachment timeline is appropriate for our OTMR regime because a single party controls the work, such timelines are not appropriate for a utility that has to coordinate work separately for both the new attacher and multiple existing attachers.¹²⁹

34. *Legal Considerations.* We reject the contentions of certain cable commenters that OTMR “deprives an existing attacher of its statutory right to notice and an opportunity to add to or modify its own existing attachment before a pole is modified or altered and thus violates Section 224(h).”¹³⁰ Section 224(h) of the Act provides, in relevant part, that “[w]henver the owner of a pole . . . intends to modify or alter such pole . . . the owner shall provide written notification of such action to any entity that has obtained an attachment . . . so that such entity may have a reasonable opportunity to add to or modify its existing attachment.”¹³¹ We agree with Verizon that there is no statutory right under section 224(h) for an existing attacher to add to or modify its existing attachment when a new attacher is

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(Google Fiber Mar. 14, 2018 Wireline *Ex Parte* Letter) (“By reducing inefficiency and waste in make-ready, adoption of OTMR will shift the core economic assumptions that inform deployment planning.”).

¹²⁴ INCOMPAS Wireline NPRM Comments at 10; *see* CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at 2-3 (“[T]he ASAP Proposal would maintain the current sequence of duplicative visits to the pole[.]”); INCOMPAS July 22, 2018 Wireline *Ex Parte* Letter at 1.

¹²⁵ *See* AT&T Wireline NPRM Comments at 28 (“Adopting a penalties-based approach would only foment conflict, in litigation or otherwise, between new and existing attachers about who is to blame for the make-ready delay.”); *see also* Crown Castle Wireline NPRM Comments at 25 (stating that “the administration, tracking, and enforcement of such fines would simply complicate matters”); Frontier Wireline NPRM Comments at 19 (stating that any significant penalties for failing to act in a certain timeframe would unfairly shift significant costs and risks to existing attachers and utilities); Verizon Wireline NPRM Reply at 9.

¹²⁶ *See* Verizon Mar. 8, 2018 Wireline *Ex Parte* Letter at 3-4 (stating that “rather than enabling new attachers to help drive the application review, survey, and make-ready estimate process, the NCTA proposal would place increased burdens on pole owners and existing attachers to process applications and complete make-ready”); Google Fiber Mar. 14, 2018 Wireline *Ex Parte* Letter at 4-5; Electric Utilities Mar. 19, 2018 Wireline *Ex Parte* Letter at 2; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at 2.

¹²⁷ NCTA Mar. 5, 2018 Wireline *Ex Parte* Letter Attach. 1-2.

¹²⁸ Electric Utilities Mar. 19, 2018 Wireline *Ex Parte* Letter at 2.

¹²⁹ *See* Verizon Wireline NPRM Comments at 9 (“With the one-touch make-ready alternative available to those who want to move more quickly, the Commission should leave intact the current process and timelines for those attachers who do not wish to take on the responsibility for conducting an engineering survey, estimating the necessary make-ready work, and doing one-touch make-ready through an approved contractor.”)

¹³⁰ NCTA Wireline NPRM Reply at 20; *see also* Charter Wireline NPRM Comments at 45-46; Comcast Wireline NPRM Comments at 19; NCTA Wireline NPRM Comments at 19; Letter from Steve Morris, Vice President & Associate General Counsel, NCTA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 1 (filed July 12, 2018) (NCTA July 12, 2018 Wireline *Ex Parte* Letter).

¹³¹ 47 U.S.C. § 224(h).

performing the make-ready.¹³² On its face section 224(h) only applies to situations where the pole owner modifies or alters the pole, and thus is not implicated under the OTMR approach we adopt today: under our approach new attachers, not pole owners, perform OTMR work.¹³³

35. We also find that OTMR does not constitute a government taking of existing attachers' property that requires just compensation under the Fifth Amendment, and we reject arguments to the contrary.¹³⁴ As an initial matter, OTMR is not a "permanent physical occupation" of an existing attacher's property;¹³⁵ at most it gives contractors of the new attacher a temporary right to move and rearrange attachments.¹³⁶ In such situations, where a regulation falls short of eliminating all economically beneficial use of the property at issue, courts apply the balancing test of *Penn Central Transportation Co.*¹³⁷ and evaluate the economic impact of the regulation on the property owner, the extent to which the regulation has interfered with "distinct investment-backed expectations," and "the character of the government action."¹³⁸ Applying that test here makes clear that OTMR effects no taking. We are limiting the application of OTMR to simple work (i.e., where outages are not expected to occur) on wireline attachments in the communications space performed by qualified contractors, and we have taken steps to ensure that the OTMR process limits adverse effects on existing attachers' networks,¹³⁹ which means any economic impact on existing attachers and any interference with investment expectations will be limited. Furthermore, OTMR represents at most an incidental movement of existing attachers' property.¹⁴⁰ To the

¹³² Verizon Wireline NPRM Reply at 10.

¹³³ See 47 U.S.C. § 224(h). We reject NCTA's contention that our analysis here of section 224(h) somehow suggests that section 224 of the Act "provides new attachers a greater right to move existing facilities than the company that owns those facilities." NCTA July 18, 2018 Wireline *Ex Parte* Letter at 1-2. Rather, section 224 of the Act gives us broad authority to adopt appropriate pole attachment rules, including the OTMR regime set forth herein. See *infra* section III.E.

¹³⁴ See Charter Wireline & Wireless NPRM Comments at 49-50; Comcast Wireline & Wireless NPRM Comments at 22.

¹³⁵ See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1073 (1992). With respect to utilities' property interests, we recognize that our new OTMR regime grants access to utilities' poles, as our current regime does, via section 224(f)(1), which requires utilities to provide cable systems and telecommunications carriers with nondiscriminatory access to utilities' poles, ducts, and rights-of-way, and that Congress' grant of such mandatory access likely constitutes a government taking. See *Gulf Power Co. v. United States*, 187 F.3d 1324, 1328-29 (11th Cir. 1999). However, we agree with the Eleventh Circuit that by mandating that utilities receive just and reasonable rates for such access, the Act "is not facially unconstitutional under the Fifth Amendment, because, at least in most cases, it provides a constitutionally adequate process which ensures a utility does not suffer that taking without obtaining just compensation," *Id.* at 1338. Our OTMR regime changes the manner by which new attachers may invoke their mandatory access right under section 224(f)(1), but does not change the process by which new attachers must compensate utilities for such access.

¹³⁶ See Google Fiber Wireline NPRM Comments at 13-14.

¹³⁷ *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978); *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001).

¹³⁸ *Penn Central Transp. Co.*, 438 U.S. at 124.

¹³⁹ See *infra* section III.A.1.c.(i), (v) (specifying that new attachers must provide advance notice and allow representatives of existing attachers and the utility a reasonable opportunity to be present when surveys and OTMR work are performed); section III.A.1.c.(vi) (mandating that new attachers allow existing attachers and the utility the ability to inspect and request any corrective measures soon after the new attacher performs the OTMR work).

¹⁴⁰ *Penn Central Transp. Co.*, 438 U.S. at 124 (noting that a taking "may more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.") (citation omitted).

extent that movement affects existing attachers' or utilities' property, such impact is incidental and not our purpose, which is to promote broadband deployment and further the public interest.¹⁴¹

b. Contractor Selection Under the OTMR Process

36. We adopt rules requiring attachers using the OTMR process to use a utility-approved contractor if the utility makes available a list of qualified contractors authorized to perform surveys and simple make-ready work in the communications space. If there is no utility-approved list of contractors, we adopt rules that require OTMR attachers to use a contractor that meets key safety and reliability criteria, as recommended by the BDAC.¹⁴² The record suggests that inconsistent updating of approved contractor lists by utilities, as well as a lack of uniform contractor qualification and selection standards, leads to delays when new attachers seek to exercise their self-help remedy and perform make-ready work on a pole.¹⁴³ At the same time, existing attachers are understandably apprehensive about having unfamiliar contractors work on and potentially damage their facilities.¹⁴⁴ The process we adopt addresses both of these problems by preventing delays in the engagement of contractors and by establishing clear minimum qualifications.¹⁴⁵

37. *Utility-Approved Contractors.* We strongly encourage utilities to publicly maintain a list of approved contractors qualified to perform surveys and simple make-ready work as part of the OTMR process.¹⁴⁶ However we do not *require* utilities to do so. Utilities have a strong interest in protecting their equipment and many have indicated their interest in deciding which contractors can perform work on their poles.¹⁴⁷ At the same time, many utilities have indicated that they do not have the expertise to select contractors qualified to work in the communications space and would prefer to defer to the new attachers' choice of contractors.¹⁴⁸ Therefore, we give the utilities the option of maintaining a list of approved contractors for OTMR work but do not impose a mandate.

38. If the utility maintains a list, new and existing attachers may request that contractors meeting the qualifications set forth below be added to the utility's list and utilities may not unreasonably withhold consent to add a new contractor to the list. We adopt this requirement so that a utility that maintains a list does not have the ability to prevent deployment progress, which would be contrary to our goal in adopting OTMR. To be reasonable, a utility's decision to withhold consent must be prompt, set forth in writing that describes the basis for rejection, nondiscriminatory, and based on fair application of commercially reasonable requirements for contractors relating to issues of safety or reliability.¹⁴⁹

¹⁴¹ *See id.*

¹⁴² *See* BDAC January 2018 Recommendations at 26.

¹⁴³ *See* ACA Wireline NPRM Reply at 24-25; *see also* BDAC January 2018 Recommendations at 20.

¹⁴⁴ *See* AT&T Wireline NPRM Comments at 16; Charter Wireline NPRM Comments at 39; Comcast Wireline NPRM Comments at 21; *see also* BDAC January 2018 Recommendations at 27.

¹⁴⁵ *See* BDAC January 2018 Recommendations at 29-30.

¹⁴⁶ *See id.* at 28; CCU Wireline NPRM Comments at 17; CPS Energy Wireline NPRM Reply at 11; Verizon Wireline NPRM Reply at 7; Letter from Heather Burnett Gold, President & CEO, Fiber Broadband Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 4 (filed Apr. 10, 2018) (FBA Apr. 10, 2018 Wireline *Ex Parte* Letter).

¹⁴⁷ *See, e.g.,* CCU Wireline NPRM Comments at 17; AT&T Wireline NPRM Reply at 10; Google Fiber Wireline NPRM Reply at 9; Verizon Wireline NPRM Reply at 7.

¹⁴⁸ *See* BDAC January 2018 Recommendations at 20, 26, 28; Midwest Electric Utilities Wireline NPRM Comments at 27; POWER Coalition Wireline NPRM Comments at 13; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at 2.

¹⁴⁹ *See* BDAC January 2018 Recommendations at 30 ("Either a pole owner or an existing attacher could reject a contractor proposed by an attacher before the twenty-five calendar day notice period expires, but only on established, declared transparent grounds uniformly applied on the basis of safety or reliability qualification failure."); CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at 2 ("An IOU pole owner . . . may

39. To help ensure public and worker safety and the integrity of all parties' equipment, we conclude that any contractors that perform OTMR must meet certain minimum safety and reliability standards. We require utilities to ensure that contractors on the approved list meet the following minimum requirements, enumerated by the BDAC, for performing OTMR work: (1) follow published safety and operational guidelines of the utility, if available, but if unavailable, follow the National Electrical Safety Code (NESC) guidelines; (2) read and follow licensed-engineered pole designs for make-ready work, if required by the utility; (3) follow all local, state, and federal laws and regulations including, but not limited to, the rules regarding Qualified and Competent Persons under the requirements of the Occupational Safety and Health Administration (OSHA) rules; (4) meet or exceed any uniformly applied and reasonable safety and reliability thresholds set and made available by the utility, e.g., the contractor cannot have a record of significant safety violations or worksite accidents;¹⁵⁰ and (5) be adequately insured or be able to establish an adequate performance bond for the make-ready work it will perform, including work it will perform on facilities owned by existing attachers.¹⁵¹ These requirements collectively will materially reduce safety and reliability risks, as well as delays in the completion of pole attachments, by allowing one qualified contractor to perform all necessary make-ready work instead of having multiple contractors make multiple trips to the pole to perform this work.¹⁵²

40. *New Attacher Selection of Contractors.* Where there is no utility-approved list of qualified contractors or no approved contractors available within a reasonable time period, then, consistent with the BDAC recommendation, new attachers proceeding with OTMR may use qualified contractors of their choosing.¹⁵³ The new attacher must certify to the utility¹⁵⁴ (either in the three-

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object to any proposed Communications Contractor . . . (i) if it is determined that such contractor does not satisfy the minimum qualification requirements proposed by the BDAC; or (ii) if it is determined that such contractor does not meet any minimum qualification requirement of the IOU pole owner related to safety or reliability, that is disclosed to the public, and that is evenhandedly applied; or (iii) if it determined, based on past record, that such contractor is not qualified to perform the work for which it seeks to be pre-approved.”).

¹⁵⁰ We decline to adopt ACA's proposal that we combine prongs (1) and (4) by incorporating the relevant elements of (4) into (1) and deleting (4). See Letter from Thomas Cohen, Counsel to ACA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 4, Attach. at 10 (filed July 23, 2018) (ACA July 23, 2018 Wireline *Ex Parte* Letter). The contractor qualification requirements we adopt conform to the BDAC's recommendations, which we find superior to ACA's proposal. ACA's proposal would limit the utility to imposing “commercially reasonable” published safety and operational guidelines, *see id.*, but we find it best promotes safety and reliability to preserve the utility's discretion to publish binding safety and operational guidelines of its choosing, consistent with the BDAC's recommendation. Additionally, while we recognize that prongs (1) and (4) overlap, we find any such overlap is warranted as extra protection to help ensure contractors do safe, reliable work.

¹⁵¹ See BDAC January 2018 Recommendations at 29; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter Attach. at 2. We adopt NCTA's proposed clarification that the make-ready for which the contractor must be adequately insured or establish an adequate performance bond includes any work it will perform on facilities owned by existing attachers. See Letter from Jennifer McKee, Vice President & Associate General Counsel, NCTA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, WT Docket No. 17-79, Attach. at 9 (filed July 25, 2018) (NCTA July 25, 2018 Wireline *Ex Parte* Letter). Through this change, we intend to clarify that the bond or insurance must be adequate for the entire scope of the make-ready work; we do not through this change address the new attacher's responsibility for damage, which we discuss below. See *infra* section III.A.1.d.

¹⁵² See BDAC January 2018 Recommendations at 19; Lumos Wireline NPRM Reply at 4-5.

¹⁵³ See BDAC January 2018 Recommendations at 28 (“In addition to those contractors placed on an approved list by the pole owner, attachers may propose contractors to the pole owner for approval for any category of make-ready work.”). To maximize options for new attachers, we allow a new attacher entitled to select a contractor that does not appear on a utility's list to use its own employees to perform pole attachment work, so long as those employees meet all qualifications for contractors set forth herein. Thus, we use the term “contractor” as a term of art that encompasses the new attacher's employees.

business-day advance notice for surveys or in the 15-day make-ready notice)¹⁵⁵ that the named contractor meets the same five minimum requirements for safety and reliability discussed above.¹⁵⁶

41. The utility may mandate additional commercially reasonable requirements for contractors relating to issues of safety and reliability, but such requirements must clearly communicate the safety or reliability issue, be non-discriminatory, in writing, and publicly available (e.g., on the utility's website).¹⁵⁷ This condition will guard against pole damage and resulting outages and safety hazards due to particular local conditions,¹⁵⁸ while ensuring that utilities do not use these additional requirements as a roadblock to deployment.¹⁵⁹ We also grant utilities the flexibility to mandate such additional commercially reasonable requirements for contractors because utilities are best positioned to ensure that any additional state or local legal requirements are complied with and any additional environmental or pole-specific factors are accounted for.¹⁶⁰

42. Where there is no utility-approved list of contractors, we adopt rules, consistent with the BDAC's recommendation, allowing the utility to veto any contractor chosen by the new attach. ¹⁶¹ Utilities must base any veto on reasonable safety or reliability concerns related to the contractor's ability to meet one or more of the minimum qualifications described earlier in this subsection or on the utility's previously posted safety standards.¹⁶² The utility also must make its veto within either the three-business-day notice period for surveys or the 15-day notice period for make-ready.¹⁶³ In reaching this determination, we agree with the Coalition of Concerned Utilities that the safety and reliability of the pole

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¹⁵⁴ The new attach may choose to require the contractor to certify to the new attach that the contractor meets the five BDAC-enumerated minimum safety and reliability requirements and provide a copy of this contractor certification to the utility.

¹⁵⁵ See *infra* section III.A.1.c.(i), (v).

¹⁵⁶ See BDAC January 2018 Recommendations at 29; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter Attach. at 2.

¹⁵⁷ See BDAC January 2018 Recommendations at 29; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter Attach. at 2. Ideally, such requirements for contractors would also be found in the pole attachment agreement between the utility and the new attach.

¹⁵⁸ See Frontier Wireline NPRM Comments at 16; Charter Wireline NPRM Comments at 38.

¹⁵⁹ See Verizon Wireline NPRM Reply at 8 n.29.

¹⁶⁰ Cf. CCU Wireline NPRM Comments at 10, 24 (stating that the Coalition currently "complies with federal, state, and, when applicable, local code and operating requirements for safe work and construction practices[.]" and that "[i]t takes careful effort to maintain and operate critical electric infrastructure[]" to ensure attachments are not installed out of compliance with applicable codes or in a manner that cannot withstand weather emergencies); Midwest Electric Utilities Wireline NPRM Comments at 38 (describing a utility response to an inclement weather emergency or power outage); POWER Coalition Wireline Comments at 6 (describing its members' experience complying with local requirements).

¹⁶¹ See BDAC January 2018 Recommendations at 30; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter Attach. at 2.

¹⁶² See BDAC January 2018 Recommendations at 30 (stating that a utility cannot be unreasonably restrictive if a contractor meets the minimum qualification requirements; a rejection of a contractor must be on "established, declared transparent grounds uniformly applied on the basis of safety or reliability qualification failure"); CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter Attach. at 2. We agree with ACA that we should prevent unwarranted vetoes by requiring the utility to have a "reasonable" basis for vetoing the new attach's contractor. See ACA July 23, 2018 Wireline *Ex Parte* Letter at 4. We decline to adopt ACA's precise proposed wording, see *id.*, Attach. at 10, which we view as unduly restricting the utility's discretion.

¹⁶³ If a contractor conducts a survey and the utility vetoes that contractor during the 15-day notice period for make-ready, then the survey is not invalidated because the utility already had the opportunity to: (1) be present for the survey; and (2) object to the contractor during the three-business-day notice period for surveys.

is extremely important and, as a result, utilities should be able to disqualify contractors that raise concrete workmanship dangers.¹⁶⁴ To avoid an ongoing dispute between the utility and the new attacher that results in the substantial delay of the pole attachment, any veto by the utility that conforms with the requirements we set forth is determinative and final.¹⁶⁵ When vetoing an attacher's chosen contractor, however, the utility must identify at least one qualified contractor available to do the work.

43. *Existing Attachers.* We decline to grant existing attachers the right to veto or object to the inclusion of a contractor on the utility-approved list or a new attacher's contractor selection.¹⁶⁶ Several commenters explain that existing attachers lack the incentive to act quickly to accommodate a new attacher on a pole given that a new attacher may be a competitor to an existing attacher.¹⁶⁷ By contrast, the utility in most cases is not a competitor to the new attacher.¹⁶⁸ Further, while there will only be one utility with an objection right for any given pole, there could be several existing attachers for that same pole, thereby materially increasing the chances that an objection may be lodged for the purposes of competitive gamesmanship were we to allow existing attachers to challenge a new attacher's contractor selection. Therefore, we are not convinced that an objection process for existing attachers could be designed in a manner sufficient to prevent significant delays in deployment. Imposition of a time limit for objections could force existing attachers to make objections more promptly, but would not prevent gamesmanship, and imposition of a good faith objection requirement would not prevent deployment delays as new attachers would need to resort to the Commission's complaint process to enforce such a requirement.

44. We also decline suggestions that we grant existing attachers the right to disqualify a contractor if the contractor does not meet the minimum qualifications for contractors we establish or if the existing attacher previously terminated the contractor for poor performance or violations of federal, state, or local law.¹⁶⁹ Adopting this proposal is unnecessary because the minimum requirements for contractors we adopt, and the duties we place on utilities and new attachers to ensure compliance with those requirements, will protect against unsafe and unqualified contractors.¹⁷⁰ Additionally, giving existing attachers this form of a veto right could delay and deter broadband deployment.¹⁷¹ For example, adopting

¹⁶⁴ See CCU Wireline NPRM Reply at 2-3; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter Attach. at 2.

¹⁶⁵ See AT&T Wireline NPRM Reply at 10.

¹⁶⁶ The BDAC recommended giving existing attachers the right to object to a new attacher's proposed contractor. See BDAC January 2018 Recommendations at 30. Several commenters support granting existing attachers a right to object to either or both of (1) contractors on the utility list and (2) the new attacher's contractor selection. See, e.g., AT&T Wireline NPRM Comments at 16; CenturyLink Wireline NPRM Comments at 15; Charter Wireline NPRM Comments at 50, 56; NCTA Wireline NPRM Comments at 16.

¹⁶⁷ See, e.g., CMA Report at 6; CCU Wireline NPRM Comments at 11; Verizon June 21, 2018 Wireline *Ex Parte* Letter at 2; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at 2; FBA Apr. 10, 2018 Wireline *Ex Parte* Letter at 2; Letter from Karen Reidy, VP of Regulatory Affairs, INCOMPAS, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2 (filed Apr. 4, 2018) (INCOMPAS Apr. 4, 2018 Wireline *Ex Parte* Letter); Google Fiber Feb. 1, 2018 Wireline *Ex Parte* Letter at 1-2.

¹⁶⁸ See *infra* section III.C (describing declining incumbent LEC pole ownership rates).

¹⁶⁹ See NCTA July 18, 2018 Wireline *Ex Parte* Letter at 3; NCTA July 25, 2018 Wireline *Ex Parte* Letter at 2, Attach. at 9; CWA July 26, 2018 Wireline *Ex Parte* Letter at 4.

¹⁷⁰ See *supra* paras. 39-40. The utility and the new attacher both have an incentive to ensure quality work and comply with our rules. We therefore find that giving the existing attacher a parallel right to ensure compliance with the minimum qualifications is unnecessary.

¹⁷¹ See Letter from Kristine Laudadio Devine, Counsel to Google Fiber, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2 (filed July 26, 2018) (Google Fiber July 26, 2018 Wireline *Ex Parte* Letter); Verizon July 26, 2018 Wireline OTMR *Ex Parte* Letter at 4.

this proposal could create an incentive for existing attachers to terminate contractors in the interest of making contractor selection more difficult for potential competitors.

45. We also reject NCTA's proposal to permit new attachers to use only contractors pre-approved by existing attachers when moving existing attachers' equipment.¹⁷² Such a proposal undermines the goals we seek to promote in adopting OTMR—speeding and lowering the costs of new deployment. In cases where there are multiple existing attachers, new attachers may need to hire multiple contractors to move existing attachments before the new attachment can be completed thereby necessitating multiple trips to the pole.¹⁷³ Even in situations where there is only one existing attacher, a new attacher could be faced with the unenviable choice of paying higher costs to use the existing attacher's preferred contractor to complete all make-ready or using two different contractors—one to move the existing attacher and one to complete the new attachment—which would slow deployment and be more costly than using one contractor.¹⁷⁴

46. The rules we adopt should alleviate some commenters' concern that depriving existing attachers of a right to input in the contractor selection process could result in serious harm to existing facilities on the pole.¹⁷⁵ First, only simple make-ready work is subject to the OTMR process; existing attachers can perform their own make-ready work in more challenging and dangerous situations. Further, the authority we grant utilities to develop a mandatory list and veto a new attacher's contractor selection for OTMR work should help mitigate the risk to the safety and reliability of the attachments subject to make-ready work by the new attacher's contractor.¹⁷⁶ As several commenters point out, in many markets, contractors approved by the utilities may already be the same as those approved by existing attachers.¹⁷⁷ Additionally, regardless of whether the utility intervenes, contractors must meet the five criteria recommended by the BDAC, which help to ensure safe, reliable, and quality work. Finally, we conclude that we have put in place adequate protections elsewhere in the new OTMR process, in addition to the protections we identify here, to protect the network reliability and safety concerns of existing attachers.¹⁷⁸

47. *Use of Union Workers to Perform Make-Ready Work.* We decline to adopt a requirement that OTMR must be performed by union contractors where an existing attacher has entered into a collective bargaining agreement (CBA) that requires the existing attacher to use union workers for pole

¹⁷² NCTA Mar. 5, 2018 Wireline *Ex Parte* Letter Attach. 4-5; NCTA July 12, 2018 Wireline *Ex Parte* at 2.

¹⁷³ Cf. Google Fiber Apr. 12, 2018 Wireline *Ex Parte* Letter at 3 (stating that if a new attacher is required to use contractors approved by existing attachers “[n]ew attachers would still be forced to pay for multiple trips to the pole by multiple contractors”).

¹⁷⁴ Cf. *id.* at 3 (allowing the existing attacher to “mandate, at the time a new deployment is commencing, that a new entrant use only its approved contractors would not only introduce additional delay in the make-ready timeframe, but would also perpetuate the existing inefficient and costly sequential process”); see also Verizon Wireline NPRM Comments at 5 (allowing a new attacher to hire one approved contractor to move all the facilities on a pole reduces “the disruption, inconvenience, and delay that come from work by multiple crews,” lowering make-ready costs, and “improv[ing] safety and pole integrity”).

¹⁷⁵ See AT&T Wireline NPRM Comments at 16; Charter Wireline NPRM Comments at 52, 56; Comcast Wireline NPRM Comments at 21 n.51; NCTA Wireline NPRM Comments at 16; NCTA July 12, 2018 Wireline *Ex Parte* at 2.

¹⁷⁶ See CCU Wireline NPRM Comments at 26; Google Fiber Wireline NPRM Reply at 9.

¹⁷⁷ See Google Fiber Wireline NPRM Reply at 9 n.17; Verizon Wireline NPRM Reply at 6.

¹⁷⁸ See *infra* section III.A.1.c.(i), (v) (specifying that new attachers must provide advance notice and allow representatives of existing attachers and the utility a reasonable opportunity to be present when surveys and OTMR work are performed); section III.A.1.c.(vi) (mandating that new attachers allow existing attachers and the utility the ability to inspect and request any corrective measures soon after the new attacher performs the OTMR work).

attachment work.¹⁷⁹ The BDAC's OTMR recommendation did not create a different OTMR regime for existing attachers subject to CBAs,¹⁸⁰ and we find no reason to do so here. New attachers that are not parties to a CBA have no obligations under such a CBA. It is the new attacher's contractor that will be performing the make-ready work, so the CBA is not implicated.

48. Further, the record indicates that requiring a new attacher to hire a union contractor only because one of the existing attachers' CBA mandates the use of union workers to perform its pole attachment work would frustrate the efficiency and utility of OTMR. The record suggests that in some areas, it may not be possible for a new attacher to find union contractors covered by an existing attacher's CBA.¹⁸¹ In addition, tailoring our OTMR rules to an existing attacher's CBA "would result in a patchwork of rules that might be subject to change every few years and would be administratively unmanageable for new attachers."¹⁸²

49. The Communications Workers of America (CWA) has expressed concern that an OTMR regime that fails to honor CBAs has the potential to cause facility damage, service interruption, and danger to the public and workers.¹⁸³ Specifically, CWA argues that its CBAs ensure that make-ready work is performed by "well-trained employees who are directly accountable for their work," and as a result, "perform the job properly and safely."¹⁸⁴ We agree that experienced union contractors can evaluate the condition of poles, are familiar with the rules regulating attachments, and have experience preparing surveys and cost estimates and completing inspections of pole attachment work.¹⁸⁵ At the same time, we find that CWA's quality and safety concerns are already addressed in the proposed OTMR regime through the opportunity for existing attachers to be present for surveys and make-ready work¹⁸⁶ and to conduct post-make-ready inspections on the work performed.¹⁸⁷ Both opportunities provide existing attachers with a safeguard against facility damage and harms that could result from contractor mistakes¹⁸⁸—and nothing in our adoption of an OTMR regime should be construed as preventing an existing attacher from using union employees and/or contractors pursuant to an applicable CBA on pole-related work not

¹⁷⁹ Several commenters advocate such a requirement. See Frontier Wireline NPRM Comments at 17-18; AT&T Wireline NPRM Reply at 9-10; CenturyLink Wireline NPRM Reply at 14; CWA Feb. 6, 2018 Wireline *Ex Parte* Letter at 2; IBEW Jan. 30, 2018 Wireline *Ex Parte* Letter at 2.

¹⁸⁰ See BDAC January 2018 Recommendations at 19-25.

¹⁸¹ See Google Fiber Feb. 1, 2018 Wireline *Ex Parte* Letter at 4 (stating that, in many areas, the only union members covered by AT&T's collective bargaining agreements are AT&T employees).

¹⁸² Verizon Wireline NPRM Reply at 8.

¹⁸³ Letter from Debbie Goldman, Telecommunications Policy Director, CWA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 1-3 (filed May 23, 2018) (CWA May 23, 2018 Wireline *Ex Parte* Letter). Several dozen individual commenters similarly allege that "[t]his proposal puts both the lives of workers and the public at risk." See, e.g., John Bordreau Wireline NPRM Comments; Lee Cochran Wireline NPRM Comments; Maivys Cuevillas Wireline NPRM Comments; Kreissa Reed Wireline NPRM Comments. We reject these generalized allegations as speculative.

¹⁸⁴ CWA May 23, 2018 Wireline *Ex Parte* Letter at 3.

¹⁸⁵ CWA Wireline NPRM Comments at 3-4.

¹⁸⁶ See ACA Wireline NPRM Comments at 16-17.

¹⁸⁷ See AT&T Wireline NPRM Comments at 3, 18; Charter Wireline NPRM Comments at 56; COMPTIA Wireline NPRM Comments at 2; Electric Utilities Wireline NPRM Comments at 6; Google Fiber Wireline NPRM Comments at 6; Portland General Electric Company et al. (Oregon Electric Utilities) Wireline NPRM Comments at 8; CPS Energy Wireline NPRM Reply at 11.

¹⁸⁸ See ACA Wireline NPRM Comments at 16-17; Electric Utilities Wireline NPRM Comments at 6; CPS Energy Wireline NPRM Reply at 11.

subject to OTMR that the existing attacher is entitled to perform.¹⁸⁹

50. Finally, allowing private contracts to dictate our policy choice would “subvert[] the supremacy of federal law over contracts.”¹⁹⁰ As the Supreme Court has made clear, “[i]f the regulatory statute is otherwise within the powers of Congress . . . its application may not be defeated by private contractual provisions.”¹⁹¹

51. *Section 1.1412(d)*. We disagree with ACA’s contention that section 1.1412(d)—an existing rule provision that gives an electric utility’s “consulting representative” authority to “make final determinations, on a nondiscriminatory basis, where there is insufficient capacity and for reasons of safety, reliability, and generally applicable engineering purposes”¹⁹²—is moot as a result of our changes to the contractor process.¹⁹³ We provide opportunities for electric utilities to send a representative on surveys and make-ready work performed by a new attacher,¹⁹⁴ and this rule provision empowers that representative to make final decisions in specified cases. While we recognize that this may entail delay in certain limited circumstances in which the electric utility chooses to send a representative and a problem arises, ACA overstates its case in suggesting that this limited right “render[s] the improvements to the self-help process meaningless.”¹⁹⁵ We find the costs of retaining this narrow rule justified given its important role in promoting safe and reliable work and in establishing clear lines of authority for fieldwork at which multiple parties are present.

c. OTMR Pole Attachment Timeline

52. One substantial benefit of the OTMR process is that it allows for a substantially shortened timeline for application review and make-ready work.¹⁹⁶ We estimate that new attachers using the new OTMR process will save more than three months from application to completion as compared to the process provided for under our existing rules.¹⁹⁷

(i) Conducting a Survey

53. Our OTMR regime saves significant time by placing the responsibility on the new attacher (rather than the utility) to conduct a survey of the affected poles to determine the make-ready

¹⁸⁹ We decline to adopt CWA’s suggested language, which would provide for an existing attacher to use union employees pursuant to an applicable CBA on work subject to OTMR. See CWA July 26, 2018 Wireline *Ex Parte* Letter at 4. We recognize the value of union contractors, and attachers may choose to use union contractors; CWA’s proposal, however, could inhibit deployment by granting existing attachers control over the performance of OTMR work.

¹⁹⁰ Google Fiber Wireline NPRM Reply at 7.

¹⁹¹ *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224 (1986).

¹⁹² *Infra* Appx. A, 47 CFR § 1.1412(d).

¹⁹³ ACA July 23, 2018 Wireline *Ex Parte* Letter at 5, Attach. at 10.

¹⁹⁴ See *infra* Appx. A, 47 CFR §§ 1.1411(i)(1)(i), (i)(2)(i), (j)(3)(i), (j)(4)(i); *infra* sections III.A.1.c.i, III.A.1.c.v.

¹⁹⁵ ACA July 23, 2018 Wireline *Ex Parte* Letter at 5.

¹⁹⁶ We reject Hawaiian Electric’s request to make special accommodations for OTMR implementation in the Hawaiian Islands because of what it describes as the unique circumstances for pole attachments in Hawaii (e.g., longer pole ordering lead times, Public Utility Commission constraints, database updates). Hawaiian Electric July 25, 2018 Wireline *Ex Parte* Letter at 2-4. Hawaiian Electric has reasonable alternatives to address these challenges, including negotiating for timeline adjustments with new attachers, that themselves may be facing similar challenges, or seeking a waiver from the Commission.

¹⁹⁷ This calculation includes a 30-day reduction in the application review/survey stage, the elimination of the 28-day estimate and acceptance stages, and up to 45 days saved to complete make-ready.

work to be performed.¹⁹⁸ Under an OTMR regime, the survey will come near the beginning of the process (after the new attacher negotiates with the utility for pole access and chooses a contractor to perform the work required for attachment) to enable the new attacher to determine whether any make-ready is required and, if so, what type of make-ready (simple or complex) is involved. The results of the survey typically will be included in the new attacher's pole attachment application.¹⁹⁹

54. To help ensure that the new attacher handles third-party equipment with sufficient care and makes an accurate determination of the work to be done to prepare the poles for its new attachments, our new rules require new attachers to permit representatives of the utility and any existing attachers potentially affected by the proposed work to be present for the survey. We also require new attachers to use commercially reasonable efforts to provide the utility and existing attachers at least three business days of advance notice of the date, time, and location of the survey and the name of the contractor performing the survey.²⁰⁰ Despite claims to the contrary,²⁰¹ we agree with the BDAC that advance notice of three business days from the new attacher strikes the right balance between providing sufficient time to accommodate coordination with the utility and existing attachers and the need to keep the pole attachment process moving forward in a timely manner.²⁰² Also, as the BDAC found in the context of utility surveys, joint surveys help address the potential safety and equipment damage risks raised by existing attachers.²⁰³ To prevent coordination problems that may invite delay, we do not require a new attacher to set a date for the survey that is convenient for the utility and existing attachers.²⁰⁴ In the case of reasonable scheduling conflicts, however, we encourage the parties to work together to find a mutually-agreeable time for the

¹⁹⁸ See Verizon Wireline NPRM Reply at 5; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at 4.

¹⁹⁹ CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at 4.

²⁰⁰ See, e.g., BDAC January 2018 Recommendations at 37; ACA Wireline NPRM Reply Comments at 16-17; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at 4. Contrary to EEI's claim, our OTMR regime does not require the utility to serve in a clearinghouse role for surveys; the new attacher performs this function. See EEI July 26, 2018 Wireline *Ex Parte* Letter at 3-4. We also reject AT&T's request to eliminate the advance notice requirement for surveys, which AT&T claims is "impractical to fulfill because neither pole owners nor new attachers know the identity of existing attachers on a particular pole." Letter from Frank S. Simone, Vice President, Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 5 (filed July 23, 2018) (AT&T July 23, 2018 Wireline *Ex Parte* Letter). We recognize that new attachers may need to rely upon utilities for existing attacher contact information to make the notifications, and utilities presumably have access to such information through pole attachment agreements and/or previous make-ready notifications. Therefore, if a new attacher requests contact information for existing attachers from the utility for use in this notification process, the utility must provide any such contact information it possesses. We adopt this requirement so that a new attacher can fulfill its notification obligation when it does not have a direct relationship with existing attachers. We find a utility's failure to keep adequate documentation on existing attachments is insufficient justification for eliminating the advance notice requirement for surveys.

²⁰¹ See EEI July 26, 2018 Wireline *Ex Parte* Letter at 3 ("In practice, three business days of notice will rarely allow utilities or existing attachers the ability to schedule survey ride-outs."); Xcel/Alliant July 26, 2018 Wireline *Ex Parte* Letter at 3 n.5.

²⁰² See, e.g., BDAC January 2018 Recommendations at 37, 39 ("Members of the Committee agreed that a joint survey would be a useful option for the attacher and could benefit the utility as well. They also agreed that the pole owner should be able to establish the timing of the joint survey and then give the attacher reasonable notice (of not less than three days) to participate."); ACA Wireline NPRM Comments at 16-17; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at 4; FBA July 20, 2018 Wireline *Ex Parte* Letter at 4.

²⁰³ See BDAC January 2018 Recommendations at 37. NCTA's contention that the existing attacher has no recourse if it disagrees with the results of the new attacher's survey is incorrect. See NCTA July 18, 2018 Wireline *Ex Parte* Letter at 2-3. Existing attachers can raise any objections about the survey findings either with the new attacher or with the utility, which can make final determinations on survey results for reasons of capacity, safety, reliability, and generally applicable engineering purposes. See 47 CFR § 1.1412(d).

²⁰⁴ See BDAC January 2018 Recommendations at 40.

survey. We also encourage all attachers to provide a point of contact publicly (e.g., on their websites) so that new attachers know whom to contact when providing notices required under the OTMR regime.

(ii) Notifying the Utility of the Intent to Use OTMR

55. Consistent with the BDAC's recommendation, we require the new attacher to ensure that its contractor determines whether make-ready work identified in the survey is simple or complex, subject to a utility's right to reasonably object to the determination.²⁰⁵ For purposes of clarity and certainty, we require a new attacher—if it wants to use the OTMR process and is eligible to do so based on the survey—to elect OTMR in its pole attachment application and to identify in its application the simple make-ready work to be performed.²⁰⁶ Some commenters oppose letting the new attacher's contractor make the simple versus complex determination.²⁰⁷ AT&T, for example, advocates for allowing the existing attacher to make the determination.²⁰⁸ However, we agree with those commenters that argue that the new attacher's contractor has the incentive to make the correct determination in order to (1) avoid liability for damages caused by an incorrect choice; (2) limit risk; and (3) in the case of third-party contractors, preserve relationships with all attachers, as well as with the utility, to obtain future work.²⁰⁹ As a result, we find it is "more likely that approved contractors will be conservative in their determination of whether work is simple or complex."²¹⁰ In addition, we agree with Google Fiber that having a contractor chosen from a neutral utility-approved list, where such a list is available, "determine whether make-ready is simple or complex means neither the incumbent nor the new attacher has an opportunity to inject anti-competitive bias into the process."²¹¹

56. We require a utility that wishes to object to a simple make-ready determination to raise such an objection during the 15-day application review period (or within 30 days in the case of larger orders).²¹² We decline suggestions that we extend the objection right to existing attachers²¹³ because we

²⁰⁵ See *id.* at 24; see also CPS Energy Wireline NPRM Reply at 7; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at Attach. at 1; Verizon Mar. 8, 2018 Wireline *Ex Parte* Letter at 5; INCOMPAS Apr. 4, 2018 Wireline *Ex Parte* Letter at 2. Because all utilities have strong incentives to promote safety and the structural integrity of their poles, we agree with AT&T and Windstream that all utilities, including incumbent LEC pole owners, should have the ability to object to the simple/complex determination on poles that the utility owns. See AT&T July 23, 2018 Wireline *Ex Parte* Letter at 2-3; Windstream July 25, 2018 Wireline *Ex Parte* Letter at 2-3. At this time, we find it unnecessary to establish specific procedures around determining whether work will be in the communications space (and thus eligible for OTMR) because we expect that determination to be self-evident.

²⁰⁶ CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter Attach. at 2.

²⁰⁷ See AT&T Wireline NPRM Reply at 9; NCTA Wireline NPRM Reply at 17; CWA Feb. 6, 2018 Wireline *Ex Parte* Letter at 3.

²⁰⁸ See AT&T Wireline NPRM Reply at 9; Charter Wireline & Wireless NPRM Comments at 55.

²⁰⁹ See Google Fiber Wireline NPRM Reply at 6; Verizon Mar. 8, 2018 Wireline *Ex Parte* Letter at 5; see also INCOMPAS Apr. 4, 2018 Wireline *Ex Parte* Letter at 2 (explaining that letting existing attachers, which are often competitors of new attachers, select the contractor for OTMR could lead to anti-competitive behavior). In cases where the new attacher uses its own employees, we find that it will be sufficiently incentivized to make the correct choice in order to limit liability for damages and risk.

²¹⁰ Google Fiber Feb. 1, 2018 Wireline *Ex Parte* Letter at 3.

²¹¹ *Id.*; see also Verizon Mar. 8, 2018 Wireline *Ex Parte* Letter at 5.

²¹² We are not, contrary to some assertions, making the utility the arbiter of what constitutes complex make-ready within the communications space. See Letter from Robin F. Bromberg, Counsel to American Electric Power Service Corp. and Georgia Power, to Marlene Dortch, Secretary, FCC, WC Docket No. 17-84, at 1 (filed July 23, 2018) (AEP/Georgia Power July 23, 2018 Wireline *Ex Parte* Letter); Letter from Robin F. Bromberg, Counsel to Georgia Power et al., to Marlene Dortch, Secretary, FCC, WC Docket No. 17-84, at 6 (filed July 26, 2018) (Southern Company July 26, 2018 Wireline *Ex Parte* Letter). We are merely giving the utility the ability, *if it elects*, to evaluate and object to the simple/complex determination made by the new attacher's contractor. We do so because we find that the utility is in a good position to make an unbiased and informed decision on this issue. Utilities are

agree that doing so could provide existing attachers the opportunity “to slow a new attacher’s deployment by over-designating make-ready work as complex.”²¹⁴ Also, while the BDAC did not address the timing of an objection to the simple/complex determination in its OTMR recommendation, we find that setting a time limit for the objection will reduce confusion and foster quicker deployment. We find 15 days to be sufficient because the utility will have the right to accompany the new attacher’s contractor on the survey when the contractor makes the simple/complex determination,²¹⁵ so the utility will have ample opportunity to have the information it needs to determine whether to object before the deadline.

57. If the utility objects to the new contractor’s determination that work is simple, then the work is deemed complex—the utility’s objection is final and determinative so long as it is specific and in writing, includes all relevant evidence and information supporting its decision, and provides a good faith explanation of how such evidence and information relate to a determination that the make-ready is not simple. This approach is consistent with other decisions left to a utility during our pole attachment process.²¹⁶ We find that making the utility’s determination final is appropriate because it avoids protracted disputes that could slow deployment. However, we caution utilities that if they make such a decision in a manner inconsistent with the requirements we set forth, for instance without adequate support or in bad faith, then new attachers can avail themselves of our complaint process to address such behavior.

58. If the new attacher determines that the make-ready involves a mix of simple and complex work (or involves work above the communications space), then we allow the new attacher discretion to determine whether to bifurcate the work. If the new attacher prefers to complete the simple make-ready work under the OTMR process while it waits for complex work/work above the communications space to run its course through the longer existing process, then it may do so. A new attacher electing to bifurcate the work must submit separate applications for the simple and complex work and work above the communications space.²¹⁷ If the new attacher prefers that its entire project (both simple and complex work and work above the communications space) follow the existing process, or if the new attacher does not view bifurcation as feasible, then it may employ the existing process for the entire project.

59. In response to a request from Xcel/Alliant, we clarify “what procedures should be followed when it is discovered in the field while make-ready is being performed that the work on a particular pole is in fact complex, or if it is found that conditions in the field will prevent the OTMR

(Continued from previous page)

free to consult with existing attachers in making such an evaluation to the extent such consultation would be useful. *See* Letter from Brett Kilbourne, Vice President, Policy and General Counsel, UTC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2 (filed July 26, 2018) (UTC July 26, 2018 Wireline *Ex Parte* Letter at 2).

²¹³ *See* NCTA July 18, 2018 Wireline *Ex Parte* Letter at 2-3; CWA July 26, 2018 Wireline *Ex Parte* Letter at 4.

²¹⁴ Verizon July 26, 2018 Wireline OTMR *Ex Parte* Letter at 4; *see also* Google Fiber July 26, 2018 Wireline *Ex Parte* Letter at 2. We also disagree with NCTA’s contention that the existing attacher has no recourse if it does not agree with the determination of the new attacher’s contractor that certain make-ready work is simple. *See* NCTA July 18, 2018 Wireline *Ex Parte* Letter at 2-3. The existing attacher always may voice its concerns to the new attacher and to the utility, which can veto the determination of a new attacher’s contractor and which has an incentive as the pole owner and as an attacher to ensure that work is classified correctly.

²¹⁵ *See infra* section III.A.1.c.(i).

²¹⁶ *See* 47 U.S.C. § 224(f)(2); *see infra* Appx. A, 47 CFR § 1.1412(d).

²¹⁷ *See, e.g.,* AEP/Georgia Power July 23, 2018 Wireline *Ex Parte* Letter at 1-2 (“It is unclear how the Commission intends the OTMR process to unfold where a single application involves various categories of make-ready, including simple communications space make-ready, complex communications space make-ready, and power supply space make-ready.”); *see* UTC July 26, 2018 Wireline *Ex Parte* Letter at 2 (requesting clarification as to what extent a utility may deny an application that includes multiple types of make-ready). In response to these requests for clarification, we have clarified herein that new attachers that wish to perform both OTMR and complex work must submit separate applications.

contractor from performing the make-ready work in a ‘simple’ manner, if at all.”²¹⁸ In such situations, we find that if the new attacher or the utility discovers that work initially classified by the new attacher and approved by the utility as simple actually turns out to be complex, then that specific work must be stopped.²¹⁹ The determining party must notify the other party of its determination and the affected poles; the attachments at issue will then be governed by the non-OTMR timeline, and the utility should provide notice to existing attachers of make-ready work as soon as reasonably practicable.²²⁰

(iii) Review of Application for Completeness

60. In the interest of speeding application review, we adopt a rule to specify that under the OTMR regime, a pole attachment application is complete if it provides the utility with the information necessary under the utility’s procedures, as specified in a master service agreement or in publicly-available requirements at the time of submission of the application, to make an informed decision on the application.²²¹ We also establish a timeline for the utility’s review of the application for completeness. We adopt these requirements to address attachers’ complaints—made in response to the Commission’s request in the *Wireline Infrastructure Notice* for comments on ways to streamline and accelerate the pole attachment timeline²²²—that “pole owners are not transparent about telling applicants all information that is required to be included on applications at the time of their submission,” often resulting in delays to the pole attachment process while the pole owner requests additional information over a series of weeks or months.²²³

61. While the current definition of a complete application only requires “information necessary under [the utility’s] procedures,”²²⁴ our revised definition provides more transparency about what an attacher must include in its application, because the master service agreement or publicly-available requirements must be available to new attachers as they prepare their application.²²⁵ We reject NCTA’s proposal that we define an application as complete if it provides “only the information reasonably necessary to commence the application process and does not impose unreasonable or unnecessary additional requirements”²²⁶ because that definition fails to provide new attachers sufficient prior notice of the application requirements and invites disputes between the new attacher and utility over what information is “reasonably necessary to commence the application process” or what constitutes “unreasonable or unnecessary additional requirements.”²²⁷

62. To prevent unnecessary delays in starting the pole attachment process, we adopt rules consistent with the BDAC-recommended timeline for a utility to determine whether a pole attachment

²¹⁸ Xcel/Alliant July 26, 2018 Wireline *Ex Parte* Letter at 4.

²¹⁹ See *infra* Appx. A, 47 CFR § 1.1411(j)(4)(iii). The new attacher may choose to continue OTMR work on other poles to the extent that such work is simple.

²²⁰ See *infra* section III.A.2.a.(iii); Appx. A, 47 CFR § 1.1411(e).

²²¹ See Letter from Thomas Cohen, Counsel to ACA, to Marlene Dortch, Secretary, FCC, WC Docket No. 17-84, at 5 (filed Sep. 14, 2017) (ACA Sep. 14, 2017 Wireline *Ex Parte* Letter). The BDAC recommended a definition of a complete pole attachment application that we adopt for our existing pole attachment timeline. See BDAC January 2018 Recommendations at 32; see also *infra* section III.A.1.c.(iii). We slightly revise that definition for purposes of our OTMR timeline to account for the new attacher, rather than the utility, conducting the pole surveys.

²²² See *Wireline Infrastructure Notice*, 32 FCC Rcd at 3268-69, 3273, paras. 7-8, 21.

²²³ See Lighttower Wireline NPRM Comments at 4-5; ACA Sep. 14, 2017 Wireline *Ex Parte* Letter at 4; FBA Apr. 10, 2018 Wireline *Ex Parte* Letter at 3; FBA July 20, 2018 Wireline *Ex Parte* Letter at 3-4.

²²⁴ 47 CFR § 1.1411(c).

²²⁵ See *infra* Appx. A, 47 CFR § 1.1411(c)(1).

²²⁶ NCTA Mar. 5, 2018 Wireline *Ex Parte* Letter at Attach. at 1.

²²⁷ *Id.*

application is complete:²²⁸

- A utility has 10 business days after receipt of a pole attachment application in which to determine whether the application is complete and notify the attacher of that decision.
- If the utility notifies the attacher that the attacher's application is not complete within the 10 business-day review period, then the utility must specify where and how the application is deficient.
- If there is no response by the utility within 10 business days, or if the utility rejects the application as incomplete but fails to specify any deficiencies in the application, then the application is deemed complete.
- If the utility timely notifies the new attacher that the application is incomplete and specifies deficiencies, a resubmitted application need only supplement the previous application by addressing the issues identified by the utility, and the application shall be deemed complete within five business days after its resubmission, unless the utility specifies which deficiencies were not addressed and how the resubmitted application did not sufficiently address the utility's reasons.²²⁹
- The new attacher may follow this resubmission procedure as many times as it chooses, so long as in each case it makes a bona fide attempt to correct the issues identified by the utility, and in each case the deadlines set forth herein apply to the utility's review.

63. We find that incorporating a specific timeline into our rules provides all parties with some predictability about the start of the OTMR process and avoids unnecessary delays that arise when utilities do not formally accept an application in a timely manner.²³⁰ We find that the timeline we adopt balances the interests of new attachers in the speedy processing of applications and of utilities in needing sufficient time to review the applications. We require utilities to specify the deficiencies in pole attachment applications within 10 business days of receipt so that the new attachers have the information necessary to address those deficiencies in a timely fashion. We also believe this gives incentives for utilities generally to communicate to prospective applicants concerning what is needed for an application because doing so will aid in the utility's formal review process. We adopt a "deemed grant" remedy to prevent delays, and we adopt a shorter timeline for second and further reviews because we expect utilities' review to be cabined to a more limited number of issues that it previously identified. We also encourage utilities that receive complete applications to respond promptly and affirmatively confirm that applications are complete, rather than wait for the 10 business-day review period to lapse. In response to a concern raised by Crown Castle, we clarify that the utility cannot delay its determination of whether an application is complete by seeking to negotiate rates, terms, and conditions in the pole attachment agreement that "unreasonably deviate from those assured by the rules."²³¹ Such bad faith practices intended to delay the start of the pole attachment timeline are prohibited as contrary to our goal of speedy broadband deployment.

(iv) Application Review

64. For OTMR attachments, we shorten the time period within which a utility must decide

²²⁸ BDAC January 2018 Recommendations at 32; *see also* ACA Sep. 14, 2017 Wireline *Ex Parte* Letter at 5. *See infra* Appx. A, 47 CFR § 1.1411(j)(1)(ii).

²²⁹ Because the utility already must specify the reasons for deeming an application incomplete, and thus condense the outstanding issues with regard to the application, we disagree with EEI that utilities should have 10 days to review a resubmitted application to determine whether the new attacher adequately has addressed the reasons for the application's return. *See* EEI July 26, 2018 Wireline *Ex Parte* Letter at 4.

²³⁰ *See* ACA Sep. 14, 2017 Wireline *Ex Parte* Letter at 4-5 (explaining the delays and lack of transparency in the application process).

²³¹ Crown Castle July 25, 2018 Wireline *Ex Parte* Letter at 4.

whether to grant a complete application from 45 days to 15 days for standard requests and from 60 days to 30 days for larger requests.²³² While the BDAC did not address this issue, we find that because the new attacher (rather than the utility) will be doing most of the pre-make-ready work under OTMR (e.g., surveys, notices), it is appropriate to adopt a shorter timeline for the utility to review the application.²³³ Furthermore, because the utility has the right to specify the information it requires the new attacher to put in the application and has the ability to reject the application (multiple times if necessary) before accepting it for review, we find 15 days should be sufficient for the utility to conduct its review.²³⁴ We reject Xcel/Alliant's contention that providing a shorter timeframe for OTMR application review will cause utilities to unfairly prioritize OTMR applications over previously-filed non-OTMR applications or cause new attachers to game the process by submitting OTMR applications to get them processed and approved ahead of other attachers.²³⁵ There is no incentive for new attachers to submit bad faith OTMR applications because it does not bring the applicant any advantage—as discussed above, once the new attacher or utility discovers that simple work actually is complex, then the work must follow our non-OTMR timeline, resulting in no time savings and wasted money and effort that the applicant could have saved had it originally classified the work correctly in its application.²³⁶

(v) Make-Ready

65. The new attacher may proceed with OTMR by giving 15 days' prior written notice to the utility and all affected existing attachers.²³⁷ To avoid unnecessary delays, we conclude that the new attacher may provide the required 15-day notice any time after the utility deems its pole attachment application complete. Thus, the 15-day notice period may run concurrently with the utility's evaluation of whether to grant the application.²³⁸ If, however, the new attacher cannot start make-ready work on the date specified in its 15-day notice (e.g., because its application has been denied or it is otherwise not ready to commence make-ready), then the new attacher must provide 15 days' advance notice of its revised make-ready date.

²³² See *infra* Appx. A, 47 CFR § 1.1411(j)(2) (providing that the deadline is extended to 60 days for larger pole attachment requests as described in 47 CFR § 1.1411(g)). Larger requests are when an order is greater than 3000 poles or 5 percent of the utility's poles in a state. See *infra* Appx. A, 47 CFR § 1.1411(g).

²³³ See CPS Energy Wireline NPRM Reply at 7 (explaining that transferring the make-ready design and planning to the new attachers allows CPS Energy to slash its pole attachment application review time by over fifty percent); see also EEI July 26, 2018 Wireline *Ex Parte* Letter at 5; Xcel/Alliant July 26, 2018 Wireline *Ex Parte* Letter at 2-4; UTC July 26, 2018 Wireline *Ex Parte* Letter at 2.

²³⁴ We reject the contentions that 15 days “does not provide a mechanism by which a new attacher may be made aware if the poles it selected are already subject to a pre-existing pole attachment application” and that it does not “account for how to address multiple or overlapping pole orders.” EEI July 26, 2018 Wireline *Ex Parte* Letter at 5; see also Xcel/Alliant July 26, 2018 Wireline *Ex Parte* Letter at 2; UTC July 26, 2018 Wireline *Ex Parte* Letter at 2. In the time we give to a utility to review a pole attachment application and also to determine its completeness, we expect that the utility should be able to resolve these processing issues. But, if the utility needs additional time, then it may work with the new attacher to negotiate a new schedule that timely resolves these issues. We retain in the OTMR context our preexisting requirement that if a utility denies an application, the utility's denial must be specific and include all relevant evidence and information supporting its denial and must explain how such evidence and information relate to a denial of access for reasons of safety, reliability, lack of capacity, or engineering standards. See 47 CFR § 1.1403(b).

²³⁵ Xcel/Alliant July 26, 2018 Wireline *Ex Parte* Letter at 3.

²³⁶ See *supra* section III.A.1.a.

²³⁷ See COMPTIA Wireline NPRM Comments at 2; Google Fiber Wireline NPRM Reply at 9; cf. BDAC January 2018 Recommendations at 23.

²³⁸ We disagree with CWA's contention that the utility's application review period and the new attacher's pre-make-ready notice period should not run concurrently. CWA July 26, 2018 Wireline *Ex Parte* Letter at 3. As part of our goal of speeding the OTMR pole attachment process, we find that allowing the two time periods to run concurrently will eliminate unnecessary delays in the process.

66. Although the BDAC recommendation provides for 25 days prior written notice for OTMR,²³⁹ we find that 15 days strikes a reasonable balance between promoting fast access to utility poles (one of the core goals of OTMR) and providing sufficient time for existing attachers and the utility to work with the new attacher to arrange to be present when OTMR is being performed on their equipment.²⁴⁰ Furthermore, the 25-day notice period recommended by the BDAC for OTMR is only five days shorter than the 30-day period recommended by the BDAC for existing attachers to complete complex make-ready work,²⁴¹ which is not much time savings for an OTMR process that we adopt for simple work that is unlikely to cause safety issues.²⁴² We also disagree with NCTA's request for a longer notice period for larger projects,²⁴³ because this is merely a notice requirement and does not require action on the part of the existing attacher or utility, there is no need for a longer notice period for larger projects.

67. To keep all affected parties informed about the new attacher's progress, and consistent with the BDAC's recommendation, we require the new attacher to provide representatives of the utility and existing attachers with the following information in the 15-day advance notice: (1) the date and time of the make-ready work; (2) a description of the make-ready work involved; (3) a reasonable opportunity to be present when the make-ready work is being performed; and (4) the name of the contractor chosen by the new attacher to perform the make-ready work.²⁴⁴ Allowing existing attachers and the utility a reasonable opportunity to be present when OTMR work is being done addresses the concerns of existing attachers that third-party contractors may not take proper care when performing simple make-ready work on their equipment.²⁴⁵ We also adopt the advance notice requirements to allow the utility and existing attachers, if they so choose, to alert their customers that work on their equipment is forthcoming; as Liberty Cablevision of Puerto Rico explains, "[t]his is a reasonable way to address concerns that service-affecting problems arising from the make-ready work would be improperly attributed to an existing attacher."²⁴⁶ In addition, providing the name of the new attacher's OTMR contractor allows existing

²³⁹ See BDAC January 2018 Recommendations at 23; *see also* AT&T Wireline NPRM Comments at 17 (requesting that new attachers notify existing attachers at least 30 days prior to the OTMR make-ready); CPS Energy Wireline NPRM Reply at 9, 16-17 (requesting 21 days' advance notice to existing attachers of impending OTMR work); Charter Feb. 5, 2018 Wireline *Ex Parte* Letter at 1 (requesting 30 days' advance notice to give existing attachers a chance to move their equipment); CenturyLink July 23, 2018 Wireline *Ex Parte* Letter at 4-5 (requesting 25 days advance notice); NCTA July 25, 2018 Wireline *Ex Parte* Letter at 2 (requesting 25 days advance notice); CWA July 26, 2018 Wireline *Ex Parte* Letter at 3 (requesting 25 days advance notice).

²⁴⁰ See Level 3 Wireline NPRM Comments at 3; Verizon Wireline NPRM Comments at 7 (recommending only five days' notice before OTMR work begins); Google Fiber Wireline NPRM Reply at 9.

²⁴¹ See BDAC January 2018 Recommendations at 21, 23.

²⁴² See Google Fiber Wireline NPRM Reply at 9 (stating that "a 15-day notice period should be sufficient for utility-approved contractors to ensure that these services will be adequately protected during make-ready").

²⁴³ See NCTA July 25, 2018 Wireline *Ex Parte* Letter at 2.

²⁴⁴ See BDAC January 2018 Recommendations at 23; *infra* Appx. A, 47 CFR § 1.1411(j)(4)(i); Charter Wireline & Wireless NPRM Comments at 56; NCTA Mar. 5, 2018 Wireline *Ex Parte* Letter at Attach. at 5. As is the case for survey notifications, if a new attacher requests contact information for existing attachers from the utility for use in this notification process, the utility must provide any such contact information it possesses. *See supra* section III.A.1.c.(i). We adopt this requirement so that a new attacher can fulfill its notification obligation when it does not have a direct relationship with existing attachers.

²⁴⁵ See BDAC January 2018 Recommendations at 27 ("Existing attachers worry that one-touch make-ready endangers their attachments and provision of service because they are in control of neither the contractor nor the quality of work performed."); Comcast Wireline & Wireless NPRM Comments at 21; NCTA Mar. 5, 2018 Wireline *Ex Parte* Letter at 2 (stating that cable operators have experienced problems with OTMR "where there is a complete lack of privity between the existing attacher and the contractor.").

²⁴⁶ Liberty Cablevision of Puerto Rico Wireline NPRM Comments at 8 n.7.

attachers to notify the utility and the utility to object if the contractor is not properly qualified.²⁴⁷

68. We emphasize that the 15 days is only a notice period before the new attacher begins make-ready work; it is not an opportunity for existing attachers or the utility to complete make-ready work on their equipment and then bill the new attacher for that work.²⁴⁸ However, we clarify that we are not precluding existing attachers and the utility from doing non-reimbursable work on their equipment during the 15-day notice period. We find that, contrary to the requests of certain attachers,²⁴⁹ providing an existing attacher an affirmative right to perform make-ready and bill the new attacher for such work during the notice period would undermine one of the main benefits of OTMR: decreasing make-ready costs for new attachers.²⁵⁰

69. We also adopt the BDAC recommendation that we require the new attacher to notify an affected entity immediately if the new attacher's contractor damages another company's equipment or causes an outage that is reasonably likely to interrupt the provision of service.²⁵¹ We extend this requirement to damage to the utility's equipment as well. Upon receiving notice of damaged equipment or a service outage, the utility or existing attacher can either complete any necessary remedial work and bill the new attacher for the reasonable costs related to fixing the damage or outage or require the new attacher to fix the damage or outage at its expense immediately following notice from the utility or existing attacher.²⁵² Upon notice from the existing attacher or the utility to fix damages or an outage caused by the new attacher, the new attacher must complete the repair work before it can resume its make-ready work.²⁵³ Where the utility or the existing attacher elects to fix the damage or outage, the new attacher can only continue with make-ready work if it does not interfere with the repair work being

²⁴⁷ See BDAC January 2018 Recommendations at 27 ("Opponents of one-touch make-ready often cite unknown contractor qualifications as a principal reason why one-touch make-ready should not be adopted."); see also Charter Wireline & Wireless NPRM Comments at 42 (stating that OTMR is only as effective as the contractor performing the work).

²⁴⁸ See Verizon July 2, 2018 Wireline *Ex Parte* Letter at 3 ("If a new attacher elects OTMR, existing attachers would not have the right to perform their own make-ready."); Google Fiber July 26, 2018 Wireline *Ex Parte* Letter at 2.

²⁴⁹ See NCTA July 18, 2018 Wireline *Ex Parte* Letter at 3-4; CenturyLink July 23, 2018 Wireline *Ex Parte* Letter at 4; Letter from Christianna Barnhart, Vice President, Regulatory Affairs, Charter, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 1 (filed July 25, 2018) (Charter July 25, 2018 Wireline *Ex Parte* Letter); Letter from David Don, Vice President, Regulatory Policy, Comcast, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 1 (filed July 26, 2018) (Comcast July 26, 2018 Wireline *Ex Parte* Letter); CWA July 26, 2018 Wireline *Ex Parte* Letter at 3.

²⁵⁰ See Google Fiber Mar. 14, 2018 Wireline *Ex Parte* Letter at 1; Verizon Mar. 8, 2018 Wireline *Ex Parte* Letter at 3-4. We decline CenturyLink's request that we clarify that when performing OTMR, a new attacher should preserve the relative position of existing attachers on a pole. See CenturyLink July 23, 2018 Wireline *Ex Parte* Letter at 5. While we agree that new attachers should strive to complete their attachments in the least disruptive manner possible, the Commission has not historically regulated the positioning of attachments on the pole, and attachers remain free to bargain for such positioning rights in their respective pole attachment agreements with the utility.

²⁵¹ BDAC January 2018 Recommendations at 22; Charter Wireline & Wireless NPRM Comments at 57; NCTA Mar. 5, 2018 Wireline *Ex Parte* Letter at Attach. at 5; Comcast July 26, 2018 Wireline *Ex Parte* Letter at 1; Google Fiber July 26, 2018 Wireline *Ex Parte* Letter at 1-2. This obligation also applies when the new attacher or its contractors are performing self-help make-ready work. See *infra* section III.A.2.b.

²⁵² See, e.g., CenturyLink Wireline NPRM Comments at 12-13; Charter Wireline & Wireless NPRM Comments at 56-57; CPS Energy Wireline NPRM Reply at 11-12; Electric Utilities Wireline NPRM Comments at 6; Frontier Wireline NPRM Comments at 19; Level 3 Wireline NPRM Comments at 3; Midwest Electric Utilities Wireline NPRM Comments at 8; POWER Coalition Wireline NPRM Comments at 12; UTC Wireline NPRM Comments at 14; AT&T-CWA Jan. 16, 2018 Wireline *Ex Parte* Letter at 1; NCTA July 18, 2018 Wireline *Ex Parte* Letter at 3; Comcast July 26, 2018 Wireline *Ex Parte* Letter at 1-2; Google Fiber July 26, 2018 Wireline *Ex Parte* Letter at 1-2.

²⁵³ See NCTA July 18, 2018 Wireline *Ex Parte* Letter at 3; Comcast July 26, 2018 Wireline *Ex Parte* Letter at 1; Google Fiber July 26, 2018 Wireline *Ex Parte* Letter at 2.

conducted by the utility or existing attacher. This requirement for immediate notification and repair of damages or outages caused by a new attacher's contractor addresses the concern of existing attachers and utilities that the new attacher's contractor may damage equipment or cause an outage that would harm consumers or threaten safety without the existing attacher's or utility's knowledge or an opportunity for prompt recourse.²⁵⁴

(vi) Post Make-Ready

70. We agree with commenters that suggest that the OTMR process should include time for post-make-ready inspections and the quick repair of any defective make-ready work.²⁵⁵ To give existing attachers and the utility an opportunity to correct any errors and to further encourage quality work by the new attacher, we adopt the BDAC's recommendation that the new attacher must provide notice to the utility and affected existing attachers within 15 days after the new attacher has completed OTMR work on a particular pole.²⁵⁶ In its post-make ready notice, the new attacher must provide the utility and existing attachers at least a 90-day period for the inspection of make-ready work performed by the new attacher's contractors.²⁵⁷ This post-make-ready inspection and remedy requirement gives the utility and existing attachers their own opportunity to ensure that work has been done correctly.

71. To allow new attachers to timely address allegations of needed repair work, we adopt rules requiring that within 14 days after any post-make ready inspection, the utility and the existing attachers notify the new attacher of any damage or any code (e.g., safety, electrical, engineering, construction) violations caused to their equipment by the new attacher's make-ready work and provide adequate documentation of the damage or the violations.²⁵⁸ The utility or existing attacher can either complete any necessary remedial work and bill the new attacher for the reasonable costs related to fixing the damage or violations, or require the new attacher to fix the damage or violations at its expense within 14 days following notice from the utility or existing attacher.²⁵⁹ We provide the utility or existing attacher options regarding repair to maximize their flexibility in addressing issues for which they are not at fault. The safeguards we establish in the OTMR process collectively give the new attacher the

²⁵⁴ See BDAC January 2018 Recommendations at 27; Charter Wireline & Wireless NPRM Comments at 39-43; Comcast Wireline NPRM Comments at 21-22; NCTA Wireline NPRM Reply at 16-17.

²⁵⁵ See AT&T Wireline NPRM Comments at 18; CenturyLink Wireline NPRM Comments at 15; Charter Wireline & Wireless NPRM Comments at 56-57; COMPTIA Wireline NPRM Comments at 2; Electric Utilities Wireline NPRM Comments at 6; Google Fiber Wireline NPRM Comments at 6; Oregon Electric Utilities Wireline NPRM Comments at 8; CPS Energy Wireline NPRM Reply at 11; UTC Wireline NPRM Reply at 19; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at 4.

²⁵⁶ BDAC January 2018 Recommendations at 22; *see also* Electric Utilities Wireline NPRM Comments at 6; CPS Energy Wireline NPRM Reply at 11. To minimize paperwork burdens, the new attacher may batch in one post-make-ready notice all poles completed in a particular 15-day span. For example, if a pole attachment project took 30 days to complete, the new attacher could provide one notice to the existing attacher with the first 15 days' worth of work and a second notice on day 30 with the remainder of the work.

²⁵⁷ See, e.g., CPS Energy Wireline NPRM Reply at 11; Electric Utilities Wireline NPRM Comments at 6; NCTA July 18, 2018 Wireline *Ex Parte* Letter at 4; Google Fiber July 26, 2018 Wireline *Ex Parte* Letter at 2.

²⁵⁸ See EEI July 26, 2018 Wireline *Ex Parte* Letter at 6; Xcel/Alliant July 26, 2018 Wireline *Ex Parte* Letter at 4-5.

²⁵⁹ See, e.g., Charter Wireline & Wireless NPRM Comments at 56-57; CPS Energy Wireline NPRM Reply at 11; Electric Utilities Wireline NPRM Comments at 6; Frontier Wireline NPRM Comments at 19-20; Midwest Electric Utilities Wireline NPRM Comments at 8; POWER Coalition Wireline NPRM Comments at 12; UTC Wireline NPRM Comments at 14; AT&T-CWA Jan. 16, 2018 Wireline *Ex Parte* Letter at 1; *see also* Level 3 Wireline NPRM Comments at 3 (submitting that remediation should take place within 30 days). We decline the request of EEI and Xcel/Alliant that we adopt a re-inspection timeframe after repairs have been made by the new attacher. *See* EEI July 26, 2018 Wireline *Ex Parte* Letter at 6; Xcel/Alliant July 26, 2018 Wireline *Ex Parte* Letter at 4-5. While the utility or an existing attacher is free to conduct an inspection of the new attacher's repairs, formalizing the process is not needed as we require the parties to work together to ensure that repairs are completed.

incentive to ensure its contractor performs work correctly; we therefore expect the invocation of this remediation procedure to be infrequent.

72. We disagree with Verizon's argument that we should refrain from establishing a timeframe for the utility and existing attachers to inspect completed make-ready work because deadlines for raising claims about property damage are "typically governed by state contract or property law."²⁶⁰ We find it appropriate to establish a post-inspection timeline at the federal level so that parties can identify any defective make-ready work that has the potential to cause harm or injury to persons or equipment and remedy it as soon as possible. We also find that the deadlines we establish for the post-make-ready timeline give the existing attachers and the utility time that is sufficient but not unnecessarily long to inspect the work and give the new attacher reasonable time to fix any equipment damage and to rectify any potentially unsafe conditions.

d. Indemnification

73. We conclude that new attachers should be responsible and liable for any damage or non-compliance resulting from work completed by the new attacher during OTMR. The OTMR rules we adopt provide a process for existing attachers to timely identify damage to their equipment that occurs during the OTMR process and to arrange for its repair.²⁶¹ To the extent that process proves insufficient, injured parties may seek judicial relief based on state law claims.

74. We find, consistent with the BDAC's recommendation,²⁶² that federally-imposed indemnification is not necessary.²⁶³ The record indicates that the existing legal regime, including contract²⁶⁴ and tort law,²⁶⁵ provides sufficient protection for existing attachers without broad federal regulatory

²⁶⁰ Verizon Wireline NPRM Reply at 9.

²⁶¹ See *supra* section III.A.1.c.(vi). OTMR contractors will be required to carry adequate insurance or establish a performance bond, which should ensure there is compensation available should the contractor's work be faulty. See *supra* section III.A.1.b. To reduce disputes over the cause of damages, NCTA proposes that we require new attachers' contractors to "document, via photograph or video, the condition of the existing attachers' facilities both before performing any make-ready work and after make-ready work is complete." NCTA Mar. 5, 2018 Wireline *Ex Parte* Letter Attach. 6; NCTA July 12, 2018 Wireline *Ex Parte* at 3. While we agree with NCTA that such documentation could potentially help to resolve disputes surrounding the cause of damage, there is no record evidence as to how effective or burdensome such a requirement would be, and NCTA does not indicate how widespread this practice currently is. Therefore, we decline to mandate it at this time.

²⁶² See January 2018 BDAC Recommendations at 47.

²⁶³ Several commenters propose such a requirement. See AT&T Wireline NPRM Comments at 18; Electric Utilities Wireline NPRM Comments at 6; Frontier Wireline NPRM Comments at 18; UTC Wireline NPRM Comments at 14; Comcast Wireline NPRM Reply at 11; NCTA Wireline NPRM Reply at 20; NCTA July 12, 2018 Wireline *Ex Parte* Letter at 2-3; NCTA July 18, 2018 Wireline *Ex Parte* Letter at 2, 4; CenturyLink July 23, 2018 Wireline *Ex Parte* Letter at 4; Charter July 25, 2018 Wireline *Ex Parte* Letter at 1-2; CWA July 26, 2018 Wireline *Ex Parte* Letter at 4.

²⁶⁴ See Google Fiber Apr. 12, 2018 Wireline *Ex Parte* Letter at 3 (contending that contractual negotiations are sufficient to address new attacher liability to existing attachers beyond liability for damage the new attacher or the new attacher's contractor causes to the existing attacher's facilities); Verizon Mar. 8, 2018 Wireline *Ex Parte* Letter at 6 (arguing that "[a]ny third party or indirect damages should be addressed in the attachment agreement(s) between the parties already in place"). Google Fiber observes that it is common practice today for liability concerns to be addressed in pole attachment agreements, "under which attachers routinely agree to indemnify pole owners for property damage, bodily injury, and death arising from their work on, and attachments to utility poles." Letter from Kristine Laudadio Devine, Counsel to Google Fiber, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 3 n. 8 (filed Nov. 30, 2017) (Google Fiber Nov. 30, 2017 Wireline *Ex Parte* Letter).

²⁶⁵ See Charter Wireline & Wireless NPRM Comments at 51 (contending that without contractual privity between the existing and new attachers, the only method of resolving disputes over deficient make-ready work is through tort litigation); CenturyLink Wireline NPRM Reply at 14 (stating that the only likely remedy for an attaching entity, like Century Link, with no contract with another communications company "would be litigation against the IOU for breach or the attacher or its contractor in tort"). Google and CPS Energy also argue that indemnification is not

intrusion. The repair process we adopt in our OTMR rules adds an additional layer of protection.²⁶⁶ With these other remedies already available, we disagree with NCTA that a Commission-mandated indemnification requirement is the “only practical mechanism by which an existing attacher can hold a new attacher or its contractor accountable for the consequences of performing shoddy work” in situations where there is no privity of contract between the parties or a statutory requirement to hold harmless existing attachers.²⁶⁷ Rather, we find that adding a federal layer of indemnification would not be efficient or assist in speeding broadband deployment.²⁶⁸ Further, we agree with Google Fiber that indemnification obligations are typically not one-size-fits-all provisions,²⁶⁹ such that it would be difficult to craft a regulatory solution that is workable in all situations.

75. We disagree with NCTA’s assertion that section 224(i) of the Act requires federally mandated “[b]road indemnification of existing attachers,” including indemnification for consequential damages.²⁷⁰ Section 224(i) provides that existing attachers “shall not be required to bear any of the costs of rearranging or replacing its attachment, if such rearrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment sought by any other entity (including the owner of such pole, duct, conduit, or right-of-way).”²⁷¹ NCTA claims that this language requires new attachers to pay for “any damages – such as damages caused by service downtime – resulting from such work.”²⁷²

76. We find NCTA’s reading of section 224(i) to be overly broad. In our view, the statute is best read to allow the existing attacher to recover only those costs directly connected to “rearranging or replacing the attachment,” i.e., the direct costs of moving or replacing the attachment.²⁷³ These costs do not include consequential damages. While NCTA relies on the modifier “any of” for its broad reading, contending that the phrase “any of” means the statute requires compensation for consequential damages,²⁷⁴ the more natural reading of “any of” is that the statute prohibits holding existing attachers responsible for any *portion* of “the costs of rearranging or replacing its attachment.”²⁷⁵ NCTA cites no precedent that supports its broad reading, and the Commission’s bonding and insurance requirements that NCTA does

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appropriate in situations where there is not privity of contract between new and existing attachers. *See* CPS Energy Wireline NPRM Reply at 19-21; Google Fiber Nov. 30, 2017 Wireline *Ex Parte* Letter at 2-3. State tort law remains available regardless of whether there is contractual privity.

²⁶⁶ *See* FBA July 20, 2018 Wireline *Ex Parte* Letter at 3.

²⁶⁷ Letter from Steven F. Morris, Vice President & Associate General Counsel, NCTA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 6 (filed Apr. 4, 2018) (NCTA Apr. 4, 2018 Wireline *Ex Parte* Letter); *see also* CenturyLink July 23, 2018 Wireline *Ex Parte* Letter at 4.

²⁶⁸ *See* FBA July 20, 2018 Wireline *Ex Parte* Letter at 3. Although CenturyLink claims that without Commission-imposed indemnification, disputes over damages “will have to be” resolved via litigation, CenturyLink fails to demonstrate how a federal indemnification remedy would change the risk of litigation. CenturyLink July 23, 2018 Wireline *Ex Parte* Letter at 4. Parties frequently resolve contractual and tort issues out of court, and conversely a federal indemnification remedy does not foreclose litigation. We also disagree with CenturyLink’s assertion that the approach we adopt “unfairly shift[s] the burden from [new] attachers to existing attachers for legal and regulatory obligations”—rather, we preserve the regulatory status quo under existing law. *Id.*

²⁶⁹ Google Fiber Nov. 30, 2017 Wireline *Ex Parte* Letter at 2-3.

²⁷⁰ *See* NCTA Apr. 4, 2018 Wireline *Ex Parte* Letter at 5.

²⁷¹ 47 U.S.C. § 224(i).

²⁷² NCTA Apr. 4, 2018 Wireline *Ex Parte* Letter at 5 n.19.

²⁷³ 47 U.S.C. § 224(i).

²⁷⁴ *See* NCTA Apr. 4, 2018 Wireline *Ex Parte* Letter at 5 n.19.

²⁷⁵ Contrary to NCTA’s assertion, in reaching this conclusion, we are not “add[ing] qualifying language” but rather construing the statute. NCTA July 18, 2018 Wireline *Ex Parte* Letter at 4.

cite²⁷⁶ are far more narrow than the broad indemnification it argues for in this instance.²⁷⁷ In fact, we have previously declined to adopt rules requiring broad indemnification for consequential damages, instead finding that indemnification obligations should be left for commercial negotiations.²⁷⁸

2. Targeted Changes to the Commission's Existing Pole Attachment Process

77. To speed broadband deployment for new attachments that are not eligible for our OTMR process and for new attachers that prefer not to use the OTMR process, we make targeted changes to the rules governing the existing pole attachment timeline. Our targeted changes include:

- Revising the definition of a complete pole attachment application and establishing a timeline for a utility's determination whether an application is complete;
- Requiring utilities to provide at least three business days' advance notice of any surveys to the new attacher and each existing attacher;
- Establishing a 30-day deadline for completion of all make-ready work in the communications space;
- Eliminating the 15-day utility make-ready period for communications space attachments;
- Streamlining the utility's notice requirements;
- Enhancing the new attacher's self-help remedy by making the remedy available for surveys and make-ready work for all attachments anywhere on the pole in the event that the utility or the existing attachers fail to meet the required deadlines;
- Revising the contractor selection process for a new attacher's self-help work; and
- Requiring utilities to provide detailed estimates and final invoices to new attachers regarding make-ready costs.

78. We agree with numerous commenters that with respect to the Commission's current pole attachment timeline, we should refrain from adopting wholesale changes at this time.²⁷⁹ We agree with

²⁷⁶ *Id.* at 5; *2011 Pole Attachment Order*, 26 FCC Rcd. at 5266-69, para. 56 (“If a requirement is customary and prudent whenever a [utility-approved] contractor [for self-help] is hired, such as requiring a service bond . . . it is likely reasonable.”); *In the Matter of Leased Commercial Access*, MB Docket No. 07-42, Report and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd. 2909, 2922-23, para. 27-28 (2008) (*2008 Leased Access Order*) (finding it reasonable for a cable system operator to require a leased access programmer “to obtain reasonable liability insurance coverage[,]” but confirming that the Commission would “continue to address complaints about specific contract terms and conditions on a case-by-case basis”). The *2008 Leased Access Order*'s rules never went into effect due to a stay by the Sixth Circuit. *See Order, United Church of Christ Office of Communications, Inc. et al. v. FCC*, No. 08-3245 (and consolidated cases) (6th Cir., May 22, 2008). In June of this year, the Commission tentatively concluded that it should vacate the *2008 Leased Access Order*. *Leased Commercial Access Modernization of Media Regulation Initiative*, MB Docket Nos. 07-42, 17-105, Further Notice of Proposed Rulemaking, FCC 18-80, para. 2 (June 8, 2018). Consistent with the Commission's approach in the *2011 Pole Attachment Order*, our Order today requires analogous bonding or insurance requirements for new attachers' third-party OTMR contractors. *See supra* section III.A.1.b.

²⁷⁷ *Cf.* Verizon July 2, 2018 Wireline *Ex Parte* Letter at 5 (submitting that “[t]he fact that the Commission has stated that, as a general matter, a utility can impose reasonable service bond requirements on contractors and that a cable system operator can impose reasonable insurance requirements in leased access contracts does not answer whether broad indemnification is reasonable for OTMR.”).

²⁷⁸ *See 2011 Pole Attachment Order*, 26 FCC Rcd. at 5261, para. 39 (concluding in response to commenters seeking broad indemnification for self-help make-ready work that “we presume that utilities could structure attachment agreements to . . . address liability or other concerns they might have in cases where they elect to perform make-ready themselves.”).

²⁷⁹ *See* CCU Wireline NPRM Comments at 24-25; CenturyLink Wireline NPRM Comments at 3; Comcast Wireline NPRM Comments at 18; Charter Wireline NPRM Comments at 37-38; EEI Wireline NPRM Comments at 3, 22;

Verizon that “any timeline change should be very cautious and include only targeted, incremental reforms” and with AT&T that “[e]xisting timelines are already challenging for some utilities to meet, and shortening those deadlines even further could compromise safety by encouraging workforces to rush or to take shortcuts to meet deadlines.”²⁸⁰ As a result, while we make changes aimed at speeding broadband deployment where the record indicates such changes would be workable and beneficial, we leave unchanged the pole attachment deadlines for the existing application review/survey, estimate, and acceptance stages.

a. Creating a More Efficient Pole Attachment Timeline

(i) Review of application for completeness

79. For the reasons discussed above, we adopt rules reflecting the same improvements to our definition of a complete pole attachment application and the same completeness review process as we do for the OTMR timeline, subject to one change to adjust for the fact that the utility conducts the survey under the non-OTMR process.²⁸¹ We adopt the BDAC’s recommendation and revise our existing pole attachment rules to define an application as complete if it provides the utility with the information necessary under its procedures, as specified in a master service agreement or in publicly-available requirements at the time of submission of the application, to begin to survey the affected poles.²⁸² While the current definition of a complete application only requires “information necessary under [the utility’s] procedures,”²⁸³ this revised definition requires more transparency on behalf of the utility as the master service agreement and public requirements will be available to new attachers as they prepare their applications. In addition, to prevent unnecessary delays in starting the pole attachment process, we adopt the same BDAC-recommended timeline as in our OTMR process for a utility to determine whether a pole attachment application is complete.²⁸⁴ We agree with ACA that providing a specific timeline for determining completeness offers all parties predictability about the start of the OTMR process and avoids unnecessary delays.²⁸⁵

80. We decline to make further changes at this time to our rules governing the process prior to the utility’s substantive review of a pole attachment application. Some new attachers ask that we curtail or eliminate what they describe as “burdensome” pre-application requirements imposed by some

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Electric Utilities Wireline NPRM Comments at 11-13; Frontier Wireline NPRM Comments at 15; POWER Coalition Wireline NPRM Comments at 5; Puget Sound Energy Wireline NPRM Comments at 3-5; Texas Office of Public Utility Counsel Wireline NPRM Comments at 2; APPA Wireline & Wireless NPRM Reply at 30; AT&T Wireline NPRM Reply at 1, 4-5; CWA Wireline NPRM Reply at 1; Midwest Electric Utilities Wireline NPRM Reply at 4-5; Verizon Wireline NPRM Reply at 10.

²⁸⁰ See AT&T Wireline NPRM Reply at 4-5; Verizon Wireline NPRM Reply at 10.

²⁸¹ See *supra* section III.A.1.c.(iii). Except for the distinction we identify, nothing about the complete application definition and completeness review process we adopt is dependent on or justified by which party performs the make-ready work.

²⁸² BDAC January 2018 Recommendations at 32; ACA Sep. 14, 2017 Wireline *Ex Parte* Letter at 5; CenterPoint Energy et al. May 25, 2018 *Ex Parte* Letter at 3 n.19.

²⁸³ 47 CFR § 1.1411(c).

²⁸⁴ See *supra* section III.A.1.c.(iii); BDAC January 2018 Recommendations at 32; see also ACA Sep. 14, 2017 Wireline *Ex Parte* Letter at 5.

²⁸⁵ ACA Sep. 14, 2017 Wireline *Ex Parte* Letter at 4-5; see also FBA July 20, 2018 Wireline *Ex Parte* at 3-4 (“The FBA believes these [application completeness and timing] rules will help reduce uncertainty and expedite the processing of applications.”). We decline to adopt ACA’s request that we tie review deadlines to an application’s submission date, rather than the date it is received. See ACA July 23, 2018 Wireline *Ex Parte* Letter at 5. Instead, we follow the BDAC OTMR recommendation that ties deadlines to receipt of the application by the utility, because the utility cannot begin to review the application until it has been received. See BDAC January 2018 Recommendations at 32.

utilities,²⁸⁶ such as “unnecessary” pole design and engineering analyses, the submission of a “pre-application” to allow utilities to determine make-ready costs, and the pre-payment of pole surveys and other fees.²⁸⁷ Because it is unclear from the record whether any pre-application requirements have the systematic effect of delaying broadband deployment, we find it premature to adopt rules governing these requirements and instead will address any onerous pre-application requirements on a case-by-case basis via our complaint procedures. We recognize that utility-imposed pre-application procedures can have value²⁸⁸ and can help to avoid incomplete or erroneous pole attachment applications, thus saving time in the process.²⁸⁹ Certain pre-application requests for information (e.g., the submission of pole loading analyses) can be important tools to address safety, reliability, and engineering concerns.²⁹⁰ We caution utilities, however, that any such requirements must be reasonable, nondiscriminatory, and applied fairly and efficiently.²⁹¹

(ii) Review of whether to grant complete application and survey

81. We decline to shorten the 45-day period in our existing rules during which the utility must review a complete pole attachment application and survey the affected poles for non-OTMR projects.²⁹² In so doing, we reject proposals by some attachers that we shorten the application review and survey stage²⁹³ because we agree with utility commenters that the existing 45-day timeframe accounts for demands on existing workforce, safety concerns, volume of pole attachment applications, and timing constraints.²⁹⁴ We also decline to adopt ACA’s proposal that a pole attachment application be deemed granted if the utility fails to act on an application within the 45-day timeframe.²⁹⁵ Failure by the utility to

²⁸⁶ See, e.g., Charter Wireline NPRM Comments at 36-37; ExteNet Wireline & Wireless NPRM Comments at 51; Lighttower Wireline NPRM Comments at 4-5; NCTA Wireline NPRM Comments at 6-7; ACA Wireline NPRM Reply at 19; Comcast Wireline & Wireless NPRM Reply at 10; Crown Castle Wireline NPRM Reply at 3-4.

²⁸⁷ See Charter Wireline NPRM Comments at 36-37; Lighttower Wireline NPRM Comments at 4-5; ACA Wireline NPRM Reply at 19; Crown Castle Wireline NPRM Reply at 3-5.

²⁸⁸ See CCU Wireline NPRM Reply at 18 (“Each pole must be analyzed to ensure that it has sufficient strength and space to accommodate the new pole attachment, and that applicable safety codes and standards can be achieved.”).

²⁸⁹ See Midwest Electric Utilities Wireline NPRM Comments at 17-18; CCU Wireline NPRM Reply at 12-13.

²⁹⁰ CCU Wireline NPRM Reply at 12-13, 16; Electric Utilities Wireline NPRM Reply at 17-19; POWER Coalition Wireline NPRM Reply at 11.

²⁹¹ See *2011 Pole Attachment Order*, 26 FCC Rcd at 5274, para. 73; see also POWER Coalition Wireline NPRM Reply at 11 (explaining that pre-application requirements “are designed precisely to facilitate the pole owner’s determination of whether any requested attachment would raise concerns of safety, reliability, and engineering”).

²⁹² We also clarify that nothing in our rules precludes a utility from using a new attacher to conduct a survey of the affected poles, at the utility’s expense, consistent with the requirements in section 1.1411(i)(1). See ACA July 23, 3018 Wireline *Ex Parte* Letter at 3, Attach. at 3.

²⁹³ See, e.g., NCTA Mar. 5, 2018 Wireline *Ex Parte* Letter at Attach. at 1 (proposing 15-day application review and survey period); Charter Feb. 5, 2018 Wireline *Ex Parte* Letter at Attach. at 1 (proposing 30-day application review and survey period); ExteNet Wireline & Wireless NPRM Comments at 51-52 (same proposal as Charter); Lighttower Wireline NPRM Comments at 4.

²⁹⁴ See, e.g., AT&T Wireline NPRM Comments at 7-8; CCU Wireline NPRM Comments at 23; CenturyLink Wireline NPRM Comments at 8; CWA Wireline NPRM Comments at 7-8; EEI Wireline NPRM Comments at 20-21; Electric Utilities Wireline NPRM Comments at 11; Frontier Wireline NPRM Comments at 16; POWER Coalition Wireline NPRM Comments at i; Puget Sound Energy Wireline NPRM Comments at 3; Verizon Wireline NPRM Comments at 9; APPA Wireline NPRM Reply at 3, 30; Midwest Electric Utilities Wireline NPRM Reply at 5-6, 16; UTC Wireline NPRM Reply at 1.

²⁹⁵ See ACA July 23, 3018 Wireline *Ex Parte* Letter at 2, Attach. at 3; Letter from Thomas Cohen, Counsel to ACA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2-3 (filed July 25, 2018) (ACA July 25, 2018 Wireline *Ex Parte* Letter).

act on an application within the prescribed time period is a violation of our rules and, accordingly, use of our recently-adopted expedited pole access complaint procedure is available as a remedy.²⁹⁶

82. To make the survey and application review process more efficient and transparent, however, we adopt a change recommended by the BDAC and several commenters to require utilities to facilitate survey participation by new and existing attachers.²⁹⁷ Specifically, in performing a field inspection as part of any pre-construction survey, we modify our rules to require a utility to permit the new attacher and any existing attachers potentially affected by the new attachment to be present for any pole surveys.²⁹⁸ We require the utility to use commercially reasonable efforts to provide at least three business days' advance notice of any surveys to the new attacher and each existing attacher, such notice to include the date, time, and location of the survey, and the name of the contractor performing the survey.²⁹⁹ We find that advance notice of three business days strikes the right balance between providing sufficient time to accommodate coordination with the attachers and the need to keep the pole attachment process moving forward in a timely manner.³⁰⁰ We agree with ACA that by encouraging collaboration between all interested parties at an early stage in the pole attachment process, this requirement will facilitate "the expeditious development of solutions in advance of attachments, as well as reduce the potential for future disputes" and that it "reduce[s] the possibility of improper attachments, a concern raised by virtually all utility commenters."³⁰¹

83. In addition, to prevent unnecessary and wasteful duplication of surveys, we adopt a change to our rules that allows utilities to meet the survey requirement of our existing timeline by electing to use surveys previously prepared on the poles in question by new attachers. In the OTMR context, new attachers will perform the necessary surveys to determine whether make-ready work is simple or complex prior to the submission of an application.³⁰² To the extent such work is complex, it will be governed by our existing pole attachment timeline where the utility performs the survey and must give advance notice

²⁹⁶ See *Wireline Infrastructure Order*, 32 FCC Rcd at 11132-34, paras. 9-14.

²⁹⁷ See BDAC January 2018 Recommendations at 37; ACA Wireline NPRM Reply at 18-19; FBA Apr. 10, 2018 Wireline *Ex Parte* Letter at 4; FBA July 20, 2018 Wireline *Ex Parte* Letter at 4.

²⁹⁸ See, e.g., BDAC January 2018 Recommendations at 37 (stating that a joint survey requirement "would speed up the application process and lower the cost of attachments"); ACA Wireline NPRM Comments at 16-17.

²⁹⁹ See BDAC January 2018 Recommendations at 37. To prevent coordination problems that may invite delay, we do not require a utility to set a date for the survey that is convenient for the affected attachers. *Id.* at 40. However, in the case of reasonable scheduling conflicts, we encourage the parties to work together to find a mutually-agreeable time for the survey. As we did in the OTMR context, we reject AT&T's request to eliminate the notification requirement for surveys. See *supra* section III.A.1.c.(i); AT&T July 23, 2018 Wireline *Ex Parte* Letter at 5. Giving existing attachers the ability to attend the survey by providing advance notification increases collaboration between the parties and assists in identifying potential issues to ensure safety and network reliability. The failure of a utility to maintain adequate records to enable the utility to identify the attachers on its poles, which AT&T claims is typical, is not a sufficient reason for us to eliminate the notification requirement. See *id.*

³⁰⁰ In light of the BDAC's recommendation, reached after much deliberation by a wide variety of stakeholders, we deny ACA's request that we use calendar days rather than business days. See ACA July 23, 2018 Wireline *Ex Parte* Letter at Attach. at 2.

³⁰¹ ACA Wireline NPRM Reply at 18-19 (footnotes omitted); see also ACA Wireline NPRM Comments at 39 (noting that Central Hudson Gas & Electric Corp. gives attachers five days' notice of the survey and permits attachers to be present); FBA July 20, 2018 Wireline *Ex Parte* Letter at 4. But see Xcel/Alliant July 26, 2018 Wireline *Ex Parte* Letter at 7 (claiming that the advance notification requirement would provide "no practical benefit to attachers because survey schedules "are often unpredictable.""). To provide utilities some measure of flexibility in complying with this requirement while still encouraging joint surveys to occur, we hold utilities to a "commercially reasonable efforts standard" to make the notifications.

³⁰² See *supra* section III.A.1.c.(i).

of the survey to affected attachers.³⁰³ However, we will allow the utility to elect to use the new attacher's previously performed survey (performed as part of the OTMR pole attachment process) to fulfill its survey requirements, rather than require the utility to perform a potentially duplicative survey. The utility still must notify affected attachers of its intent to use the new attacher's survey and provide a copy of the new attacher's survey in its notice. If the utility is relying solely on the new attacher's survey to fulfill the survey requirements, we agree with Crown Castle that it is appropriate to shorten the survey period from 45 days to 15 days to speed deployment.³⁰⁴

(iii) Make-ready stage

84. To speed broadband deployment, we amend our rules to reduce the deadlines for both simple and complex make-ready from 60 to 30 days (and from 105 to 75 days for large requests in the communications space). To account for the unique circumstances involved with attachments above the communications space,³⁰⁵ we maintain the current make-ready deadline of 90 days (and 135 days for large requests) for these attachments. We also adopt modified notice requirements to apportion more of the responsibility for promoting make-ready timeline compliance from utilities to new attachers, because new attachers have the greater incentive to drive adherence to the make-ready deadline.

85. *Make-ready deadlines.* Based on the current record and the BDAC's recommendation, we adopt a change to our rules that shortens the make-ready deadline for new pole attachments in the communications space to promote broadband deployment without imposing undue risk to safety or reliability.³⁰⁶ We agree with Crown Castle that adoption of a shorter make-ready period in the communications space will promote the efficient completion of make-ready by encouraging utilities and existing attachers to prioritize attachment work.³⁰⁷ We also agree with Google Fiber that a 30-day period for communications space make-ready (and 75 days for larger requests) "will ensure that existing attachers have the opportunity to control make-ready that is expected to affect their services, while reducing delays and increasing efficiency for new attachers."³⁰⁸ The make-ready timelines we adopt for work in the communication space should be sufficient for both simple and complex work.

86. While the BDAC recommended that we impose a 30-day deadline for complex make-ready work in the communications space,³⁰⁹ it did not make a recommendation on the deadline for simple make-ready work that is not subject to OTMR. We find that there is value to maintaining consistency of deadlines in the communications space; thus, we adopt the 30-day deadline for all communications space make-ready work.

87. To account for the safety concerns of working above the communications space, we maintain our current make-ready deadlines of 90 days (and 135 days for large requests).³¹⁰ In establishing the existing deadlines for make-ready above the communications space, which are 30 days longer than the existing deadlines for make-ready work in the communications space, the Commission pointed to the

³⁰³ See *infra* Appx. A, 47 CFR § 1.1411(c)(3).

³⁰⁴ Crown Castle July 25, 2018 Wireline *Ex Parte* Letter at 5.

³⁰⁵ See, e.g., Southern Company July 26, 2018 Wireline *Ex Parte* Letter at 2; EEI July 26, 2018 Wireline *Ex Parte* Letter at 7-8.

³⁰⁶ See BDAC January 2018 Recommendations at 21, 24; ExteNet Wireline NPRM Comments at 52; Lightower Wireline NPRM Comments at 7; Crown Castle Wireline NPRM Reply at 11-12; Google Fiber Wireline NPRM Reply at 6.

³⁰⁷ Crown Castle Wireline NPRM Comments at 17.

³⁰⁸ Google Fiber Wireline NPRM Reply at 6.

³⁰⁹ BDAC January 2018 Recommendations at 21, 24; see also Google Fiber Wireline NPRM Comments at 7-8.

³¹⁰ See CCU Wireline NPRM Comments at 26-28; EEI Wireline NPRM Comments at 28-29; Midwest Electric Utilities Wireline NPRM Comments at 28-29; APPA Wireline NPRM Reply at 30; UTC July 26, 2018 Wireline *Ex Parte* Letter at 1; Southern Company July 26, 2018 Wireline *Ex Parte* Letter at 2.

safety risks associated with working on attachments in, near, or above the electric space and the recognized lack of real-world experience at the time with pole-top attachments.³¹¹ We recognize that both utilities and attachers have more experience with these types of attachments than when the Commission adopted these deadlines in 2011,³¹² but the same safety risks identified by the Commission in 2011 are still relevant today,³¹³ and therefore we continue to allow for more time to complete make-ready above the communications space because such attachments involve work near electrical wires that require more careful work and more experienced contractors. However, we recognize the important role that attachments above the communications space can have in facilitating faster and more efficient wireless deployment (particularly the small cell deployments necessary for advanced 5G networks),³¹⁴ and therefore, as described below, we make the self-help remedy applicable to these attachments for the first time, which we anticipate will speed deployment by providing a strong incentive for utilities and existing attachers to meet their make-ready deadlines and give new attachers the tools to deploy quickly when deadlines are not met.³¹⁵

88. For all attachments, we retain as a safeguard our existing rule allowing utilities to deviate from the make-ready timelines for good and sufficient cause when it is infeasible for the utility to complete make-ready work within the prescribed time frame.³¹⁶ This safeguard will mitigate the effects of our decrease in the make-ready time periods by carving out edge cases where timely completion is truly infeasible and the utility wishes to retain control of the make-ready process. It aids us in balancing the interests of utilities to control make-ready in non-OTMR circumstances and the needs of new attachers to obtain timely completion of OTMR or the ability to employ self-help.

89. Recognizing that our new timeline will put pressure on existing attachers, particularly with respect to poles that have multiple attachers that must conduct complex make-ready work within a shorter timeframe, we adopt a new safeguard for existing attachers. Specifically, we adopt the BDAC recommendation that an existing attacher may deviate from the 30-day deadline for complex make-ready in the communications space (or the 75-day deadline in the case of larger orders) for reasons of safety or service interruption that renders it infeasible for the existing attacher to complete complex make-ready by the deadline.³¹⁷ An existing attacher that so deviates must immediately notify, in writing, the new attacher

³¹¹ See *2011 Pole Attachment Order*, 26 FCC Rcd at 5258-59, para. 33.

³¹² See AT&T Wireline NPRM Comments at 14; Verizon Wireline NPRM Reply at 11; Crown Castle Wireline NPRM Comments at 18; see also AT&T Wireline NPRM Reply at 6 (commenting that since 2011, “pole owners, wireless providers, and contractors have become more, not less, knowledgeable about and proficient at safely deploying antennas and other equipment on utility poles”).

³¹³ See CCU Wireline NPRM Comments at 26-28; EEI Wireline NPRM Comments at 28-29; Midwest Electric Utilities Wireline NPRM Comments at 28-29; APPA Wireline NPRM Reply at 30; UTC July 26, 2018 Wireline *Ex Parte* Letter at 1; Southern Company July 26, 2018 Wireline *Ex Parte* Letter at 2.

³¹⁴ See ExteNet Wireline NPRM Comments at 52; AT&T Wireline NPRM Reply at 6-7; Crown Castle Wireline NPRM Reply at 12-13; Verizon Wireline NPRM Reply at 11.

³¹⁵ See *infra* section III.A.2.b.

³¹⁶ *2011 Pole Attachment Order*, 26 FCC Rcd at 5272-73, para. 68. We agree with ACA that a utility that so deviates may do so for a period no longer than necessary to complete make-ready on the affected poles and must immediately notify, in writing, the new attacher and affected existing attachers, identify the affected poles, and include a detailed explanation of the basis for the deviation and a new completion date. See ACA July 23, 2018 Wireline *Ex Parte* Letter at Attach. at 6; see also *infra*, Appx. A, 47 CFR § 1.1411(h)(2). A new attacher may challenge the utility’s determination for deviating from the make-ready timeline if the utility’s rationale is not justified by good and sufficient cause. *2011 Pole Attachment Order*, 26 FCC Rcd at 5273, para. 68.

³¹⁷ BDAC January 2018 Recommendations at 21; see also Level 3 Wireline NPRM Comments at 3 (“New attachers must provide 30 days’ written notice for complex make ready to allow a field meeting to be scheduled within that 30 days . . . The existing attacher will have 60 days from the date of notice to perform Complex Make Ready if the technicians mutually agree to such extension in the field meeting.”); Oregon Electric Utilities Wireline NPRM

and other affected existing attachers, identify the affected poles, and include a detailed explanation of the basis for the deviation and a new completion date, which cannot extend beyond 60 days from the date of the utility make-ready notice to existing attachers (or 105 days in the case of larger orders). The existing attacher shall deviate from the complex make-ready time limits for a period no longer than necessary to complete make-ready on the affected poles. If the complex make-ready work is not complete within 60 days from the date that the existing attacher sends the notice to the new attacher, then the new attacher can complete the work using a utility-approved contractor.³¹⁸ We require existing attachers to act in good faith in obtaining an extension, and we caution that obtaining an extension as a routine matter or for the purpose of delaying the new attachment is inconsistent with acting in good faith. If a new attacher believes the existing attacher is not using the extension period in good faith, it may file a complaint with the Commission.

90. We reject AT&T's request for a uniform 60-day time period for complex make-ready.³¹⁹ Although AT&T's proposal might provide more predictability, we find that the BDAC recommendation better speeds deployment by setting a shorter 30-day period for complex make-ready in the communications space and allowing for additional time in that context only on a case-by-case basis.

91. We further accelerate communications space attachments by eliminating the optional 15-day extension period for the utility to complete the make-ready work.³²⁰ Many commenters and the BDAC support elimination of the extra 15 days at the end of the make-ready stage because few, if any, utilities actually invoke the extension.³²¹ However, with respect to work above the communications space, we retain the optional 15-day extension period for utility make-ready.³²² Because we are extending a new attacher's self-help remedy to attachments above the communications space, more utilities may need to use the additional 15 days to perform such make-ready work themselves.³²³ Further, retaining this extra period promotes safety and reliability of the electric grid by granting the utility extra time to undertake the work itself. To the extent utilities do not intend to avail themselves of the additional 15 days before a new attacher resorts to self-help above the communications space, we strongly encourage utilities to communicate that intent as soon as possible to new attachers so that the new attacher can promptly begin make-ready work.

92. We decline to reduce the timeline for large attachments beyond the 30-day decrease for communications space attachments set forth above. While Crown Castle advocates for eliminating the additional time afforded to large pole attachment requests because of the resulting extra delay to the pole

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Comments at 5 (when make-ready requires more than 45 days to complete, the parties must negotiate "a mutually satisfactory longer period to complete the make ready work.").

³¹⁸ BDAC January 2018 Recommendations at 21; *see also* AT&T-CWA Jan. 16, 2018 Wireline *Ex Parte* Letter at 3. If no utility-approved contractor is available, then the new attacher must follow the procedures outlined *infra* in section III.A.2.c. for choosing an appropriate contractor.

³¹⁹ Letter from Ola Oyefusi, Director, Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2 (filed Mar. 23, 2018).

³²⁰ *See* 47 CFR § 1.1411(e)(1)(iv).

³²¹ *See* BDAC January 2018 Recommendations at 46 ("[B]ased on information that utilities rarely, if ever, assert their right to complete make-ready work that is uncompleted by existing attachers within 15 days, Committee members agreed to remove this obligation on utilities, which would facilitate a requesting attacher completing make-ready work as quickly as possible."); AT&T Wireline NPRM Comments at 13; Frontier Wireline NPRM Comments at 15; USTelecom Wireline NPRM Comments at 17; Lumos Wireline NPRM Reply at 6-7.

³²² *See* 47 CFR § 1.1411(e)(2)(iv).

³²³ *Cf.* CenturyLink Wireline NPRM Comments at 10.

attachment process,³²⁴ we agree with commenters that argue that the additional time is often needed for utilities to carefully process larger requests.³²⁵ As AT&T explains “more attachments on more poles require more surveys, more coordination with attachers, and more make-ready work. That additional work, much of which involves site visits, requires additional time.”³²⁶

93. We also decline the request of some commenters to adopt a shorter timeline for routine pole attachment requests involving a small number of poles.³²⁷ We agree with the Coalition of Concerned Utilities that mandating shorter deadlines for smaller requests could cause the utilities to give undue priority to those requests merely because they are smaller in order to meet the compressed deadlines.³²⁸ In addition, the Coalition of Concerned Utilities claims that new attachers have been shown to abuse the process in states where utilities are required to process smaller applications more quickly by submitting a series of smaller applications (as opposed to one large application) to ensure that utilities focus on their applications first.³²⁹ We do not want to incentivize possible gamesmanship by instituting a federal requirement of shorter deadlines for smaller requests.

94. *Notice and New Attacher Role.* We adopt the BDAC recommendation that when a utility provides the required make-ready notice to existing attachers, then it must provide the new attacher with a copy of the notice, plus the contact information of existing attachers to which the notices were sent, and thereafter the new attacher (rather than the utility) must take responsibility for encouraging and coordinating with existing attachers to ensure completion of make-ready work on a timely basis.³³⁰ We adopt this additional notice requirement to empower the new attacher to promote the timely completion of make-ready.³³¹ As explained by the POWER Coalition, “the new attacher is in the better position to manage the work of existing attachers, to impose reasonable deadlines, and to negotiate compensation for

³²⁴ See Crown Castle Wireline NPRM Comments at 17-18.

³²⁵ See e.g., AT&T Wireline NPRM Comments at 10; CenturyLink Wireline NPRM Comments at 10; EEI Wireline NPRM Comments at 22; Midwest Electric Utilities Wireline NPRM Comments at 20; UTC Wireline NPRM Reply at 10-11.

³²⁶ AT&T Wireline NPRM Comments at 10.

³²⁷ See NTCA Wireline NPRM Comments at 6-7 (would apply to requests by smaller providers for routine attachments involving 100 or fewer poles in a six-month period); WTA Wireline NPRM Comments at 18 (would apply to pole attachment requests involving 50 or fewer poles); ACA Wireline NPRM Reply at 20-22 (would apply to routine pole attachment requests involving 20 or fewer poles); Charter Feb. 5, 2018 Wireline *Ex Parte* Letter at 3 (would apply to applications of 30 or fewer poles).

³²⁸ See CCU Wireline NPRM Reply at 23.

³²⁹ *Id.* (noting that “[i]n order to treat attaching entities in a nondiscriminatory manner, utilities typically process applications in the order they are received, no matter the size if [*sic*] the application”).

³³⁰ See BDAC January 2018 Recommendations at 46; Electric Utilities Wireline NPRM Comments at 20; POWER Coalition Wireline NPRM Comments at 11-12; Letter from Thomas Cohen and J. Bradford Currier, Counsel to ACA, to Marlene Dortch, Secretary, FCC, WC Docket No. 17-84, at 6 (filed Mar. 26, 2018) (ACA Mar. 26, 2018 Wireline *Ex Parte* Letter); FBA Apr. 10, 2018 Wireline *Ex Parte* Letter at 4; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at Attach. at 3. We decline ACA’s request that we require utilities to provide new attachers with specific contact information, such as e-mail addresses and telephone numbers. See ACA 2018 July 23, 2018 Wireline *Ex Parte* Letter at Attach. at 5. While we encourage utilities to provide as much existing attacher contact information to new attachers as possible, we recognize that utilities may not always have every form of contact information we may specify.

³³¹ At the same time, we expect existing attachers to respond in a timely manner to requests from new attachers for information, including estimated completion dates and work status updates, and to cooperate with new attachers and other existing attachers to complete make-ready prior to the date set in the notice. See ACA July 23, 2018 Wireline *Ex Parte* Letter at 2-3, Attach. at 5.

the work performed.”³³²

95. *Delivery of Power.* We decline to amend our rules to require that the make-ready process include the delivery of electric power to a new attachment.³³³ As pointed out by utility commenters, the provision of electric service is outside of our jurisdiction, as it is governed by the Federal Energy Regulatory Commission and state law.³³⁴ We recognize, however, that electricity is critical to powering wireline and wireless equipment and that any delay in supplying power to a new attachment is an impediment to broadband deployment.³³⁵ We therefore strongly encourage utilities and new attachers to work together to avoid delays in delivering power to new attachments.

b. Enhancing the Self-Help Remedy

96. In the interest of speeding broadband deployment, we modify our rules to provide a self-help remedy to new attachers for work above the communications space, including the installation of wireless 5G small cells, when the utility or existing attachers have failed to complete make-ready work within the required time frames. We recognize that despite widespread agreement that make-ready work often extends past Commission-prescribed timelines,³³⁶ and new attachers’ frustration with delays caused by missed deadlines for make-ready work,³³⁷ the record shows that, at present, new attachers rarely invoke the existing self-help remedy in the communications space.³³⁸ In the interest of ensuring that new attachers are able to exercise the self-help remedy, we take this opportunity to reiterate its availability and modify our rules to provide a process for new attachers to communicate their intent to engage in self-help to the utility and existing attachers. These steps, together with the changes we make to the process for new attachers to hire contractors to conduct self-help work, should encourage the use of self-help where necessary and strengthen the incentive for utilities and existing attachers to complete work on time.

97. *Self-Help Above the Communications Space.* In the *2011 Pole Attachment Order*, the Commission declined to apply a self-help remedy for survey and make-ready work for pole attachments “located in, near, or above the electric space.”³³⁹ After further consideration and in light of the national importance of a speedy rollout of 5G services, we amend our rules to allow new attachers to invoke the self-help remedy for work above the communications space, including the installation of wireless 5G

³³² POWER Coalition Wireline NPRM Comments at 11-12; *see also* Electric Utilities Wireline NPRM Comments at 20 (requesting we make clear that “beyond an initial notification regarding the need for and nature of make-ready, the pole owner has no further notification or coordination obligations.”); ACA Mar. 26, 2018 Wireline *Ex Parte* Letter at 6 (asking that we require “the utility to notify existing attachers about the need for and nature of make-ready work and to provide that information to the new attacher, who then will be responsible for following-up with existing attachers on that work.”); Letter from Ola Oyefusi, Director, Federal Regulatory, AT&T to Marlene H. Dortch, Secretary, FCC, WC Docket 17-84, at 1-2 (filed April 19, 2018) (advocating for the new attacher to serve as “project manager” for the make-ready process).

³³³ *See* Crown Castle Wireline NPRM Comments at 21-22; Lighttower Wireline NPRM Comments at 7-8.

³³⁴ *See* CCU Wireline NPRM Reply at 24-25; EEI Wireline NPRM Reply at 9; Electric Utilities Wireline NPRM Reply at 9-12; Midwest Electric Utilities Wireline NPRM Reply at 28; POWER Coalition Wireline NPRM Reply at 10.

³³⁵ *See* Crown Castle Wireline NPRM Comments at 21-22; Lighttower Wireline NPRM Comments at 7-8.

³³⁶ *See* CCU Wireline NPRM Comments at 11-12; FBA Wireline NPRM Comments at 4; Google Fiber Wireline NPRM Comments at 11-12; CMA Report at 1-2, 6; INCOMPAS Feb. 13, 2018 Wireline *Ex Parte* Letter at Attach. at 2-3; NCTA Apr. 4, 2018 Wireline *Ex Parte* Letter at 2; *see also* BDAC January 2018 Recommendations at 19-20.

³³⁷ *See* ACA Wireline NPRM Comments at 20; CCU Wireline NPRM Comments at 11; FBA Wireline NPRM Comments at 4; Google Fiber Wireline NPRM Comments at 11-12; CMA Report at 1-2, 6-7; INCOMPAS Feb. 13, 2018 Wireline *Ex Parte* Letter at Attach. at 2-3; NCTA Apr. 4, 2018 Wireline *Ex Parte* Letter at 2.

³³⁸ *See* BDAC January 2018 Recommendations at 43-46; ACA Wireline NPRM Comments at 44; FBA Apr. 10, 2018 Wireline *Ex Parte* Letter at 4; Verizon July 2, 2018 Wireline *Ex Parte* Letter at 3.

³³⁹ *See 2011 Pole Attachment Order*, 26 FCC Rcd at 5262, para. 42.

small cells, when utilities and existing attachers have not met make-ready work deadlines.³⁴⁰ Accenture estimates that wireless providers will invest \$275 billion dollars over the next decade to deploy 5G, which is expected to create three million new jobs across the country and boost the U.S. gross domestic product by half a trillion dollars.³⁴¹ As CTIA explains, the network infrastructure needed to support 5G cannot wait, and it is incumbent on the Commission to quickly eliminate barriers to, and encourage investment in, 5G deployment.³⁴² Although we do not allow wireless attachers to perform their own work in the first instance for safety and equipment integrity reasons, we nonetheless give them the ability to use self-help to complete make-ready when utilities miss their deadline.

98. Until now, the only remedy for missed deadlines for work above the communications space has been filing a complaint with the Commission's Enforcement Bureau.³⁴³ We agree with commenters that argue that complaints are an important but insufficient tool for encouraging compliance with our deadlines and speeding broadband deployment.³⁴⁴ We expect the availability of self-help above the communications space will strongly encourage utilities and existing attachers to meet their make-ready deadlines and give new attachers the tools to deploy quickly when they do not.³⁴⁵ As described by Crown Castle, the extension of the self-help remedy to attachments above the communications space closes "a significant gap in the Commission's rules that leaves Crown Castle without a meaningful remedy when the electric utility fails to perform make-ready work in a timely fashion."³⁴⁶

99. We recognize the valid concerns of utilities regarding the importance of safety and equipment integrity, particularly in the electric space,³⁴⁷ and we take several steps to address these

³⁴⁰ We reject the request of AEP/Georgia Power that we "issue a Further Notice of Proposed Rulemaking on this issue." AEP/Georgia Power July 23, 2018 *Ex Parte* Letter at 3; *see also* EEI July 26, 2018 Wireline *Ex Parte* Letter at 9 (requesting a further notice regarding self-help above the communications space); Southern Company July 26, 2018 Wireline *Ex Parte* Letter at 3 (positing that the electric utilities assist in developing "an alternative proposal for rules that incentivize timely performance, rather than penalizing untimely performance"). In response to our request for comments on potential reforms to our current pole attachment timeline to facilitate timely access to poles, we assembled a record on the issue of self-help above the communications space and received comments and additional filings from both those in favor and opposed to the idea. *See Wireline Infrastructure Notice*, 32 FCC Rcd at 3268, paras. 6-7. We also reject Georgia Power's request to limit self-help above the communications space to only wireless attachments. *See* Letter from Allen Bell, Distribution Manager, Georgia Power Company, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 1 (filed July 27, 2018). Although Georgia Power asserts that such a distinction would "reduce the safety and reliability threat," it offers no evidence in support of this claim. *Id.*

³⁴¹ *See* CTIA Wireline NPRM Comments at 4 (quoting Accenture Strategy, Smart Cities – How 5G Can Help Municipalities Become Vibrant Smart Cities at 1 (Jan. 12, 2017), https://newsroom.accenture.com/content/1101/files/Accenture_5G-Municipalities-Become-Smart-Cities.pdf).

³⁴² *See* CTIA Wireline NPRM Comments at 5.

³⁴³ *See 2011 Pole Attachment Order*, 26 FCC Rcd at 5262, paras. 42-43. We are not aware of any such complaints being filed since 2011.

³⁴⁴ *See* ACA Wireline NPRM Comments at 32; *see also* Crown Castle Wireline NPRM Comments at 19.

³⁴⁵ *See* ACA Wireline NPRM Comments at 46 ("The [self-help] process also would provide an incentive for utilities and existing attachers to conduct necessary make-ready works in a timely fashion to prevent other companies from moving their equipment."); FBA July 20, 2018 Wireline *Ex Parte* Letter at 4.

³⁴⁶ Crown Castle Wireline NPRM Comments at 19.

³⁴⁷ *See* CCU Wireline NPRM Comments at 28-29; Electric Utilities Wireline NPRM Comments at 8-11; POWER Coalition Wireline NPRM Comments at 11; Puget Sound Energy Wireline NPRM Comments at 5; Texas Office of Public Utility Counsel Wireline NPRM Comments at 3-4; EEI Wireline NPRM Reply at 20-21; Midwest Electric Utilities Wireline NPRM Reply at 24; Letter from Thomas R. Pryatel, Director, Energy Delivery-Operations Services, FirstEnergy Service Company, to Ajit Pai, Chairman, FCC, WC Docket No. 17-84, at 1-3 (filed July 23, 2018) (FirstEnergy July 23, 2018 Wireline *Ex Parte* Letter); Letter from Thomas B. Magee, Counsel to CCU, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2-3 (filed July 25, 2018) (CCU July 25, 2018 *Ex Parte* Letter); Letter from Ken Johnson, VP Reg. & Gov. Affairs, Puget Sound Energy, to Marlene H. Dortch,

important issues. As an initial matter, in response to concerns expressed by utilities,³⁴⁸ we maintain the 90-day period (135 for larger requests) for the utility to complete make-ready. In the event that new attachers must resort to self-help above the communications space, the new attacher must use a qualified contractor, that is pre-approved by the utility, to do the work.³⁴⁹ While some utilities argue that contractors working for third parties will not adhere to the utility's procedures for ensuring the integrity of electric distribution facilities,³⁵⁰ the utility will have full control over the contractor pre-approval process and therefore will be able to require that contractors who wish to be placed on the utility-approved list adhere to utility protocols for working in the electric space, even when the contractor is retained by a third-party communications attacher. In addition, we reiterate that utilities will have the opportunity to identify and address any safety and equipment concerns when they receive advance self-help notice and post-completion notice from the new attacher.³⁵¹ Our rules also contain additional pre-existing protections for utilities that empower them to promote safety and reliability.³⁵² Finally, utilities may prevent self-help from being invoked by completing make-ready on time. Because electric utilities always will have the opportunity to complete make-ready work before self-help is triggered, have control over which contractors will be allowed to perform self-help, and will have the opportunity to be present when the self-help make-ready work is performed, we disagree with FirstEnergy that our new rules "risk loss of control for every expansion of capacity to accommodate new attachments."³⁵³

100. We also disagree with FirstEnergy's suggestion that we lack jurisdiction to allow for self-help above the communications space because Congress granted jurisdiction to the Commission only over poles and not "electrical equipment attached to the poles."³⁵⁴ Our rules are designed to facilitate timely and non-discriminatory access to poles for attachments, and the action we take herein falls well within the Commission's jurisdiction.³⁵⁵ While Section 224(f)(2) of the Act gives utilities the ability to deny

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Secretary, FCC at 1-2 (filed July 25, 2018) (Puget Sound Energy July 25, 2018 Wireline *Ex Parte* Letter); Hawaiian Electric July 25, 2018 Wireline *Ex Parte* Letter at 5; EEI July 26, 2018 Wireline *Ex Parte* Letter at 8; Southern Company July 26, 2018 Wireline *Ex Parte* Letter at 2; UTC July 26, 2018 Wireline *Ex Parte* Letter at 3. *But see* Verizon July 26, 2018 Wireline OTMR *Ex Parte* Letter at 5 (arguing that the "Commission should reject requests to eliminate the . . . self-help remedy for make-ready work above the communications space).

³⁴⁸ See, e.g., Southern Company July 26, 2018 Wireline *Ex Parte* Letter at 2; EEI July 26, 2018 Wireline *Ex Parte* Letter at 7-8.

³⁴⁹ See ACA Wireline NPRM Comments at 45; Crown Castle Wireline NPRM Comments at 19; Lighttower Wireline NPRM Comments at 13-14.

³⁵⁰ See FirstEnergy July 23, 2018 Wireline *Ex Parte* Letter at 2; AEP/Georgia Power July 23, 2018 Wireline *Ex Parte* Letter at 3; CCU July 25, 2018 Wireline *Ex Parte* Letter at 3; Puget Sound Energy July 25, 2018 Wireline *Ex Parte* Letter at 1-2; EEI July 26, 2018 Wireline *Ex Parte* Letter at 9; UTC July 26, 2018 Wireline *Ex Parte* Letter at 3-4.

³⁵¹ See CenturyLink Wireline NPRM Comments at 11; Liberty Cablevision of Puerto Rico Wireline NPRM Comments at 8-9; Midwest Electric Utilities Wireline NPRM Comments at 27; POWER Coalition Wireline NPRM Comments at 12; ACA Wireline NPRM Reply at 27-28; NCTA Mar. 5, 2018 Wireline *Ex Parte* Letter at Attach. at 6; BDAC January 2018 Recommendations at 42.

³⁵² See *infra* Appx. A, 47 CFR § 1.1412(d) (stating that when self-help surveys and make-ready work result in disputes between attachers and an electric utility, the consulting electric utilities are entitled to make final determinations "on a nondiscriminatory basis, where there is insufficient capacity and for reasons of safety, reliability, and generally applicable engineering purposes"); 47 CFR § 1.1411(e)(2)(iv) (providing the utility 15 days to complete work beyond other attachers).

³⁵³ FirstEnergy July 23, 2018 Wireline *Ex Parte* Letter at 3.

³⁵⁴ *Id.*

³⁵⁵ See *2011 Pole Attachment Order*, 26 FCC Rcd at 5282, para 91 (stating "the broad language of section 224(b)(1) and (b)(2) indicate a delegation of comprehensive rulemaking authority over all attachment issues, including access" and that Section 224(f) is a further broad mandate of "nondiscriminatory" access with a specific carve-out for certain

applications for new attachments due to lack of capacity, as stated by First Energy, and for “safety, reliability, and generally applicable engineering purposes,” their discretion under Section 224(f)(2) is not “unfettered.”³⁵⁶ And in any event, the actions we take here do not abridge a utility’s ability to deny access on a non-discriminatory basis as provided for by Section 224(f)(2).³⁵⁷

101. *Pole Replacements.* We agree with parties that argue that the self-help remedy should not be available when pole replacements are required as part of make-ready.³⁵⁸ The record shows that pole replacements can be complicated to execute and are more likely to cause service outages or facilities damage.³⁵⁹ Given the particularly disruptive nature of this type of work, we make clear that pole replacements are not eligible for self-help.

102. *Self-Help Notices.* Similar to the pre- and post-work notice requirements we adopt in the new OTMR process, and consistent with the BDAC’s recommendation, we require new attachers to give affected utilities and existing attachers (1) no less than three business days advance notice for self-help surveys and five days’ advance notice of when self-help make-ready work will be performed and a reasonable opportunity to be present,³⁶⁰ and (2) notice no later than 15 days after make-ready is complete on a particular pole so that they have an opportunity to inspect the make-ready work.³⁶¹ Just as in the

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conditions where electric utilities may deny access to their “poles, ducts, conduits, or rights-of-way”); *see also 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 and Further Notice Proposed Rulemaking, 25 FCC Rcd 11864, 11873, para. 17 (2010) (“We hold that access to poles, including the preparation of poles for attachment, commonly termed ‘make-ready,’ must be timely in order to constitute just and reasonable access.”).

³⁵⁶ See 47 U.S.C. § 224(f)(2); First Energy July 23, 2018 Wireline *Ex Parte* Letter at 3; *Southern Co. v. FCC*, 293 F.3d 1338, 1348 (11th Cir. 2002). For example, the D.C. Circuit has upheld the Commission’s interpretation that capacity is not insufficient where facility rearrangement in the existing space using traditional methods of attachment can accommodate the request. *See Gulf Power Co. v. FCC*, 669 F.3d 320, 325 (D.C. Cir. 2012). In the *2011 Pole Attachment Order*, the Commission further clarified that “where rearrangement of a pole’s facilities--whether in the communications space or the electric space--can accommodate an attachment, there is not “insufficient capacity” under section 224(f)(2). . . . We do not equate capacity expansion with facility rearrangement in existing space.” 26 FCC Rcd 5240, paras. 231-32 (2011).

³⁵⁷ The retained and modified rules include opportunities and safeguards for utilities to exercise their right under Section 224(f)(2), including instances where there are valid concerns about “safe and reliable operation of the electric system” or “electrical equipment attached to the poles.” *See* First Energy July 23, 2018 Wireline *Ex Parte* Letter at 2, 3 (emphasis in original); 47 CFR § 1.1413(d); Appx. A, 47 CFR §§ 1.1412(c), 1.1412(h)(2), 1.1412(i)(2)(i).

³⁵⁸ *See* AEP/Georgia Power July 23, 2018 Wireline *Ex Parte* Letter at 3; Southern Company July 26, 2018 Wireline *Ex Parte* Letter at 3; UTC July 26, 2018 Wireline *Ex Parte* Letter at 1, 3.

³⁵⁹ *See* Google Fiber Apr. 12, 2018 Wireline *Ex Parte* Letter at 2; Midwest Electric Utilities Wireline NPRM Reply at 25-26; Puget Sound Energy Wireline NPRM Comments at 7-8.

³⁶⁰ In our new OTMR-based pole attachment process, we require that new attachers provide no less than three business days’ advance notice for surveys and 15 days advance notice for make-ready. *See supra* sections III.A.1.c.(i), (v). The notice period to commence self-help make-ready is 10 days shorter than in the OTMR process because the utility and existing attachers have at least 30 days to perform make-ready prior to the new attacher electing self-help. *See* ACA Wireline NPRM Comments at 46 (proposing 7-day self-help make-ready notice period).

³⁶¹ Just as in the OTMR context, the new attacher’s post-make-ready notice must provide the affected utility and existing attachers at least 90 days from receipt in which to inspect the make-ready work done on a particular pole. The affected utility and existing attachers have 14 days after completion of their inspection to notify the new attacher of any damage to their equipment or any code (e.g., safety, electrical, engineering, construction) violations caused by make-ready conducted by the new attacher. If the utility or existing attachers discover damage or any code violations caused by make-ready conducted by the new attacher on equipment belonging to the utility or an existing attacher, then the utility or existing attacher shall inform the new attacher and provide adequate documentation of the damage or code violations. The utility or existing attacher may either (A) complete any

OTMR context, the advance notice must include the date and time of the work, the nature of the work, and the name of the contractor being used by the new attacher.³⁶² As in the OTMR context, we also require new attachers to provide immediate notice to the affected utility and existing attachers if the new attacher's contractor damages equipment or causes an outage that is reasonably likely to interrupt the provision of service.³⁶³ We find that these self-help notices will promote safe, reliable work and provide the opportunity for corrections where needed, as well as allow utilities and existing attachers to alert their customers of the work.³⁶⁴ In this context, we also find that the notices will help to address complaints that utilities are not receiving consistent notices from attachers regarding critical steps in the pole attachment process.³⁶⁵

103. At the request of numerous commenters,³⁶⁶ we also take this opportunity to reiterate that under our existing rules, the make-ready clock runs simultaneously and not sequentially for all existing attachers, and the utility must immediately notify at the same time all entities with existing attachments

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necessary remedial work and bill the new attacher for the reasonable costs related to fixing the damage or code violations, or (B) require the new attacher to fix the damage or code violations at its expense within 14 days following notice from the utility or existing attacher. *See supra* section III.A.1.c.(vi); CenturyLink Wireline NPRM Comments at 11; Liberty Cablevision of Puerto Rico Wireline NPRM Comments at 9; Midwest Electric Utilities Wireline NPRM Comments at 27; POWER Coalition Wireline NPRM Comments at 11-12; ACA Wireline NPRM Reply at 28; Charter Feb. 5, 2018 Wireline *Ex Parte* Letter at 1; NCTA Mar. 5, 2018 Wireline *Ex Parte* Letter at Attach. at 6; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter at Attach. at 4. To maintain consistency with the OTMR rules, we decline to adopt ACA's suggestion to eliminate the 14-day notice period. *See* ACA July 23, 2018 Wireline *Ex Parte* Letter at Attach. at 7. Similarly, we decline EEI and UTC's proposal to enact an additional period for re-inspection of the new attacher's repair. *See* EEI July 26, 2018 Wireline *Ex Parte* Letter at 6; UTC July 26, 2018 Wireline *Ex Parte* Letter at 3. The utility is free to inspect the new attacher's repair at any time without us having to mandate further processes.

³⁶² *See supra* sections III.A.1.c.(i), (v). Similar to our finding with regard to the OTMR process, we find that the utility and existing attachers should be responsible for any expenses associated with double-checking the self-help work performed by the new attacher's contractors, including any post-make-ready inspections. *See supra* section III.A.1.a; *see also* Google Fiber July 23, 2018 Wireline *Ex Parte* Letter at 2; Verizon July 26, 2018 Wireline OTMR *Ex Parte* Letter at 7. *But see* NCTA July 18, 2018 Wireline *Ex Parte* Letter at 2, 4 (arguing that existing attachers should be reimbursed by the new attacher for expenses associated with monitoring the new attacher's self-help survey and make-ready work); CWA July 26, 2018 Wireline *Ex Parte* Letter at 4 (arguing same). We find that the new attacher should not be penalized when existing attachers and the utility miss their deadlines by holding a new attacher responsible for both the costs of doing the work itself and reimbursing the expenses of the utility and existing attachers to monitor and inspect that work.

³⁶³ *See supra* section III.A.1.c.(v); *see also infra* Appx. A, 47 CFR § 1.1411(j)(4)(ii). As in the OTMR context, upon receiving notice of damaged equipment or a service outage, the utility or existing attacher can either complete any necessary remedial work and bill the new attacher for the reasonable costs related to fixing the damage or outage or require the new attacher to fix the damage or outage at its expense immediately following notice from the utility or existing attacher. Upon notice from the existing attacher or the utility to fix damages or outages caused by a contractor, the new attacher must complete the repair work before it can resume its make-ready work. Where the utility or the existing attacher elects to fix the damage or outage, the new attacher can only continue with make-ready work if it does not interfere with the repair work being conducted by the utility or existing attacher. *See infra* Appx. A 47 CFR § 1.1411(i)(2)(ii).

³⁶⁴ For the same reasons as in the OTMR context, we decline NCTA's proposal to codify a complaint right under the pole attachment rules for existing attachers for violations of the self-help rules. *See* NCTA July 18, 2018 Wireline *Ex Parte* Letter at 2, 4; *supra* section III.A.1.

³⁶⁵ *See* Midwest Electric Utilities Wireline NPRM Comments at 27.

³⁶⁶ *See* Google Fiber Wireline NPRM Comments at 11-12; AT&T Wireline NPRM Reply at 11 (asserting that concerns with sequential make-ready can be resolved by clarifying that there is only one make-ready period applicable to all existing attachers); Lumos Wireline NPRM Reply at 5; CMA Report at 1-2, 6; *see also* ACA Wireline NPRM Comments at 20; CCU Wireline NPRM Comments at 11; Charter Wireline NPRM Comments at 34-35; BDAC January 2018 Recommendations at 19.

that are affected by the proposed make-ready work.³⁶⁷ We recognize that coordinating work among existing attachers may be difficult, particularly for poles with many attachments, and existing attachers that are not the first to move may in some circumstances receive limited or even no time for work during the make-ready stage.³⁶⁸ Despite these challenges, we expect utilities, new attachers, and existing attachers to work cooperatively to ensure that pole attachment deadlines are met. If others do not meet their deadlines, new attachers then may invoke the self-help remedy.³⁶⁹

c. Contractor Selection for Self-Help

104. We adopt different approaches to new attacher contractor selection for simple and non-simple self-help make-ready. Given that simple self-help and OTMR are substantially similar, we adopt the same approach to contractor selection for simple self-help in the communications space as for OTMR, and we do so for the same reasons set forth above.³⁷⁰ Thus, consistent with the OTMR regime:

- A new attacher electing self-help for simple work in the communications space must select a contractor from a utility-maintained list of qualified contractors, where such a list is available. The contractor must meet the same safety and reliability criteria as contractors authorized to perform OTMR work. New and existing attachers may request that qualified contractors be added to the utility's list and the utility may not unreasonably withhold its consent for such additions.
- Where no utility-maintained list is available, or no utility-approved contractor is available within a reasonable time period, the new attacher must select a contractor that meets the same safety and reliability criteria as contractors authorized to perform OTMR work and any additional non-discriminatory, written, and publicly-available criteria relating to safety and reliability that the utility specifies. The utility may veto the new attacher's contractor selection so long as it offers another available, qualified contractor.

105. For complex work and work above the communications space, we take a different approach and require new attachers to select a contractor from the utility's list. We also require utilities to make available and keep up-to-date a reasonably sufficient list of contractors they authorize to perform complex and non-communications space self-help surveys and make-ready work.³⁷¹ We thus maintain our existing contractor selection requirements as to complex self-help in the communications space and extend those requirements to self-help above the communications space.³⁷²

106. We treat the utility list as mandatory for complex and above the communications space work for several reasons. These types of make-ready can involve greater risks than simple make-ready, and we agree with numerous commenters that utility selection of eligible contractors promotes safe and

³⁶⁷ See 47 CFR § 1.1411(e); see also AT&T-CWA Jan. 16, 2018 Wireline *Ex Parte* Letter at 3 (“Sequential timelines are not and have never been contemplated or required by existing Commission rules.”).

³⁶⁸ See Google Fiber Feb. 1, 2018 Wireline *Ex Parte* Letter at 3; see also *supra* section III.A.1.a. We encourage coordination to ensure that each existing attacher receives the time it needs to complete make-ready.

³⁶⁹ See 47 CFR § 1.1411(e)(1)(v); 2011 *Pole Attachment Order*, 26 FCC Rcd at 5265, para. 49.

³⁷⁰ See *supra* section III.A.1.b.

³⁷¹ We decline AT&T's request to exempt LEC pole owners from the requirement to maintain a list of approved contractors for work above the communications space. See AT&T July 23, 2018 Wireline *Ex Parte* Letter at 4-6. While we agree with AT&T that LEC pole owners may not have direct knowledge of contractors qualified to do such work, their pre-existing relationship with the electric utility places LEC pole owners in a better position to obtain such information than the new attacher, which may not have such a relationship.

³⁷² 47 CFR §§ 1.1412(a)-(b).

reliable work in more challenging circumstances.³⁷³ Although the current selection process sometimes entails delays where utilities fail to provide a list of approved contractors,³⁷⁴ we find that as to complex work and work above the communications space—which poses heightened safety and reliability risks—the benefits of the current approach outweigh its costs.³⁷⁵ We recognize that self-help above the communications space is novel and poses particularly heightened safety and reliability risks.³⁷⁶ We therefore find it especially important to give the utility control over who performs such work.³⁷⁷ In reaching this conclusion, we decline to adopt the BDAC’s recommendation that utilities need no longer provide, and requesting attachers need not use, utility-approved contractors to complete complex make-ready work in the communications space under the self-help remedy.³⁷⁸

107. Although we treat the utility list as mandatory for complex and above the communications space make-ready, we adopt a protective measure to prevent the utility list from being a choke-point that prevents deployment. The record indicates that some new attachers have been unable to exercise their self-help remedy because a list of utility-approved contractors was not available.³⁷⁹ To alleviate this problem for complex and above the communications space work, we set forth in our rules—as we do in the context of OTMR and simple-self-help—that new and existing attachers may request that qualified contractors be added to the utility’s list and that the utility may not unreasonably withhold its consent for such additions.³⁸⁰ As in the context of OTMR and simple self-help, to be reasonable, a utility’s decision to withhold consent must be prompt, set forth in writing that describes the basis for rejection, nondiscriminatory, and based on fair application of commercially reasonable requirements for contractors relating to issues of safety or reliability.³⁸¹

108. Because we adopt this safeguard for non-simple make-ready, we decline to adopt the BDAC’s recommended multi-step objection and appeal process for adding and removing contractors from the utility-approved contractor list.³⁸² Among other things, the BDAC proposes giving existing attachers

³⁷³ See CCU Wireline NPRM Comments at 28; Verizon Wireline NPRM Reply at 7; Google Fiber Feb. 1, 2018 Wireline *Ex Parte* Letter at 4.

³⁷⁴ See ACA Wireline NPRM Comments at 44-45.

³⁷⁵ AT&T Wireline NPRM Reply at 7-8; *see also 2011 Pole Attachment Order*, 26 FCC Rcd at 5267, para. 55 (concluding that the use of a utility-approved contractor by the new attacher “ensures that only qualified contractors work on utility poles”).

³⁷⁶ See CCU Wireline NPRM Comments at 28-29; Midwest Electric Utilities Wireline NPRM Comments at 28; EEI Wireline NPRM Comments at 19 n.18; UTC Wireline NPRM Reply at 16.

³⁷⁷ See Midwest Electric Utilities Wireline NPRM Comments at 28-29; CCU Wireline NPRM Comments at 28-29; UTC Wireline NPRM Reply at 16; CenterPoint Energy et al. May 25, 2018 Wireline *Ex Parte* Letter Attach. at 1.

³⁷⁸ BDAC January 2018 Recommendations at 46. The BDAC’s recommendation also extends to simple work in the communications space, *see id.*, and we adopt that aspect of the recommendation as set forth above.

³⁷⁹ See ACA Wireline NPRM Reply at 24.

³⁸⁰ ACA expresses concern that, unlike with OTMR contractor selection, self-help new attachers are not permitted to select a qualified contractor to perform complex and electric space make-ready work where utilities do not provide a list. See ACA July 25, 2018 Wireline *Ex Parte* Letter at 4. While requiring new attachers to request the addition of a qualified contractor to the list may be a more time-consuming process than simply allowing new attachers to select a contractor and proceed with the self-help work, we find that this approach still provides new attachers with input while better accounting for the heightened safety and reliability risks that may arise in non-simple work.

³⁸¹ See *supra* section III.A.1.b.

³⁸² See FCC, Broadband Deployment Advisory Committee, Approved Recommendations, Addendum to the Report of the Competitive Access to Broadband Infrastructure Working Group at 2-4 (Apr. 25, 2018) <https://www.fcc.gov/sites/default/files/bdac-cabi-report-04252018.pdf> (BDAC April 2018 Recommendations).

the right to request the removal of a contractor from the list,³⁸³ and it proposes allowing appeals to the Commission for an expedited letter ruling by the Commission staff.³⁸⁴ We find the BDAC's process unduly complex and cumbersome, and we believe it provides counterproductive opportunities for delay to competitors to new attachers.³⁸⁵ We agree with Verizon that while utilities should consider feedback on contractors from existing attachers, if existing attachers had rights to object to utility-approved contractors, "the list of approved contractors could vary from pole to pole based on the particular attachers on the poles," creating an administrative burden for new attachers and thereby slowing deployment.³⁸⁶ Further, given that we do not directly regulate and generally have little information about communications pole attachment contractors operating throughout the country, we are not well-positioned at this juncture to adjudicate disputes over specific contractors' qualifications, especially on an expedited basis.

d. Detailed Make-Ready Costs

109. To facilitate the planning of more aggressive deployments, we adopt additional requirements to improve the transparency and usefulness of the make-ready cost estimates currently required under our rules.³⁸⁷ We require estimates of all make-ready charges to be detailed and include documentation that is sufficient to determine the basis for all charges,³⁸⁸ as well as similarly detailed post-make-ready invoices.

110. The record reflects frustration over the lack of transparency of current estimates of make-ready work charges.³⁸⁹ ACA, Lumos, Crown Castle, and other commenters express support for a requirement that utilities provide detailed, itemized estimates and final invoices of all necessary make-ready costs.³⁹⁰ They, along with other commenters, argue that, in many cases, utilities currently do not provide detailed estimates or detailed final invoices.³⁹¹ They claim that where utilities do not detail the basis of potential or actual charges, new attachers may reasonably fear that utilities can "potentially include costs that are unnecessary, inappropriately inflated, or that attaching entities could easily avoid."

³⁸³ See *id.* at 2-3.

³⁸⁴ See *id.* at 4.

³⁸⁵ See *supra* section III.A.1.b. (finding giving existing attachers an objection right to contractors likely to slow broadband deployment).

³⁸⁶ Verizon Wireline NPRM Reply at 7.

³⁸⁷ Under our current rules, a utility must present a new attacher with "an estimate of charges to perform all necessary make-ready work" within 14 days of conducting the survey of the pole or receiving from the new attacher its own conducted survey. 47 CFR § 1.1411(d); see also *2011 Pole Attachment Order*, 26 FCC Rcd at 5255-56, paras. 26-28.

³⁸⁸ See Lumos Wireline NPRM Reply at 13.

³⁸⁹ See ACA Wireline & Wireless NPRM Comments at 24-26, 48; Crown Castle Wireline NPRM Comments at 15; Google Fiber Wireline NPRM Comments at 11; NCTA Wireline & Wireless NPRM Comments at 11-12; Lumos Wireline NPRM Reply at 13.

³⁹⁰ See ACA Wireline & Wireless NPRM Comments at 24-26; Lightower Wireline NPRM Comments at 6; Crown Castle Wireline NPRM Reply at 7-8; Lumos Wireline NPRM Reply at 13.

³⁹¹ See, e.g., ACA Wireline & Wireless NPRM Comments at 25, 49; Crown Castle Wireline NPRM Comments at 14; Lightower Wireline NPRM Comments at 6; Lumos Wireline NPRM Comments at 12-13; ACA Wireline & Wireless NPRM Reply at ii; Charter Feb. 5, 2018 Wireline *Ex Parte* Letter Attach. at 3; ACA Sep. 14, 2017 Wireline *Ex Parte* Letter at 7. Oregon and New York currently require detailed make-ready estimates. See Or. Admin. R. 860-028-0100; N.Y. Pub. Serv. Comm'n, *Proceeding on Motion of the Commission Concerning Certain Pole Attachment Issues*, Order Adopting Policy Statement on Pole Attachments, Case 03-M0432, Appendix A (Aug. 6, 2004), available at <http://www.utilityregulation.com/content/orders/04NY0432E.pdf>; see also ACA Wireline & Wireless NPRM Comments at 49.

³⁹² Numerous commenters describe experiencing “‘bill shock,’ where a utility’s make-ready invoices far exceed[] the utility’s initial estimates[,]”³⁹³ and add that the lack of transparency of make-ready costs inhibits their ability to plan network expansions.³⁹⁴ Given the frustration reflected in the record, we find that requiring detailed make-ready cost estimates and post-make-ready invoices will improve transparency in the make-ready process and better enable providers to plan broadband buildouts.³⁹⁵

111. We further clarify that our current rules require the utility to provide estimates for all make-ready work to be completed, regardless of what party completes the work.³⁹⁶ Although some utilities claim they are poorly positioned to provide estimates for make-ready work other than their own,³⁹⁷ we continue to find that utilities are best positioned to compile and submit these make-ready estimates to new attachers due to their pre-existing and ongoing relationships with the existing attachers on their poles.³⁹⁸ We recognize that in many circumstances the utility will not be able to prepare on its own an estimate for other existing attachers’ make-ready work;³⁹⁹ therefore, we clarify that utilities may comply

³⁹² Crown Castle Wireline NPRM Comments at 15; *see also* ACA Wireline & Wireless NPRM Comments at 48 (“Utilities . . . have exploited these gaps by providing attachers with vague and un-itemized pre-job estimates and post-job bills for make-ready work and attempting to charge attachers for fixing existing safety code violations and subsidizing the utilities’ own deferred maintenance.”).

³⁹³ ACA Mar. 26, 2018 Wireline *Ex Parte* Letter at 3.

³⁹⁴ *See* Google Fiber Wireline NPRM Comments at 11 (noting that improved cost certainty across markets can allow attachers to plan network expansions with greater confidence); Lumos Wireline NPRM Comments at 14 (noting that requiring utilities to make their charges more transparent “would expedite the performance of necessary make-ready while maintaining cost certainty and ensuring non-discriminatory treatment of attachers”); ACA Wireline & Wireless NPRM Comments at 25-26 (stating that “post-make-ready financial surprises can damage the viability of projects” and providing examples of significant back-billing); NCTA Wireline & Wireless NPRM Comments at 11-12 (recognizing that cost transparency allows attachers to plan upgrades and extensions more effectively).

³⁹⁵ *See* Lumos Wireline NPRM Reply at 13.

³⁹⁶ Our current rule requires that “a utility shall present to a cable operator or telecommunications carrier an estimate of charges to perform all necessary make-ready work” 47 CFR § 1.1411(d).

³⁹⁷ *See* Electric Utilities Wireline NPRM Comments at 15 (contending that utilities are ill-equipped both to estimate the make-ready costs of a third-party attacher on the utilities’ poles and to enforce any requirement that these third parties provide make-ready cost estimates to new attachers); Midwest Electric Utilities Wireline NPRM Reply at 17 (arguing that a utility should be required to provide “an estimate of the costs to perform make-ready work only on the utilities own facilities” and “not . . . an estimate of the costs to perform make-ready work on other attachers’ facilities”); AT&T July 23, 2018 Wireline *Ex Parte* Letter at 2; CCU July 25, 2018 Wireline *Ex Parte* Letter at 2; *see also* CenterPoint Energy et al. May 25, 2018 *Ex Parte* Letter Attach. at 4 (“[M]ake-ready transactions [should] be made directly between the new attacher and the contractor who ultimately performs the make-ready prescribed by the pole owner.”).

³⁹⁸ *See* ACA July 25, 2018 Wireline *Ex Parte* Letter at 5. We also remind utilities of the 14-day deadline in our rules to provide the estimate of make-ready charges to the new attacher. *See* 47 CFR § 1.1411(d). We decline to extend this time period as such an extension would unduly slow down the make-ready process. *See* UTC July 26, 2018 Wireline *Ex Parte* Letter at 4-5; *see also* Xcel/Alliant July 26, 2018 Wireline *Ex Parte* Letter at 5-6 (proposing that estimates should be provided within a reasonable period of time).

³⁹⁹ *See* AEP/Georgia Power July 23, 2018 Wireline *Ex Parte* Letter at 4; AT&T July 23, 2018 Wireline *Ex Parte* Letter at 2; CCU July 25, 2018 Wireline *Ex Parte* Letter at 2; EEI July 26, 2018 Wireline *Ex Parte* Letter at 10-11; Puget Sound Energy July 25, 2018 Wireline *Ex Parte* Letter at 2; Hawaiian Electric July 25, 2018 Wireline *Ex Parte* Letter at 5; Xcel/Alliant July 26, 2018 Wireline *Ex Parte* Letter at 6; UTC July 26, 2018 Wireline *Ex Parte* Letter at 5. While Southern Company argues that requiring electric utilities to compile estimates contradicts our decision in this Order to shift the burden to new attachers to coordinate make-ready, we find that this requirement merely clarifies our existing rule requirement and represents a limited and warranted ongoing obligation for utilities. *See* Southern Company July 26, 2018 Wireline *Ex Parte* Letter at 4; *see also* § 1.1411(d).

with this requirement by compiling estimates from third-parties for submission to the new attacher.⁴⁰⁰ We do not require utilities to compile and submit final invoices of make-ready work performed by third-party existing attachers.⁴⁰¹ We anticipate that existing attachers will have sufficient incentives to ensure that their final invoice reaches the new attacher so that they receive compensation for performed work.

112. We require the utility to detail all make-ready cost estimates and final invoices on a per-pole basis when requested by the new attacher.⁴⁰² While we recognize that requiring utilities to provide costs on a per-pole basis may be more burdensome than providing a less granular estimate,⁴⁰³ we find that a pole-by-pole estimate may be necessary to enable new attachers to understand the costs of deployment and to make informed decisions about altering their deployment plans if make-ready costs on specific poles could prove to be cost-prohibitive.⁴⁰⁴ Requiring per-pole estimates and invoices upon request will also enable new attachers to better determine whether invoices are accurate, saving new attachers the unnecessary time and cost they currently devote to such a task.⁴⁰⁵ The record shows that certain fixed costs are not necessarily charged on a per-pole basis (e.g., traffic control, lock-out/tag-out, truck rolls),⁴⁰⁶ and therefore the rules we adopt today allow for such fixed costs to be estimated and submitted on a per-job basis, rather than a pole-by-pole basis, even where a pole-by-pole estimate or invoice is requested.⁴⁰⁷

113. As part of the detailed estimate, the utility must disclose to the new attacher its projected material, labor, and other related costs that form the basis of its estimate, including specifications of what costs, if any, the utility is passing through to the new attacher from the utility's use of a third-party contractor. The utility must also provide documentation that is sufficient to determine the basis of all charges in the final invoice, including any material, labor and other related costs.⁴⁰⁸ While we understand

⁴⁰⁰ See ACA July 25, 2018 Wireline *Ex Parte* Letter at 5. We further clarify that where the utility compiles third-party estimates, it is responsible only for compilation and transmission—it is not responsible for the accuracy or content of the estimates.

⁴⁰¹ See Xcel/Alliant July 26, 2018 Wireline *Ex Parte* Letter at 6-7. To the extent that the utility is an existing attacher, it is still responsible, where applicable, for providing a final invoice.

⁴⁰² See ACA Wireline & Wireless NPRM Comments at 24-25, 49-50; NCTA Wireline & Wireless NPRM Comments at 11-12; Crown Castle Wireline NPRM Reply at 8; *see also* Xcel/Alliant July 26, 2018 Wireline *Ex Parte* Letter at 5-6 (suggesting that the Commission allow utilities to make available upon request the cost information on which their estimates and invoices are based). We decline Southern Company's proposal to only require utilities to provide estimates and final invoices on a per-pole basis "where reasonably possible." *See* Southern Company July 26, 2018 Wireline *Ex Parte* Letter at 3-4. This suggested language could excuse electric utilities from ever providing estimates on a per-pole basis as some utilities currently claim that they do not have the billing system to accommodate pole-by-pole estimates and invoices. *See id.*

⁴⁰³ *See* CCU Wireline NPRM Reply at 19 (arguing that detailing charges on a per-pole basis would be overly time consuming and cost prohibitive); Electric Utilities Wireline NPRM Reply at 26; AT&T July 23, 2018 Wireline *Ex Parte* Letter at 2; AEP/Georgia Power July 23, 2018 Wireline *Ex Parte* Letter at 3; CCU July 25, 2018 Wireline *Ex Parte* Letter at 2; EEI July 26, 2018 Wireline *Ex Parte* Letter at 12; UTC July 26, 2018 Wireline *Ex Parte* Letter at 4; Puget Sound Energy July 25, 2018 Wireline *Ex Parte* Letter at 2; Hawaiian Electric July 25, 2018 Wireline *Ex Parte* Letter at 5.

⁴⁰⁴ *See* ACA Wireline & Wireless NPRM Comments at 24-25, 49-50; NCTA Wireline & Wireless NPRM Comments at 11-12; Crown Castle Wireline NPRM Reply at 8.

⁴⁰⁵ *See* ACA Wireline & Wireless NPRM Comments at 24-25, 49-50; NCTA Wireline & Wireless NPRM Comments at 11-12; Crown Castle Wireline NPRM Reply at 8.

⁴⁰⁶ *See* AEP/Georgia Power July 23, 2018 Wireline *Ex Parte* Letter at 3; Southern Company July 26, 2018 Wireline *Ex Parte* Letter at 4.

⁴⁰⁷ *See infra* Appx. A, 47 CFR § 1.1411(d).

⁴⁰⁸ *See* ACA July 23, 2018 Wireline *Ex Parte* at 2, Attach. at 4.

that this requirement places a burden on utilities,⁴⁰⁹ we agree with ACA that this requirement will allow new attachers to understand the basis for each individual make-ready charge and prevent disputes over “unreasonable or simply unnecessary make-ready charges in aggregate cost estimates.”⁴¹⁰ However, if a utility completes make-ready and the final cost of the work does not differ from the estimate, it is not required to provide the new attacher with a final invoice.⁴¹¹

114. We decline to adopt the request of some commenters that we require utilities to provide new attachers with a publicly-available schedule of common make-ready charges. These commenters argue that easy access to make-ready rates could promote fair and predictable rates, a more efficient process, and a level playing field between attachers and utilities during attachment rate negotiations, as well as averting disputes over rates and the process used.⁴¹² The record indicates that make-ready costs vary considerably, however, based on a wide variety of factors, including geographic area, soil, vegetation conditions, the accessibility of the pole, and the availability of contractors in the area.⁴¹³ Contractors charge varying rates for their work based on the “labor requirements, equipment used[,] and travel time to the jobsite” of the particular make-ready job.⁴¹⁴ Other issues, such as the complexity of the job, rights-of-way, age of the pole, what is on the pole, and size of the pole, also contribute to the determination of a make-ready rate.⁴¹⁵ The variety and complexity of these variables suggest that requiring utilities nationwide to produce a schedule of make-ready rates would be unreasonably burdensome unless the schedule were at such a level of generality that it would be of little use to attachers in predicting the actual costs of their planned pole attachments.⁴¹⁶ At the same time, we encourage utilities to voluntarily make publicly available schedules of make-ready charges in circumstances in which it is feasible to do so, such as where the utility operates in an area of the country with homogenous terrain.⁴¹⁷

3. Treatment of Overlapping

115. We codify our longstanding policy that utilities may not require an attacher to obtain its approval for overlapping.⁴¹⁸ Consistent with Commission precedent, the utility also may not require pre-

⁴⁰⁹ See Puget Sound Energy July 25, 2018 Wireline *Ex Parte* Letter at 2; EEI July 26, 2018 Wireline *Ex Parte* Letter at 12; UTC July 26, 2018 Wireline *Ex Parte* Letter at 4-5.

⁴¹⁰ See ACA Wireline & Wireless NPRM Comments at 49-50.

⁴¹¹ See Southern Company July 26, 2018 Wireline *Ex Parte* Letter at 4. To this end, and in order to ensure a transparent make-ready process, we decline Hawaiian Electric’s proposal that utilities should not be required to provide a new attacher with a final invoice when the final make-ready charges differ from those in the estimate. See Hawaiian Electric July 25, 2018 Wireline *Ex Parte* Letter at 5.

⁴¹² See, e.g., ACA Wireline & Wireless NPRM Comments at 47-48; AT&T Wireline NPRM Comments at 24; Comcast Wireline & Wireless NPRM Comments at 28; Lumos Wireline NPRM Comments at 14; NCTA Wireline & Wireless NPRM Comments at 12; Comcast Wireline & Wireless NPRM Reply at 11; Crown Castle Wireline NPRM Reply at 7-8.

⁴¹³ See, e.g., EEI Wireline NPRM Comments at 38; Frontier Wireline NPRM Comments at 21-22; USTelecom Wireline NPRM Comments at 18-19; UTC Wireline NPRM Comments at 15.

⁴¹⁴ UTC Wireline NPRM Comments at 15; see also Electric Utilities Wireline NPRM Comments at 40 (quoting *2011 Pole Attachment Order*, 26 FCC Rcd at 5279, para. 86) (“Actual charges vary depending on numerous unique factors, including material and labor costs which fluctuate. As such, the price of make-ready does not lend itself well to fixed schedule of charges.”).

⁴¹⁵ See CCU Wireline NPRM Comments at 30-31.

⁴¹⁶ See EEI Wireline NPRM Comments at 40.

⁴¹⁷ EEI asserts that utilities that currently provide a schedule of common make-ready charges typically operate in areas of the country with homogenous terrain. EEI Wireline NPRM Comments at 40.

⁴¹⁸ *Amendment of Commission’s Rules and Policies Governing Pole Attachments*, CS Docket Nos. 97-98 and 97-151, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12141, para. 75 (2001) (*2001 Pole*

approval for third party overlashing of an existing attachment, when such overlashing is conducted with the permission of an existing attacher.⁴¹⁹ In addition, we adopt a rule that allows utilities to establish reasonable advance notice requirements. As the Commission has previously found, the ability to overlash often “marks the difference between being able to serve a customer’s broadband needs within weeks versus six or more months when delivery of service is dependent on a new attachment.”⁴²⁰ In codifying the existing overlashing precedent while adopting a pre-notification option, we seek to promote faster, less expensive broadband deployment while addressing important safety concerns relating to overlashing.⁴²¹ We find that our codification will hasten deployment by resolving disagreements over whether utilities may impose procedural requirements on overlashing by existing attachers.⁴²²

116. While we make clear that pre-approval for overlashing is not permissible, we adopt a rule that utilities may, but are not required to, establish reasonable pre-notification requirements including a requirement that attachers provide 15 days (or fewer) advance notice of overlashing work.⁴²³ Commenters express the concern that poles may not always be able to reliably support additional weight due to age and environmental factors, such as ice and wind, and as a result, overlashing even one additional cable on a pole may cause an overloading.⁴²⁴ Such pole overloading could “hamper the

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Attachment Order) (“We affirm our policy that neither the host attaching entity nor the third-party overlasher must obtain additional approval from or consent of the utility for overlashing other than the approval obtained for the host attachment.”), *aff’d Southern Co. v. FCC*, 313 F.3d 574, 582 (D.C. Cir. 2002).

⁴¹⁹ *2001 Pole Attachment Order*, 16 FCC Rcd at 12141, para. 75; *see also* AT&T July 23, 2018 Wireline *Ex Parte* Letter at 3 (requesting codification that pre-approval not be required for pre-approved third-party overlashing); ACA July 25, 2018 Wireline *Ex Parte* Letter at 3 (requesting same); Verizon July 26, 2018 Wireline OTMR *Ex Parte* Letter at 7 (requesting same).

⁴²⁰ Crown Castle Wireline FNPRM Comments at 2; *see also* ACA Wireline and Wireless NPRM Comments at 11.

⁴²¹ *See Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission’s Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, Report and Order 13 FCC Rcd 6777, 6807, para. 62 (1998); *see also* CTIA Wireline FNPRM Reply at 3-4; FBA Wireline FNPRM Reply at 1; FBA July 20, 2018 Wireline *Ex Parte* Letter at 3.

⁴²² *See* ACA Wireline & Wireless NPRM Comments at 10-11; Crown Castle Wireline FNPRM Comments at 4-5; Verizon Wireline FNPRM Comments at 19; FBA July 20, 2018 Wireline *Ex Parte* Letter at 3.

⁴²³ *See* AT&T Wireline FNPRM Comments 15; CPS Energy Wireline FNPRM Comments at 2; EEI Wireline FNPRM Comments at 12; Electric Utilities Wireline FNPRM Comments at 25; NTCA Wireline FNPRM Comments at 5; POWER Coalition Wireline FNPRM Comments at 6; Utility Coalition on Overlashing Wireline FNPRM Comments at 10; UTC Wireline FNPRM Comments at 4; Xcel Energy Wireline FNPRM Comments at 1-2; ACA Wireline FNPRM Reply at 10; CPS Energy Wireline FNPRM Reply at 3; Electric Utilities Wireline FNPRM Reply at ii-iii, 4; NASUCA Wireline FNPRM Reply at 2-3; NRECA Wireline FNPRM Reply at 2; POWER Coalition Wireline FNPRM Reply at 8; UTC Wireline FNPRM Reply at 1-2). Further, a handful of states also require advance notice of overlashing; *see* UTC Wireline FNPRM Comments at 5 (noting that Arkansas, Ohio, Louisiana, Iowa, and Utah provide “for advance notice of overlashing.”); Electric Utilities Wireline FNPRM Comments at 12-18 (stating that the public utility commissions of Arkansas, Ohio, Washington, Louisiana, Iowa, Utah, Connecticut have ratified or adopted an advance notice requirement to some degree); Utility Coalition on Overlashing Wireline FNPRM Comments at ii, 23-24 (noting that states such as Louisiana, California, Ohio, and Michigan recognize the impact of overlashing “must be analyzed in advance of the overlashing”); ACA Wireline FNPRM Reply at 11, n. 47 (“Washington and Louisiana require 15 days’ notice, while Utah requires 10 days’ notice for most overlashing projects and Iowa requires 7 days’ notice”). We decline Southern Company’s proposal to impose a “reasonable penalty” where an overlasher fails to comply with an electric utility’s advance notice requirement. *See* Southern Company July 26, 2018 Wireline *Ex Parte* Letter at 9. The informal complaint process is available to utilities that wish to allege a violation of the notice rule.

⁴²⁴ *See, e.g.,* AT&T Wireline FNPRM Comments at 15; EEI Wireline FNPRM Comments at 5; Electric Utilities Wireline FNPRM Comments at 18-19; UTC Wireline FNPRM Comments at 3; CCU Wireline NPRM Reply at 30; Utility Coalition on Overlashing Wireline FNPRM Reply at 4, 6-7; Letter from Robin F. Bromberg, Counsel, Electric Utilities, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2-3 (filed Nov. 13, 2017)

installation or maintenance of electric facilities, or other on-going wireline or wireless facility installations.”⁴²⁵ We find these concerns to be valid and supported by the record.⁴²⁶ Thus, we agree with commenters that allowing utilities to require advance notice will promote safety and reliability and allow the utility to protect its interests without imposing unnecessary burdens on attachers.⁴²⁷ If after receiving this advance notice, a utility determines, through its own engineering analysis, that there is insufficient capacity on the pole for a noticed overlash, the noticed overlash would be inconsistent with generally applicable engineering practices, or the noticed overlash would compromise the pole’s safety or reliability,⁴²⁸ the utility must provide specific documentation demonstrating that the overlash creates a capacity, safety, reliability, or engineering issue within the 15 day advance notice period and the overlasher must address any identified issues—either by modifying its proposal or by explaining why, in the overlasher’s view, a modification is unnecessary—before continuing with the overlash.⁴²⁹ Consistent with our approach to OTMR and self-help,⁴³⁰ we adopt ACA’s position that a utility may not charge a fee to the party seeking to overlash for the utility’s review of the proposed overlash, as such fees will increase the costs of deployment.⁴³¹

117. We find that an approach to overlashing that allows for pre-notification without requiring

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(Electric Utilities Nov. 13, 2017 Wireline *Ex Parte* Letter); CenterPoint Energy/FPL Feb. 13, 2018 Wireline *Ex Parte* Letter at 2.

⁴²⁵ CPS Energy Wireline FNPRM Comments at 8.

⁴²⁶ For instance, the Coalition of Concerned Utilities argues that overlashing may cause the pole line “to sag to such an extent that it violates required vertical safety clearance requirements over streets and highways.” CCU Wireline NPRM Reply at 30. EEI suggests that overlashing may cause pole failure, interrupt electrical service, and endanger the public. EEI Wireline FNPRM Comments at 5. Similarly, the Electric Utilities contend that the combination of overlashing and environmental factors, such as wind and ice, could cause pole line overload and that a utility-performed engineering analysis may prevent such an overload. Electric Utilities Wireline FNPRM Comments at 18-19.

⁴²⁷ See AT&T Wireline FNPRM Comments at 15; CPS Energy Wireline FNPRM Comments at 2; NTCA Wireline FNPRM Comments at 5; POWER Coalition Wireline FNPRM Comments at 6; Utility Coalition on Overlashing Wireline FNPRM Comments at 10; UTC Wireline FNPRM Comments at 4; Xcel Energy Wireline FNPRM Comments at 1-2; ACA Wireline FNPRM Reply at 10-11; CPS Energy Wireline FNPRM Reply at 3-4; Electric Utilities Wireline FNPRM Reply at ii-iii, 4; NASUCA Wireline FNPRM Reply at 2-3; NRECA Wireline FNPRM Reply at 2; POWER Coalition Wireline FNPRM Reply at 8; UTC Wireline FNPRM Reply at 1-2. The record indicates that several states already require advance notice of overlashing. See UTC Wireline FNPRM Comments at 5; Electric Utilities Wireline FNPRM Comments at 12-18; Utility Coalition on Overlashing Wireline FNPRM Comments at ii, 23-24; ACA Wireline FNPRM Reply at 11, n. 47. This 15-day notice period is consistent with the OTMR notice period that we adopt for simple make-ready work in the communications space. See *supra* section III.A.1.c.(v).

⁴²⁸ 47 U.S.C. § 224(f)(2).

⁴²⁹ See Comcast July 26, 2018 Wireline *Ex Parte* Letter at 2. To the extent a utility can document that an overlash would require modifications to the pole or replacement of the pole, the overlasher will be held responsible for the costs associated with ensuring that the pole can safely accommodate the overlash. See *Southern Co. v. FCC*, 313 F.3d 574, 582 (D.C. Cir. 2002). A utility may not deny access to overlash due to a pre-existing violation on the pole. But see UTC July 26, 2018 Wireline *Ex Parte* Letter at 5. However, a party that chooses to overlash on a pole with a safety violation and causes damage to the pole or other equipment will be held responsible for any necessary repairs.

⁴³⁰ See *supra* sections III.A.1.a. (requiring that utilities pay their own costs to double-check new attachers’ OTMR work); III.A.2.b. (requiring that utilities pay their own costs to double-check new attachers’ self-help work).

⁴³¹ See ACA July 23, 2018 Wireline *Ex Parte* Letter at 6, Attach. at 11. To this end, we reject Southern Company’s assertion that the costs of performing a pre-overlash engineering analysis are incremental costs caused by the new attacher and, as a result, electric utilities are entitled to recover them. See Southern Company July 26, 2018 Wireline *Ex Parte* Letter at 9-10.

pre-approval is superior to more extreme solutions advocated by some commenters.⁴³² We are unpersuaded, for example, by arguments that utility pre-approval for overloading is necessary to ensure safety.⁴³³ Pre-approval is not currently required, and the record does not demonstrate that significant safety or reliability issues have arisen from the application of the current policy. Rather, the record reflects that an advance notice requirement has been sufficient to address safety and reliability concerns, as it provides utilities with the opportunity to conduct any engineering studies or inspections either prior to the overload being completed or after completion.⁴³⁴ For instance, after an Edison Electric Institute member received advance notice of overloading on 5,186 poles, its inspection found that 716 of those poles “‘had preexisting violations for failure to meet NESC requirements for clearance between communications attachments and power facilities.’”⁴³⁵ Similarly, in 2016, Oncor Electric Delivery in Texas received advance notice of overloading and discovered 13.8% of the poles had existing clearance violations between existing attachments and power facilities.⁴³⁶ Further, requiring that attachers receive prior approval for overloading would unnecessarily increase costs for attachers and delay deployment.⁴³⁷

118. On the other hand, we also reject commenters’ arguments for notice only after overloading (i.e., “attach-and-notify”).⁴³⁸ While attach-and-notify advocates assert that advance notice is time-consuming, cumbersome, and inefficient,⁴³⁹ we find the burden of advance notice minimal compared to the importance of ensuring that any new overloaded facilities will not “‘compromise the safety or integrity of existing electric distribution and communications infrastructure.’”⁴⁴⁰ Providing the utility with advance notice of overloading will allow it to better monitor and ensure the safety, integrity, and reliability of its poles both before and after the overload is completed⁴⁴¹ without overburdening

⁴³² We reject EEI’s proposal to subject the overloading process to the same OTMR or non-OTMR timeline and processes as this would be tantamount to requiring pre-approval for overloading and would dramatically slow deployment via overloading. *See* EEI July 26, 2018 Wireline *Ex Parte* Letter at 13.

⁴³³ *See, e.g.*, CCU Wireline NPRM Reply at 29-30; EEI Wireline FNPRM Comments at 13.

⁴³⁴ *See, e.g.*, UTC Wireline FNPRM Comments at 4; Utility Coalition on Overloading Wireline FNPRM Comments at 10. Conversely, the record indicates that in at least one case, a utility was not able to detect and prevent a problem because it did not receive advance notice. Specifically, Ameren Missouri identifies a situation in which a truck hit improperly low-hanging wires; it asserts that the problem was exacerbated by overloading and claims that if it had received advance notice of the overloading, it would have been able to perform an inspection, discover the existing violation, and prevent a company from overloading when there was a public safety threat of a low hanging wire over a public road. *See* Electric Utilities Wireline FNPRM Comments at 21-22.

⁴³⁵ EEI Wireline FNPRM Comments at 6.

⁴³⁶ *See* Electric Utilities Wireline FNPRM Comments at 21.

⁴³⁷ *See, e.g.*, ACA Wireline FNPRM Comments at 9; NCTA Wireline FNPRM Comments at 2.

⁴³⁸ *See* FBA Wireline FNPRM Reply at 1, 9; Verizon Wireline FNPRM Reply at 16.

⁴³⁹ *See, e.g.*, Comcast Wireline FNPRM Comments at 3; Verizon Wireline FNPRM Comments at 19; Comcast Wireline FNPRM Reply at 10; FBA Wireline FNPRM Reply at 8; NCTA Wireline FNPRM Reply at 2-3.

⁴⁴⁰ Xcel Energy Wireline FNPRM Comments at 4; *see also* AT&T Wireline FNPRM Comments at 15 (“[A]dvance notice to the pole owner and any host attaching entity . . . promotes safety and the integrity and reliability of the wireline network by affording an opportunity to validate that the attacher has considered the impact overloading will have on the pole and the host cables.”); Electric Utilities Wireline FNPRM Comments at 1 (“[T]he Commission should clarify that pole owners may require advanced notice of overloading in order to ensure that overloading complies with applicable standards for safety, reliability, and engineering.”); AT&T Wireline FNPRM Reply at 1 (“Prior notice of overloading promotes safety and the integrity and reliability of poles.”).

⁴⁴¹ Xcel Energy Wireline FNPRM Comments at 6; *see also* Electric Utilities Wireline FNPRM Comments at ii (“Without advance notice of overloading, electric utilities cannot evaluate the impact of the proposed overloading (loading/clearance) or determine whether there are existing violations (loading/clearance) that must be corrected prior to overloading.”); UTC Wireline FNPRM Comments at 4 (“[U]tilities need *advance* notice of overloading in order to conduct an engineering study and inspect the poles to assess additional loading and ensure there are no existing violations of the electric utilities’ standards or applicable codes on the pole that must be remedied prior to

overlashers or requiring multiple trips to the pole.⁴⁴²

119. We also take this opportunity to clarify several points related to overlashing. First, if the utility elects to establish an advance notice requirement, the utility must provide advanced written notice to attachers or include the requirement in its pole attachment agreements. We find that providing this guidance will give clarity to all parties as to when the utility must receive advance notice, thereby reducing the likelihood of disputes. Utilities may require pre-notification of up to 15 days, the same notice period that we adopt for OTMR attachments.⁴⁴³ We also emphasize that utilities may not use advanced notice requirements to impose quasi-application or quasi-pre-approval requirements, such as requiring engineering studies.⁴⁴⁴ Finally, just as new attachers electing OTMR are responsible for any corrective measures needed because of their work,⁴⁴⁵ in the event that damage to the pole or other existing attachment or safety or engineering standard violations result from overlashing, the overlasher will be responsible for any necessary repairs arising from such overlashing.⁴⁴⁶ Poorly performed overlashing can create safety and reliability risks,⁴⁴⁷ and the Commission has consistently found that overlashers must

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the proposed overlashing.”); Utility Coalition on Overlashing Wireline FNPRM Comments at 10 (“[A]dequate advance notice containing adequate information about the overlashing is necessary to enable utilities to analyze the capacity, safety, reliability and generally applicable engineering concerns of the utility pole owner.”).

⁴⁴² See, e.g., Xcel Energy Wireline FNPRM Comments at 6; CPS Energy Wireline FNPRM Comments at 6-7.

⁴⁴³ See *supra* section III.A.1.c.(v). We therefore reject requests that utilities be allowed to require up to 45 days prior notice of overlashing. See AEP/Georgia Power July 23, 2018 Wireline *Ex Parte* Letter at 2; Hawaiian Electric July 25, 2018 Wireline *Ex Parte* Letter at 3; Southern Company July 26, 2018 Wireline *Ex Parte* Letter at 8; UTC July 26, 2018 Wireline *Ex Parte* Letter at 5. Given that pre-approval for overlashing is not required, such a lengthy notice period should not be necessary.

⁴⁴⁴ See ACA Wireline FNPRM Reply at 12; FBA July 20, 2018 Wireline *Ex Parte* Letter at 3. We reject AT&T’s proposal to require that overlashers confirm to the pole owner in the advance notice “that they have fulfilled their responsibility” to comply with reasonable safety, reliability, and engineering practices. AT&T July 23, 2018 Wireline *Ex Parte* Letter at 3; see also ACA July 25, 2018 Wireline *Ex Parte* Letter at 4. But see Letter from Steven F. Morris, VP and Associate General Counsel, NCTA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84 at 1-2 (arguing that “AT&T provide[s] no justification for the Commission to depart from its longstanding policy and its thorough consideration of the safety of overlashing”). Requiring engineering studies, pre-certifications, or any other similar requirement is unnecessary because the overlasher is ultimately responsible for any necessary repairs subsequently discovered by the pole owner. To the extent that the pole owner wishes to perform an engineering analysis of its own either within the 15-day advance notice period or after completion of the overlash, the pole owner bears the cost of such an analysis. But see AT&T July 23, 2018 Wireline *Ex Parte* Letter at 3 (proposing that engineering studies conducted by the pole owner after an overlash is completed be paid for by the overlasher in the event that the overlasher did not provide advanced confirmation of the safety, reliability, and engineering suitability of the overlash); Hawaiian Electric July 25, 2018 Wireline *Ex Parte* Letter at 3 (proposing that new attachers be required to provide an engineering analysis of the overlash with its advance notice); Southern Company July 26, 2018 Wireline *Ex Parte* Letter at 9 (proposing that the Order should allow utilities to use advance notice requirements to require an engineering study, otherwise smaller electric utilities will not be able to pre-engineer overlashing, and safety and reliability will suffer); EEI July 26, 2018 Wireline *Ex Parte* Letter at 12-13. We also reject Southern Company’s proposal to permit utilities to require an overlasher to submit specifications of the materials to be overlashed with the notice of overlashing. See Southern Company July 26, 2018 Wireline *Ex Parte* Letter at 8. Such a requirement could unduly slow deployment with little offsetting benefit.

⁴⁴⁵ See *supra* section III.A.1.c.(vi).

⁴⁴⁶ See Crown Castle Wireline FNPRM Reply at 10; Xcel/Alliant July 26, 2018 Wireline *Ex Parte* Letter at 7.

⁴⁴⁷ See NRECA Wireline FNPRM Reply at 1-2 (describing “poorly constructed overlashing, overlashing that results in excessive wind and ice loads, overlashing with insufficient guying to maintain pole integrity, [and] vehicles snagging overlashed wires that hang too low to the ground”); AT&T Wireline FNPRM Reply at 3-4 (“AT&T has experienced a number of incidences where sagging cables from overlashing without proper engineering caused

ensure that they are complying with reasonable safety, reliability, and engineering practices.⁴⁴⁸

120. We agree with ACA that we should adopt a post-overlashing notification procedure comparable to the post-make ready notification procedure we adopt for OTMR.⁴⁴⁹ Therefore, we require that an overlashing party shall notify the affected utility within 15 days of completion of the overlash on a particular pole. The notice shall provide the affected utility at least 90 days from receipt in which to inspect the overlash. The utility has 14 days after completion of its inspection to notify the overlashing party of any damage or any code (e.g., safety, electrical, engineering, construction) violations to its equipment caused by the overlash. If the utility discovers damage or code violations caused by the overlash on equipment belonging to the utility, then the utility shall inform the overlashing party and provide adequate documentation of the damage or code violations. The utility may either complete any necessary remedial work and bill the overlashing party for the reasonable costs related to fixing the damage or code violations or require the overlashing party to fix the damage or code violations at its expense within 14 days following notice from the utility.

B. New Attachers are Not Responsible for Preexisting Violations

121. Consistent with the BDAC's recommendation, we clarify that new attachers are not responsible for the costs associated with bringing poles or third-party equipment into compliance with current safety and pole owner construction standards to the extent such poles or third-party equipment were out of compliance prior to the new attachment.⁴⁵⁰ Although utilities have sometimes held new attachers responsible for the costs of correcting preexisting violations,⁴⁵¹ this practice is inconsistent with our long-standing principle that a new attacher is responsible only for actual costs incurred to accommodate its attachment.⁴⁵² The new attachment may precipitate correction of the preexisting violation, but it is the violation itself that causes the costs, not the new attacher. Holding the new attacher liable for preexisting violations unfairly penalizes the new attacher for problems it did not cause, thereby deterring deployment, and provides incentives for attachers to complete make-ready work irresponsibly and count on later attachers to fix the problem.⁴⁵³ This is true whether the make-ready work that corrects these preexisting violations is simple or complex.⁴⁵⁴

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trucks to unknowingly snag cables, felling poles on roads and sidewalks, endangering the public from pole impact and energized electric lines, and creating avoidable service outages.”).

⁴⁴⁸ See *2001 Pole Attachment Order*, 16 FCC Rcd at 12141, para. 73. We reach this conclusion under our authority pursuant to 47 U.S.C. § 224(b)(1).

⁴⁴⁹ See ACA July 23, 2018 Wireline *Ex Parte* Letter at 6, Attach. at 11; ACA July 25, 2018 Wireline *Ex Parte* Letter at 3; see also *supra* section III.A.c.(vi).

⁴⁵⁰ BDAC January 2018 Recommendations at 24; see also Lumos Wireline NPRM Comments at 15; Electric Utilities Wireline NPRM Comments at 44; CCU Wireline NPRM Comments at 19-20; Lighttower Wireline NPRM Comments at 12; ACA Wireline NPRM Reply Comments at 28-31; FBA July 20, 2018 Wireline *Ex Parte* Letter at 4; Letter of Lawrence Lackey, Director of Regulatory, FirstLight, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2-3 (filed July 26, 2018) (FirstLight July 26, 2018 Wireline *Ex Parte* Letter). This includes situations where a pole has been “red tagged”—that is, found to be non-complaint with safety standards and placed on a replacement schedule. See Crown Castle July 25, 2018 Wireline *Ex Parte* Letter at 3. When a pole has been red tagged, new attachers are not responsible for the cost of pole replacement.

⁴⁵¹ See, e.g., ACA Wireline NPRM Comments at 22, 48-49; Lumos Wireline NPRM Comments at 15.

⁴⁵² See, e.g., *Knology, Inc. v. Georgia Power Co.*, Memorandum Opinion and Order, 18 FCC Rcd 24615, 24625, para. 26 (2003); *Kansas City Cable Partners d/b/a Time Warner Cable of Kansas City v. Kansas City Power & Light Co.*, File Nos. PA 99-001, PA 99-002, Consolidated Order, 14 FCC Rcd 11599, 11606-07, para. 19 (CSB 1999).

⁴⁵³ See ExteNet Wireline NPRM Comments at 56; Lighttower Wireline NPRM Comments at 12; Lumos Wireline NPRM Comments at 15; ACA Wireline NPRM Reply at 28-31. We therefore reject CPS Energy's approach in which “the applicant is required to remedy existing technical violations of third-party attachments at its expense as part of the one-touch make-ready process.” CPS Energy Wireline NPRM Reply at 10. Similarly, we reject the

122. We also clarify that utilities may not deny new attachers access to the pole solely based on safety concerns arising from a pre-existing violation, as Lighttower alleges sometimes occurs.⁴⁵⁵ Simply denying new attachers access prevents broadband deployment and does nothing to correct the safety issue.⁴⁵⁶ We also clarify that a utility cannot delay completion of make-ready while the utility attempts to identify or collect from the party who should pay for correction of the preexisting violation.⁴⁵⁷

C. Addressing Outdated Rate Disparities

123. In the interest of promoting infrastructure deployment, the Commission adopted a policy in 2011 that similarly situated attachers should pay similar pole attachment rates for comparable access.⁴⁵⁸ Incumbent LECs allege, however, that electric “utilities continue to charge pole attachment rates significantly higher” than the rates charged to similarly situated telecommunications attachers,⁴⁵⁹ and that these higher rates inhibit broadband deployment.⁴⁶⁰ To address this problem, we revise our rules to

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proposals from utilities that new attachers should be forced to either “wait for the corrective process to run its course” or “cover[] the cost of correcting the violation, without recourse.” AEP/Georgia Power July 23, 2018 Wireline *Ex Parte* Letter at 2-3; *see also* Southern Company July 26, 2018 Wireline *Ex Parte* Letter at 5-6. This approach is tantamount to forcing the new attacher to pay to correct the preexisting violation as the alternative would require the new attacher to postpone make-ready indefinitely. *See* Verizon July 26, 2018 Wireline OTMR *Ex Parte* Letter at 6 (explaining how this approach would force new attachers “to choose between paying to remediate preexisting violations versus risking unpredictable and potentially significant deployment delays”).

⁴⁵⁴ EEI requests clarification that if a new attacher fixes existing violations while performing simple make-ready, it may not charge the utility for such repairs. *See* EEI July 26, 2018 Wireline *Ex Parte* Letter at 6-7. If the new attacher chooses to repair a pre-existing violation it may seek reimbursement from the party responsible for the violation, including, if applicable, the utility.

⁴⁵⁵ Lighttower Wireline NPRM Comments at 12; *see also* FirstLight July 26, 2018 Wireline *Ex Parte* Letter at 2-3. This includes situations where a pole has been red-tagged, and new attachers are prevented from accessing a pole until it is replaced. *See* Crown Castle July 25, 2018 Wireline *Ex Parte* Letter at 3-4.

⁴⁵⁶ For this reason, we reject Xcel Energy and Alliant Energy’s suggestion that we provide utilities, where there is a preexisting violation, “the right to stop all work on that pole and prohibit physical access to that pole until the pre-existing safety issue is resolved and the pole is brought into compliance.” Xcel/Alliant July 26, 2018 Wireline *Ex Parte* Letter at 7; *see also* EEI July 26, 2018 Wireline *Ex Parte* Letter at 10.

⁴⁵⁷ *See* FBA July 20, 2018 Wireline *Ex Parte* Letter at 5. We disagree with American Electric Power Service Corporation and Georgia Power that the approach we adopt today denies existing attachers of any contractual right to receive notice of a violation. AEP/Georgia Power July 23, 2018 Wireline *Ex Parte* Letter at 2. Such notice could be provided, for instance, after the survey has been completed, identifying any preexisting violations, and before make-ready work is performed. We further reject the proposal that we establish a formal notice process in which existing attachers are given a timeline to correct preexisting violations. *See* Southern Company July 26, 2018 Wireline *Ex Parte* Letter at 5-6; *see also* Crown Castle July 25, 2018 Wireline *Ex Parte* Letter at 3-4 (proposing a timeline for utilities to replace poles when new attachments are prohibited due to the need for a pole replacement). Such a process largely leaves new attachers in the same unacceptable position they confront today—delaying their deployment until the existing attacher makes a repair or being forced to make the repair and attempt to recover their costs from the existing attacher.

⁴⁵⁸ *See 2011 Pole Attachment Order*, 26 FCC Rcd at 5328, 5333-5337, paras. 203, 214-219 (establishing process by which incumbent LECs can show they are similarly situated to telecommunications attachers in order to receive comparable rates to those attachers).

⁴⁵⁹ Verizon Wireline NPRM Comments at 11; *see also* AT&T Wireline NPRM Comments at 23 (describing the “higher attachment rates paid by AT&T’s ILECs to electric utilities relative to competitors that benefit from the telecommunications rate”); Frontier Wireline NPRM Comments at 4 (“ILEC attachers currently pay disproportionately higher rates compared to other broadband attachers.”); USTelecom Wireline NPRM Comments at 7 (“ILEC attachers do not currently benefit from . . . rate parity.”).

⁴⁶⁰ *See* USTelecom Wireline NPRM Comments at 7 (“The lack of regulatory parity between ILECs and their cable and CLEC counterparts in the provision of broadband services complicates investment decisions for ILECs and has undoubtedly inhibited broadband deployment in the United States.”); *see also* Letter from Kevin G. Rupy, Vice

establish a presumption that, for newly-negotiated and newly-renewed pole attachment agreements between incumbent LECs and utilities, an incumbent LEC will receive comparable pole attachment rates, terms, and conditions as a similarly-situated telecommunications carrier or a cable television system (telecommunications attachers).⁴⁶¹ The utility can rebut the presumption with clear and convincing evidence that the incumbent LEC receives net benefits under its pole attachment agreement with the utility that materially advantage the incumbent LEC over other telecommunications attachers.

124. As the Commission has recognized, historically, incumbent LECs owned approximately the same number of poles as electric utilities and were able to ensure just and reasonable rates, terms, and conditions for their attachments by negotiating long-term joint use agreements with utilities.⁴⁶² These joint use agreements may provide benefits to the incumbent LECs that are not typically found in pole attachment agreements between utilities and other telecommunications attachers, such as lower make-ready costs, the right to attach without advance utility approval, and use of the rights-of-way obtained by the utility, among other benefits.⁴⁶³ By 2011, however, incumbent LECs owned fewer poles than utilities, and the Commission found that incumbent LECs “may not be in equivalent bargaining position with electric utilities in pole attachment negotiations in some cases.”⁴⁶⁴ In 2011, the Commission determined that it had the authority “to ensure that incumbent LECs’ attachments to other utilities’ poles are pursuant to rates, terms and conditions that are just and reasonable,”⁴⁶⁵ and placed the burden on incumbent LECs to rebut the presumption that they are not similarly situated to an existing telecommunications attacher in order to obtain access on rates, terms, and conditions that are comparable to the existing telecommunications attacher.⁴⁶⁶

125. The record clearly demonstrates that incumbent LEC pole ownership continues to decline.⁴⁶⁷ Incumbent LECs argue that a reversal of the current presumption is warranted because incumbent LECs’ bargaining power vis-à-vis utilities has eroded since 2011 as their percentage of pole ownership relative to utilities has dropped, thus resulting in increased attachment rates relative to their

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President, Law & Policy, USTelecom, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2-3 (filed June 6, 2018) (USTelecom June 6, 2018 Wireline *Ex Parte* Letter) (arguing that “rationalizing antiquated monopoly-era cost structures for pole inputs is necessary for efficient investment to bring more and better broadband infrastructure to a larger share of Americans, particularly in rural areas.”).

⁴⁶¹ See USTelecom Wireline NPRM Comments at 9; Verizon Wireline NPRM Comments at 10.

⁴⁶² See *2011 Pole Attachment Order*, 26 FCC Rcd at 5244, para. 8. As the Commission explained at the time, “joint use agreements are structured as cost-sharing arrangements, with each party agreeing to own a certain percentage of the joint use poles. This percentage typically is 40–50% for the incumbent LEC and 50–60% for the electric utility, and generally reflects the relative ratio of pole ownership that existed at the time these agreements originally were negotiated. No money changes hands under these agreements if each party owns its specified percentage of joint use poles. . . . When pole ownership deviates from the agreement, the party that owns less than the specified percentage typically pays the other party an amount based on a per pole rate.” *Id.* at 5334-35, n.651 (internal citations omitted).

⁴⁶³ See EEI Wireline NPRM Reply at 14; UTC Wireline NPRM Reply at 27-28.

⁴⁶⁴ *2011 Pole Attachment Order*, 26 FCC Rcd at 5329, para. 206.

⁴⁶⁵ *Id.* at 5330, para. 208.

⁴⁶⁶ See 47 CFR § 1.1413; see also *2011 Pole Attachment Order*, 26 FCC Rcd at 5336, para. 217 (stating that, “to the extent that the incumbent LEC demonstrates that it is obtaining pole attachments on terms and conditions that leave them comparably situated to telecommunications carriers or cable operators, we believe it will be appropriate to use the rate of the comparable attacher as [a] ‘just and reasonable’ rate”).

⁴⁶⁷ See AT&T Wireline NPRM Comments at 23; Frontier Wireline NPRM Comments at 6; Letter from Kevin G. Rupy, Vice President, Law & Policy, USTelecom, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at Attach. at 7 (USTelecom Nov. 21, 2017 Wireline *Ex Parte* Letter) (“In the 46 states surveyed, USTelecom’s data show that for every ILEC pole to which IOUs attach, ILECs attach to three IOU poles. Specifically, ILECs attach to approximately 13.9 million IOU poles, whereas IOUs attach to only 4.6 million ILEC poles.”).

fellow telecommunications attachers.⁴⁶⁸ To bolster this claim, USTelecom provides the results of a recent member survey showing that its incumbent LEC members “pay an average of \$26.12 [per year] to [investor-owned utilities] today in Commission-regulated states (an *increase* from \$26.00 in 2008), compared to cable and CLEC provider payments to ILECs, which average \$3.00 and \$3.75 [per year], respectively (a *decrease* from \$3.26 and \$4.45, respectively, in 2008).”⁴⁶⁹

126. We are convinced by the record evidence showing that, since 2008, incumbent LEC pole ownership has declined and incumbent LEC pole attachment rates have increased (while pole attachment rates for cable and telecommunications attachers have decreased).⁴⁷⁰ We therefore conclude that incumbent LEC bargaining power vis-à-vis utilities has continued to decline. Therefore, based on these changed circumstances, we agree with incumbent LEC commenters’ arguments that, for new and newly-renewed pole attachment agreements between utilities and incumbent LECs, we should presume that incumbent LECs are similarly situated to other telecommunications attachers and entitled to pole attachment rates, terms, and conditions that are comparable to the telecommunications attachers.⁴⁷¹ We conclude that, for determining a comparable pole attachment rate for new and newly-renewed pole attachment agreements, the presumption is that the incumbent LEC should be charged no higher than the pole attachment rate for telecommunications attachers calculated in accordance with section 1.1406(e)(2) of the Commission’s rules.⁴⁷² We find that applying the presumption in these circumstances will promote broadband deployment and serve the public interest; we agree with USTelecom that greater rate parity between incumbent LECs and their telecommunications competitors “can energize and further accelerate broadband deployment.”⁴⁷³ However, we recognize there may be some cases in which incumbent LECs may continue to possess greater bargaining power than other attachers, for example in geographic areas where the incumbent LEC continues to own a large number of poles. Therefore, we establish a presumption that may be rebutted, rather than a more rigid rule.⁴⁷⁴

⁴⁶⁸ See AT&T Wireline NPRM Comments at 23; Frontier Wireline NPRM Comments at 4-7; USTelecom Wireline NPRM Comments at 3-4; Verizon Wireline NPRM Comments at 11. According to a recent USTelecom survey, its members in 2017 paid investor owned utilities nearly nine times what incumbent LECs charge cable provider attachers on incumbent LEC-owned poles, and almost seven times the rates incumbent LECs charge competitive LEC attachers on incumbent LEC-owned poles. See USTelecom Nov. 21, 2017 Wireline *Ex Parte* Letter Attach. at 3. According to USTelecom, this disparity has risen from 2008 when its members paid eight times more than cable providers and six times more than competitive LECs. See *id.* at Attach. at 4.

⁴⁶⁹ USTelecom Nov. 21, 2017 Wireline *Ex Parte* Letter Attach. at i (italics in original).

⁴⁷⁰ See AT&T Wireline NPRM Comments at 23; Frontier Wireline NPRM Comments at 4-7; USTelecom Wireline NPRM Comments at 3-4; Verizon Wireline NPRM Comments at 11; USTelecom Nov. 21, 2017 Wireline *Ex Parte* Letter at Attach. at 2-11.

⁴⁷¹ See Letter from Kevin Rupy, Vice President, Law & Policy, USTelecom, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 4 (filed July 27, 2018) (USTelecom July 27, 2018 Wireline *Ex Parte* Letter) (proposing we extend the presumption to newly-renewed agreements); Letter from Thomas W. Whitehead, Vice President, Federal Government Affairs, Windstream Services, LLC, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-89, WC Docket No. 17-84, at 2 (filed July 25, 2018) (Windstream July 25, 2018 Wireline and Wireless *Ex Parte* Letter) (proposing that we extend the presumption to newly-renewed agreements); see also USTelecom Wireline NPRM Comments at 6-8; AT&T Wireline NPRM Comments at 23; Frontier Wireline NPRM Comments at 5-7; Verizon Wireline NPRM Comments at 11-12; *cf.* Windstream July 25, 2018 Wireline *Ex Parte* Letter at 2 (proposing that we also extend the presumption to all agreements starting two years after the effective date of this Order).

⁴⁷² See 47 CFR § 1.1406(e)(2).

⁴⁷³ USTelecom Nov. 21, 2017 Wireline *Ex Parte* Letter Attach. at 1.

⁴⁷⁴ We find Utilities Technology Council’s claim that the presumption we adopt today will lead to the “wholesale abandonment of joint use agreements” which will, in turn, “undermine investment in the very infrastructure upon

127. We extend this rebuttable presumption to newly-negotiated and newly-renewed joint use agreements.⁴⁷⁵ We conclude that, by applying the presumption to new and newly-renewed agreements, we will give incumbent LECs parity with similarly-situated telecommunications attachers, and encourage infrastructure deployment by addressing incumbent LECs' bargaining power disadvantage.⁴⁷⁶ We recognize that this divergence from past practice will impact privately-negotiated agreements⁴⁷⁷ and so the presumption will only apply, as it relates to existing contracts, upon renewal of those agreements.⁴⁷⁸ We disagree with utilities that argue that we should not apply the presumption to any existing agreements because existing joint use agreements were negotiated at a time of more equal bargaining power between the parties and because incumbent LECs receive unique benefits under joint use agreements.⁴⁷⁹ To the extent incumbent LECs receive net benefits distinct from those given to other telecommunications attachers, a utility may rebut the presumption.

128. Utilities can rebut the presumption we adopt today in a complaint proceeding by

(Continued from previous page)

which all attaching entities depend to provide their services safely and reliably," speculative and unsupported by evidence. UTC July 26, 2018 Wireline *Ex Parte* Letter at 6-7.

⁴⁷⁵ See Electric Utilities Wireline NPRM Comments at 24-25 (suggesting that we apply the presumption to newly-negotiated agreements); Windstream July 25, 2018 Wireline *Ex Parte* Letter at 2 (suggesting that we apply the presumption to newly-renewed agreements). A new or newly-renewed pole attachment agreement is one entered into, renewed, or in evergreen status after the effective date of this Order, and renewal includes agreements that are automatically renewed, extended, or placed in evergreen status. Consistent with the Commission's conclusion in 2011, the pre-2011 pole attachment rate for telecommunications carriers will continue to serve as a reference point in complaint proceedings regarding agreements that materially advantage an incumbent LEC and which were entered into after the 2011 Order and before the effective date of the Order we release today. See *2011 Pole Attachment Order*, 26 FCC Rcd at 5337, para. 218. This includes circumstances where an agreement has been terminated and the parties continue to operate under an "evergreen" clause. See *Verizon Florida LLC v. Florida Power and Light Company*, Pole Attachment Complaint, Docket No. 15-73, File No. EB-15-MD-002, at 6 (filed Mar. 13, 2015) (describing how the parties had terminated a joint use agreement but continued to operate under rates established by the joint use agreement for existing attachments pursuant to the agreement's evergreen clause); cf. Electric Utilities Apr. 24, 2018 Wireline *Ex Parte* Letter at 5-6 ("[I]n almost all joint use agreements, investor-owned electric utilities have no right to demand removal of attachments upon termination.") (emphasis omitted).

⁴⁷⁶ See USTelecom July 27, 2018 Wireline *Ex Parte* Letter at 1-3 (explaining that lower rates will encourage infrastructure deployment, and that incumbent LECs lack the bargaining power to renegotiate existing joint use agreements); see also AT&T July 23, 2018 Wireline *Ex Parte* Letter at 3-5 (explaining same); Letter from Katharine R. Saunders, Managing Associate General Counsel, Federal Regulatory and Legal Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 1-4 (filed July 26, 2018) (explaining how our current scheme has "negatively impacted broadband deployment," and arguing that we adopt the presumption for existing joint use agreements).

⁴⁷⁷ See UTC Wireline NPRM Comments at 20; Midwest Electric Utilities Wireline NPRM Reply at 32; POWER Coalition Wireline NPRM Reply at 24-25; see also CCU Wireline NPRM Comments at 53; Electric Utilities Wireline NPRM Reply at 2; EEI July 26, 2018 Wireline *Ex Parte* Letter at 14-15.

⁴⁷⁸ Until that time, for existing agreements, the *2011 Pole Attachment Order*'s guidance regarding review of incumbent LEC pole attachment complaints will continue to apply. See *2011 Pole Attachment Order*, 26 FCC Rcd at 5333-38, paras. 214-19; see also USTelecom July 27, 2018 Wireline *Ex Parte* Letter Appx. A at i; Verizon July 25, 2018 Wireline *Ex Parte* Letter at 2-3. Because our intention is to encourage broadband deployment going forward, we decline to adopt USTelecom's proposal that we give incumbent LECs "the right to refunds for overpayments as far back as the statute of limitations allows." USTelecom July 25, 2018 Wireline *Ex Parte* Letter at 2-3.

⁴⁷⁹ See CCU Wireline NPRM Comments at 41-49; Electric Utilities Wireline NPRM Reply at 3-5; Midwest Electric Utilities Wireline NPRM Reply at 34; Electric Utilities Apr. 24, 2018 Wireline *Ex Parte* Letter at 7-8; see also UTC Wireline NPRM Comments at 20-21; Southern Company July 26, 2018 Wireline *Ex Parte* Letter at 6-8 (arguing that we should not apply the presumption to existing agreements, and suggesting that we limit the presumption for new agreements regarding new attachments).

demonstrating that the incumbent LEC receives net benefits that materially advantage the incumbent LEC over other telecommunications attachers.⁴⁸⁰ Such material benefits may include “[p]aying significantly lower make-ready costs; [n]o advance approval to make attachments; [n]o post-attachment inspection costs; [r]ights-of-way often obtained by electric company; [g]uaranteed space on the pole; [p]referential location on pole; [n]o relocation and rearrangement costs; and [n]umerous additional rights such as approving and denying pole access, collecting attachment rents and input on where new poles are placed.”⁴⁸¹ If the utility can demonstrate that the incumbent LEC receives significant material benefits beyond basic pole attachment or other rights given to another telecommunications attacher, then we leave it to the parties to negotiate the appropriate rate or tradeoffs to account for such additional benefits.

129. If the presumption we adopt today is rebutted, the pre-2011 *Pole Attachment Order* telecommunications carrier rate is the maximum rate that the utility and incumbent LEC may negotiate. This conclusion builds on and clarifies the Commission’s determination in the 2011 *Pole Attachment Order* that the pre-2011 telecommunications carrier rate should serve “as a reference point in complaint proceedings” where a joint use agreement was found to give net advantages to an incumbent LEC as compared to other attachers.⁴⁸² The Commission “[found] it prudent to identify a specific rate to be used as a reference point in these circumstances because it [would] enable better informed pole attachment negotiations . . . [and] reduce the number of disputes” regarding pole attachment rates.⁴⁸³ We reaffirm the conclusion that reference to this rate is appropriate where incumbent LECs receive net material advantages in a pole attachment agreement. And because we agree with commenters that “establishment of . . . an upper bound will provide further certainty within the pole attachment marketplace, and help to further limit pole attachment litigation,”⁴⁸⁴ we make this rate a hard cap.⁴⁸⁵ In so doing, we remove the potential for uncertainty caused by considering the rate merely as a “reference point.”

D. Other Pole Attachment Issues

130. Below, we respond to several pole attachment related proposals raised in the record in the *Wireline Infrastructure* proceeding. We do not at this time address all outstanding issues raised in the notices or record in this proceeding, and we will take further action as warranted in this proceeding to

⁴⁸⁰ See 2011 *Pole Attachment Order*, 26 FCC Rcd at 5336-37, para. 218; see also Verizon Wireline NPRM Comments at 12.

⁴⁸¹ 2011 *Pole Attachment Order*, 26 FCC Rcd at 5335, n.654 (quoting Comcast Reply, WC Docket No. 07-245, GN Docket No. 09-51, at 25 (Oct. 4, 2010)); see also CCU Wireline NPRM Comments at 45-49 (stating that “ILECs receive a host of advantages that third party attachers like cable companies and CLECs do not enjoy,” before enumerating many of those specific advantages); Electric Utilities Wireline NPRM Comments at 26-30 (stating the benefits to ILECs of joint use agreements and claiming that “it is highly unlikely that ILECs made their existing attachments on ‘comparable terms’ to other attachers because the ILECs made them with the immense capital cost savings and operational advantages of joint use agreements”); Midwest Electric Utilities Wireline NPRM Comments at 45-46 (asserting that “ILECs generally obtain numerous benefits under their existing joint use agreements that offset any increased rates they might pay for pole access in certain circumstances”); EEI July 26, 2018 Wireline *Ex Parte* Letter at 15 (“joint use agreements confer upon ILECs, as joint pole owners, a myriad of other benefits that save time and expense”).

⁴⁸² 2011 *Pole Attachment Order*, 26 FCC Rcd at 5337, para. 218.

⁴⁸³ *Id.* The Commission further concluded that this rate, “which historically has been used in the marketplace,” accounted for “particular arrangements that provide net advantages to incumbent LECs” because it was higher than the rate available to telecommunications attachers. *Id.*

⁴⁸⁴ USTelecom Wireline NPRM Comments at 11; see also Verizon Wireline NPRM Comments at 14 (“If the pre-existing telecom rate is . . . an upper bound, it will focus the parties’ negotiations by cabining the range of rates at issue.”).

⁴⁸⁵ See USTelecom Wireline NPRM Comments at 11; POWER Coalition Wireline NPRM Reply at 25 (submitting that if the utility overcomes the presumption, then “the old telecom rate should apply” if the incumbent LEC receives joint use benefits not enjoyed by other telecommunications carriers).

address outstanding issues.

131. *Uniform Pole Attachment Application.* We decline to adopt rules requiring utilities to use a uniform pole application form as requested by certain commenters.⁴⁸⁶ We agree with a previous Commission decision that it is best to “leave the details of specific application criteria and processes to individual utilities,”⁴⁸⁷ and we do not find a compelling case in the record to change course, so long as the criteria and processes a utility uses are reasonable. We also agree with the Coalition of Concerned Utilities that implementation and use of a standard pole application would likely prove difficult because “[e]ach utility has its own operational, design, construction, geographical and state regulatory requirements that call for different pole attachment application information.”⁴⁸⁸

132. *Automated Tracking of Pole Attachment Progress.* We decline to adopt ACA’s proposal that we require utilities to adopt a web-based pole attachment ticket management system.⁴⁸⁹ Attachers and utilities are in the best position to develop systems, and we are reluctant to interfere in the market absent greater evidence of need. Rather, the market appears to be working in this regard. As ACA points out, “the great majority of utilities use NJUNS, NOTIFY, or some other management system.”⁴⁹⁰ Similarly, Alliant Energy developed and implemented its own online portal for processing and tracking pole attachment applications.⁴⁹¹

133. *Utility Construction Standards and Requirements.* We decline the requests of certain commenters to establish limits on the construction standards and requirements that utilities adopt for their poles.⁴⁹² We agree with those utility commenters who argue that one-size-fits-all national pole construction standards (even if they were based on the NESC or similar codes) are not a good idea, and the better policy is to defer to reasonable and targeted construction standards established by states, localities, and the utilities themselves where appropriate.⁴⁹³

134. At this time, we decline to adopt Crown Castle’s request that we prohibit blanket bans by utilities on the attachment of equipment in the unusable space on a pole because we have an insufficient record on which to reach a clear determination.⁴⁹⁴ Crown Castle argues that it “has encountered a growing number of pole owners, whose territories cover many states, who have adopted blanket bans on attaching any equipment in the [unusable] space – despite the fact that this is a well-established and long-standing practice.”⁴⁹⁵ Two utility commenters argue that where utilities prohibit such attachments, they do so based on legitimate safety and engineering considerations, such as fall hazards, climbing obstructions, and the difficulty of moving equipment in the common space when poles have to be

⁴⁸⁶ See, e.g., Charter Feb. 5, 2018 Wireline *Ex Parte* Letter at 3 (“Utilize a pole attachment application that requires applicants to submit only the information reasonably necessary for the application process.”); FBA Wireline NPRM Comments at 8-9; Mobilitie Wireline & Wireless NPRM Comments at 10; ACA Wireline NPRM Reply at 14-17.

⁴⁸⁷ 2011 Pole Attachment Order, 26 FCC Rcd at 5274, para. 73.

⁴⁸⁸ CCU Wireline NPRM Reply at 14; see also Electric Utilities Wireline NPRM Reply at 28-29 (claiming that “[d]ifferences in application forms reflect differences in electric utilities’ internal construction standards, pole attachment policies, and even the specific geography and weather conditions of the utilities’ service area”).

⁴⁸⁹ See ACA Wireline NPRM Reply at 17; Charter Wireline & Wireless NPRM Comments at 56; Crown Castle Wireline NPRM Reply at 9; NCTA Wireline & Wireless NPRM Reply at 22-23; UTC Wireline NPRM Reply at 7.

⁴⁹⁰ ACA Wireline NPRM Reply at 17.

⁴⁹¹ Midwest Electric Utilities Wireline NPRM Reply at 12, 29-30.

⁴⁹² See Crown Castle Wireline NPRM Comments at 4-5; ExteNet Wireline & Wireless NPRM Comments at 55.

⁴⁹³ See CenterPoint Energy/FPL Feb. 13, 2018 Wireline *Ex Parte* Letter at 4.

⁴⁹⁴ Crown Castle Wireline NPRM Comments at 5-6.

⁴⁹⁵ *Id.* at 5.

replaced.⁴⁹⁶ No other commenter addressed this issue. We recognize that there are likely to be circumstances in which using the lower portion of poles to install equipment associated with DAS and other small wireless facilities will be safe and efficient.⁴⁹⁷ However, given the paucity of the record, we are not in a position to be certain whether we should mandate that utilities permit certain uses. We would be open to revisiting this issue in the future.⁴⁹⁸

E. Legal Authority

135. We conclude that we have ample authority under section 224 to take the actions above to adopt a new pole attachment process, amend our current pole attachment process, clarify responsibility for pre-existing violations, and address outdated rate disparities. Section 224 authorizes us to prescribe rules ensuring that the rates, terms, and conditions of pole attachments are just and reasonable.⁴⁹⁹ We find that the actions we take today to speed broadband deployment further these statutory goals.⁵⁰⁰

F. Effective Date of the Commission's Modified Pole Attachment Rules

136. Several parties have requested that the Commission provide a transition period in which to implement its revised rules governing pole attachments.⁵⁰¹ As AT&T notes, this Report and Order would modify “the Commission’s existing timelines for application review, make-ready, and self-help and adopt new timelines for pre-application surveys, OTMR, and post-OTMR and self-help inspection and repair.”⁵⁰² The record indicates that in some cases, these changes will require carriers and industry members to modify the automated electronic systems they use to track and coordinate pole attachment workflow and activities.⁵⁰³ Therefore, we find it appropriate to provide a transitional period. To avoid confusion and facilitate efficient compliance preparation, we also wish to make the transitional period uniform for all pole attachment-related rules. Thus, the pole attachment-related portions of this Report

⁴⁹⁶ CCU Wireline NPRM Reply at 28; Electric Utilities Wireline NPRM Reply at 24-25.

⁴⁹⁷ Cf. *2011 Pole Attachment Order*, 26 FCC Rcd at 5276, para. 77 (prohibiting blanket bans on wireless pole-top attachments).

⁴⁹⁸ While we do not today prohibit utilities from adopting blanket bans on the attachment of equipment in the unusable space on a pole, we take this opportunity to reaffirm our comments in the *2011 Pole Attachment Order* that: (1) a utility must explain in writing its precise concerns—and how they relate to lack of capacity, safety, reliability, or engineering purposes—in a way that is specific with regard to both the particular attachment(s) and the particular pole(s) at issue; and (2) such concerns must be reasonable in nature in order to be considered nondiscriminatory. We expect attachers and utilities to work together to find code-compliant solutions that address any concerns raised by a utility. See Crown Castle July 25, 2018 Wireline *Ex Parte* Letter at 1-3.

⁴⁹⁹ 47 U.S.C. §§ 224(b)(1), (2). As we have stated previously, “the broad language of section 224(b)(1) and (b)(2) indicate a delegation of comprehensive rulemaking authority over all attachment issues, including access.” *2011 Pole Attachment Order*, 26 FCC Rcd at 5282, para. 91. Our comprehensive authority covers the various rules we adopt today, including new requirements on attachers. We note that other provisions of the Act also confer broad authority to regulate providers of telecommunications service or cable television systems. See, e.g., 47 U.S.C. §§ 154(i), 201, 202, 536.

⁵⁰⁰ While we rely solely on section 224 for legal authority, our prioritization of broadband deployment throughout today’s *Report and Order* finds support in section 706(a) of the Telecommunications Act of 1996, which exhorts us to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans” by “remov[ing] barriers to infrastructure investment.” 47 U.S.C. § 1302(a). While section 706(a) does not provide a grant of regulatory authority, we look to it as guidance from Congress on how to implement our statutorily-assigned duties. See *Restoring Internet Freedom*, WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311, 471-480, paras. 268-83 (2018).

⁵⁰¹ See AT&T July 23, 2018 Wireline *Ex Parte* Letter at 1; EEI July 26, 2018 Wireline *Ex Parte* Letter at 3, 7; Hawaiian Electric July 25, 2018 Wireline *Ex Parte* Letter at 5.

⁵⁰² AT&T July 23, 2018 Wireline *Ex Parte* Letter at 1.

⁵⁰³ See *id.*

and Order (i.e., sections III.A-E) and the rule amendments adopted therein shall become effective on the latter of (1) six months after the release of this item or (2) 30 days after the Commission publishes a notice in the Federal Register announcing approval by the Office of Management and Budget of the rules adopted herein containing modified information collection requirements.⁵⁰⁴ We believe that this period will be sufficient, but no more than necessary, to allow affected industry members to modify their systems to account for the rule amendments adopted in this Report and Order.

G. Rebuilding and Repairing Broadband Infrastructure After Disasters

137. We will not allow state and local laws to stand in the way of post-disaster restoration of essential communications networks. In the November 2017 *Further Notice of Proposed Rulemaking* in this proceeding, we sought comment on whether there are targeted circumstances related to disasters in which the Commission should use its preemption authority.⁵⁰⁵ We find that sections 253 and 332(c)(7) of the Act⁵⁰⁶ provide authority to preempt state or local laws that prohibit or have the effect of prohibiting the rebuilding or restoration of facilities used to provide telecommunications services, and we commit to the exercise of that authority on a case-by-case basis where needed.⁵⁰⁷ Sections 253 and 332(c)(7) both provide for preemption of state and local laws that “prohibit or have the effect of prohibiting” the deployment of telecommunications services, and we conclude that these provisions provide authority to preempt state or local legal action that effectively prohibit the deployment of telecommunications services in the wake of a disaster.⁵⁰⁸ As the Commission has previously recognized, certain federal regulations may impede restoration efforts, and we are working to address those too⁵⁰⁹—where it is within our authority, we are committed to addressing all legal requirements that stand in the way of prompt restoration of communications infrastructure.

138. We prefer to exercise our authority to address the application of section 253 to preempt state and local requirements that inhibit network restoration on an expedited adjudicatory case-by-case basis, in which we can take into account the particularized circumstances of the state or local law in question and the impact of the disaster, and other relevant factors, rather than through adoption of a rule.

⁵⁰⁴ The remainder of this *Report and Order* will be effective 30 days after publication in the Federal Register, and the *Declaratory Ruling* will be effective upon release. See *infra* section VI.

⁵⁰⁵ See *Wireline Infrastructure Order*, 32 FCC Rcd at 11194, paras. 178-79.

⁵⁰⁶ 47 U.S.C. §§ 253, 332(c)(7).

⁵⁰⁷ Our finding that the Commission has such authority should not be construed to mean that the Commission’s preemption authority under Section 253 is limited only to times of natural disasters. See Illinois Electric Cooperative Wireline FNRPM Comments at 4.

⁵⁰⁸ 47 U.S.C. §§ 253(a), 332(c)(7). We find that our authority to interpret or act pursuant to sections 253 and 332 is not limited to natural disasters, and also extends to *force majeure* events generally, including man-made disasters. Cf., e.g., *Wireline Infrastructure Order*, 32 FCC Rcd at 11157-59, paras. 71-78 (adopting streamlined copper retirement notice procedures for *force majeure* events).

⁵⁰⁹ See *Wireline Infrastructure Order*, 32 FCC Rcd at 11157-59, paras. 71-78 (exempting incumbent LECs from certain requirements for copper retirements that are a direct result of damage to network infrastructure caused by a *force majeure* event); *Second Wireline Infrastructure Order* at paras. 58-59 (extending streamlined notice procedures for *force majeure* events to all types of network changes); *Telephone Number Portability; Numbering Resource Optimization*, CC Docket Nos. 95-116, 99-200, Order, 32 FCC Rcd 6723 (2017) (granting a temporary waiver of the Commission’s numbering rules for providers affected by Hurricane Harvey); *Telephone Number Portability; Numbering Resource Optimization*, CC Docket Nos. 95-116, 99-200, Order, 32 FCC Rcd 6831 (2017) (granting a temporary waiver of the Commission’s number assignment rules for providers affected by Hurricane Irma); *Telephone Number Portability; Numbering Resource Optimization*, CC Docket Nos. 95-116, 99-200, Order, 32 FCC Rcd 7005 (2017) (granting a temporary waiver of section 52.15(f)(ii) of the Commission’s rules for providers affected by Hurricanes Maria and Jose).

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139. As the City of New York suggests, state and local officials may be well positioned to respond to disasters and implement disaster response protocol and we will be cognizant not to exercise our preemption authority in a manner that could disrupt these efforts.⁵¹¹ In the wake of Hurricanes Harvey, Irma, and Maria, the Commission worked closely with state and local partners to support restoration of communications networks in affected areas,⁵¹² and going forward, we reiterate the need for ongoing coordination and cooperation between the Commission and state and local governments to rebuild damaged telecommunications infrastructure as quickly as possible.⁵¹³ As the Public Safety and Homeland Security Bureau is responsible for coordinating the Commission's disaster response and recovery activities⁵¹⁴ and is most closely in contact with state, local, and Federal public safety, disaster relief and restoration agencies in such instances, it should work with the Wireline Competition Bureau and Wireless Telecommunications Bureau to report, and provide assistance to, the Commission in its adjudication of such matters.

IV. DECLARATORY RULING

140. Section 253(a) of the Act specifies that “[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”⁵¹⁵ Notwithstanding that clear admonition, some states and localities have adopted moratoria on the deployment of telecommunications services or telecommunications facilities, including explicit refusals to authorize deployment and dilatory tactics that amount to *de facto* refusals to allow deployment. To provide regulatory certainty and further deployment, we issue this Declaratory Ruling making clear that such state and local moratoria violate section 253(a) and strike at the heart of the ban on barriers to entry that Congress enacted in that provision.

A. Background

141. As the Eighth Circuit has explained, section 253(a) of the Act provides “a rule of preemption[]” that “articulates a reasonably broad limitation on state and local governments’ authority to regulate telecommunications providers.”⁵¹⁶ Section 253(b) provides an exception for state requirements that are competitively neutral, consistent with section 254 of the Act, and “necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of

⁵¹⁰ See Verizon Wireline FNPRM Comments at 20-22.

⁵¹¹ See City of New York Wireline FNPRM Comments at 3.

⁵¹² See Statement of Chairman Ajit Pai, *FCC Response to Hurricanes Harvey, Irma, and Maria* (Sept. 26, 2017), <https://www.fcc.gov/document/presentation-fcc-response-hurricanes-harvey-irma-and-maria>. As of December 7, 2017, in response to all three hurricanes, the FCC issued over 30 public notices and orders, permitting the flexible use of spectrum or other non-standard actions to support incident response; granted over 200 requests for Special Temporary Authorizations; granted temporary waivers of Lifeline requirements; and waived number portability rules to facilitate restoration of telephone services. See *Public Safety and Homeland Security Bureau Seeks Comment on Response Efforts Undertaken During 2017 Hurricane Season*, PS Docket No. 17-344, Public Notice, DA 17-1180, at 2-3 (PSHSB Dec. 7, 2017); see also *Uniendo a Puerto Rico Fund and the Connect USVI Fund* at paras. 13-27 (establishing the Uniendo a Puerto Rico Fund and the Connect USVI Fund to rebuild, improve and expand voice and broadband networks in Puerto Rico and the U.S. Virgin Islands).

⁵¹³ See CWA Wireline FNPRM Comments at 7; Uniti Fiber Wireline FNPRM Comments at 5.

⁵¹⁴ See 47 CFR § 0.191.

⁵¹⁵ 47 U.S.C. § 253(a).

⁵¹⁶ *Level 3 Commc'ns, LLC v. City of St. Louis, Mo.*, 477 F.3d 528, 531–32 (8th Cir. 2007) (*Level 3*).

telecommunications services, and safeguard the rights of consumers.”⁵¹⁷ Section 253(c) provides another set of exceptions to the limits on state and local authority by specifying that nothing in section 253 “affects the authority of a State or local government to manage their public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for the use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.”⁵¹⁸ Section 253(d) requires the Commission, after notice and comment, to preempt the enforcement of specific state or local requirements that are contrary to section 253(a) or (b) “to the extent necessary to correct such violation or inconsistency.”⁵¹⁹ Pursuant to section 253(d), the Commission has preempted both state and local actions that prohibit or have the effect of prohibiting the ability of any entity to provide telecommunications services, such as a locality’s denial of franchise applications from a new competitor,⁵²⁰ provisions in state codes that protect rural incumbents,⁵²¹ and a state grant of an exclusive license to provide telecommunications services.⁵²²

142. Section 253 applies to wireless and wireline telecommunications services.⁵²³ In the *Wireline Infrastructure Notice of Inquiry*, the Commission asked whether “moratoria on market entry or the deployment of telecommunications facilities[]” are inconsistent with section 253(a).⁵²⁴ The Commission also sought comment on whether to provide an exception if moratoria were imposed with

⁵¹⁷ 47 U.S.C. § 253(b); see also *Western Wireless Corp. Petition for Preemption of Statutes and Rules Regarding the Kansas State Universal Service Fund Pursuant to Section 253 of the Communications Act of 1934*, File No. CWD 98-90, Memorandum Opinion and Order, 15 FCC Rcd 16227, 16231–32, para. 9 (2000).

⁵¹⁸ 47 U.S.C. § 253(c).

⁵¹⁹ 47 U.S.C. § 253(d). In the discussion below, we discuss the relation between subsections (d) and (a) and find that the former does not preclude us from issuing this *Declaratory Ruling* under subsection (a). See *infra* section IV.B.3.

⁵²⁰ See *Classic Telephone, Inc.; Petition for Preemption, Declaratory Ruling and Injunctive Relief*, CCBPol 96-10, Memorandum Opinion and Order, 11 FCC Rcd 13082, 13101, para. 36 (1996) (*Classic Telephone*).

⁵²¹ See *Public Utility Commission of Texas et al., Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, CCBPol 96-14 et al., Memorandum Opinion and Order, 13 FCC Rcd 3460, 3466, para. 13 (1997) (*Public Utility Comm’n of Texas*); *Silver Star Telephone Company, Inc. Petition for Preemption and Declaratory Ruling*, CCB Pol 97-1, Memorandum Opinion and Order, 12 FCC Rcd 15639, 15658, para. 42 (1997), *aff’d sub nom. RT Commc’ns, Inc. v. FCC*, 201 F.3d 1264 (10th Cir. 2000) (*RT Commc’ns*).

⁵²² See *Connect America Fund (Sandwich Isles Communications, Inc.) Petition for Waiver of the Definition of “Study Area” Contained in Part 36, Appendix-Glossary and Sections 36.611 and 69.2(hh) of the Commission’s Rules*, WC Docket No. 10-90, CC Docket No. 96-45, Memorandum Opinion and Order, 32 FCC Rcd 5878, 5888, para. 26 (2017).

⁵²³ Section 253(a) on its face applies to “any interstate or intrastate telecommunications service[,]” and the Supreme Court has held that wireless telecommunications services are included in that term. 47 U.S.C. § 253(a); *Nat’l Cable & Telecomm. Ass’n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 340 (2002) (“[a] provider of wireless telecommunications service is a ‘provider of telecommunications service’”). The Commission has previously recognized that section 253 applies to Commercial Mobile Radio Services (CMRS). See *Federal-State Joint Board on Universal Service; Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge*, CC Docket Nos. 96-45 et al., Fourth Order on Reconsideration and Report and Order, 13 FCC Rcd 5318, 5486, para. 302 (1997) (“To demonstrate that state universal service contribution requirements for CMRS providers violate section 253, there must be a showing that the state universal service programs act as a barrier to entry for CMRS providers and are not competitively neutral.”). We therefore disagree with Smart Communities that section 253 does not apply to wireless facilities. See Smart Communities Wireless NPRM Comments at 56-57.

⁵²⁴ *Wireline Infrastructure Notice*, 32 FCC Rcd at 3297, para. 102.

“sharply restricted time limits[.]” or under “exigent circumstances[.]”⁵²⁵ In the *Wireless Infrastructure NPRM*, the Commission sought comment on promulgating a preemption rule to address state or local zoning authorities’ unreasonable delays in acting on applications.⁵²⁶ That item also initiated a Notice of Inquiry, which sought comment, among other things, on whether state or local governments have imposed restrictions on deployment comparable to moratoria.⁵²⁷

143. In response to the *Wireline Infrastructure Notice of Inquiry* and the *Wireless Infrastructure NPRM*, we received numerous comments about states and localities imposing moratoria on the deployment of telecommunications infrastructure. The record includes comments from a broad array of large and small wireline and wireless providers operating throughout the country. For example, AT&T describes an Ohio municipality that “enacted a 145-day moratorium on permits for construction in rights-of-way” and an Illinois city that “imposed a five-year moratorium on pavement cuts to roadways that have been resurfaced or reconstructed.”⁵²⁸ Uniti Fiber identifies 44 jurisdictions in Florida that have implemented wireless moratoria.⁵²⁹ Frontier offers examples of several states that have issued moratoria, including Indiana, which “issued a complete moratorium” on broadband deployment in March 2017; Illinois, where localities “often refuse to issue work permits unless a carrier pays”; Michigan, which “has frost and freeze laws that prevent construction of facilities for extended periods of time during the winter”; and Washington, which “issued a moratorium banning Frontier from building new infrastructure” between August 2016 and January 2017.⁵³⁰ The record demonstrates that moratoria are numerous, geographically diverse, and occur at both the state and local level, showing that this issue affects the deployment of telecommunications services in many cases across the nation.

B. Discussion

144. The records in both the wireline and wireless infrastructure proceedings reflect the existence of two types of moratoria, express and *de facto*. We find that both types of moratoria violate section 253(a) and generally do not fall within the section 253(b) and (c) exceptions.

1. Moratoria Violate Section 253(a)

145. *Express Moratoria.* For purposes of this Declaratory Ruling, we define express moratoria as state or local statutes, regulations, or other written legal requirements that expressly, by their very terms, prevent or suspend the acceptance, processing, or approval of applications or permits necessary for deploying telecommunications services and/or facilities.⁵³¹ Commenters identify numerous

⁵²⁵ *Id.*

⁵²⁶ *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, Second Report and Order, 32 FCC Rcd 3330, 3336-37, paras. 15-16 & n.30 (*Wireless NPRM*).

⁵²⁷ *Id.* at 3364-65, paras. 95-96.

⁵²⁸ AT&T Wireline NPRM Comments at 74.

⁵²⁹ See Letter from Ronald W. Del Sesto, Jr., Counsel for Uniti Fiber, to Marleen H. Dortch, Secretary, FCC, WC Docket No. 17-84, WT Docket No. 17-79, at Exh. A (filed Oct. 30, 2017) (Uniti Fiber Oct. 30, 2017 Wireless NPRM *Ex Parte* Letter); see also Conterra Broadband Services et al. (Conterra) Wireline NPRM Comments at 28 (describing one instance where a municipality placed a moratorium on competitive deployments, and others where state highway officials “refused to issue permits for deploying fiber on bridges, even where spare conduit is available”); T-Mobile Wireline & Wireless NPRM Comments at 37 (describing a *de facto* moratorium outside Indianapolis); Wireless Infrastructure Association (WIA) Wireline & Wireless NPRM Comments at 11-12 (describing *de facto* moratoria in jurisdictions in Massachusetts and Illinois).

⁵³⁰ Frontier Wireline NPRM Comments at 32-33; see also Mobilite Wireline & Wireless NPRM Comments at Attach. 2, 11-12 (describing *de facto* moratoria in jurisdictions in Arizona, California, Michigan, Minnesota, New York, Ohio, and Oregon); Sprint Wireline & Wireless NPRM Comments at 41-42 (describing instances of *de facto* moratoria in the south and with a state DOT).

⁵³¹ We specifically include facilities where such facilities are necessary for the provision of covered services within the scope of section 253. See *Public Utility Comm’n of Texas*, 13 FCC Rcd at 3496, para. 74 (finding that “section

instances of express moratoria that harm the public by prohibiting or having the effect of prohibiting the provision and deployment of telecommunications services and/or facilities. For example, despite the Commission's direction in 2009 and 2014 that states and localities must complete their review of wireless siting applications for collocation deployments within 90 days and for deployments other than collocation within 150 days,⁵³² the record in response to the *Wireless Infrastructure NPRM* shows that express moratoria on wireless deployments are all too common. Uniti Fiber, for example, identifies dozens of local jurisdictions that have implemented moratoria on wireless deployment.⁵³³ Commenters also provide specific examples of moratoria related to the processing of siting applications involving deployment of small cells.⁵³⁴ For instance, Crown Castle describes an Amherst, New York resolution prohibiting town staff from accepting or processing any applications or issuing any permits "relating to the placement or installation of telecommunication towers, facilities and antennae within the Town's public rights-of-way until the moratorium is rescinded and/or a Local Law addressing this matter is adopted."⁵³⁵ Similarly, Uniti Fiber identifies a Jacksonville, Florida ordinance which was passed on an 'emergency' basis,⁵³⁶ and which imposed a "temporary moratorium on the acceptance, processing or approval of rights-of-way permit applications for personal wireless communication systems in the City's rights-of-way."⁵³⁷

146. Likewise, in response to the *Wireline Infrastructure Notice of Inquiry*, several commenters provide examples of state and local moratoria that have prohibited or had the effect of prohibiting the deployment of telecommunications services.⁵³⁸ For example, Crown Castle highlights

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253(a) bars state or local requirements that restrict the means or facilities through which a party is permitted to provide service"); *Petition of the State of Minnesota for a Declaratory Ruling Regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way*, CC Docket No. 98-1, Memorandum Opinion and Order, 14 FCC Rcd 21697, 21705, para. 14 (1999) (*Minnesota Preemption Order*) (concluding that Section 253(a) preempts a state's agreement with an infrastructure developer—even though the developer deployed facilities rather than provided telecommunications services—because the operative inquiry is whether the state's action has an effect on the provision of telecommunications services); *cf. Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901, 5922-23, paras. 60-62 (2007) (concluding that where the same infrastructure would provide "both telecommunications and wireless broadband Internet access service," the provisions of section 224 governing pole attachments would continue to apply to such infrastructure used to provide both types of service).

⁵³² See *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, WT Docket No. 08-165, Declaratory Ruling, 24 FCC Rcd 13994, 14016-19, paras. 56-65 (2009) (2009 *Wireless Siting Declaratory Ruling*), *aff'd sub nom. City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 569 U.S. 290 (2013); *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, WT Docket Nos. 13-238, 13-32, WC Docket No. 11-59, Report and Order, 29 FCC Rcd 12865, 12971, para. 265 (2014) (*Wireless Facilities Siting Order*).

⁵³³ See Uniti Fiber Oct. 30, 2017 Wireless NPRM *Ex Parte* Letter at Exh. A (providing a list of 44 jurisdictions in Florida that have implemented wireless moratoria).

⁵³⁴ See, e.g., Crown Castle Wireless NPRM Comments at 14-19; CTIA Wireline & Wireless NPRM Comments, Attach. 1 at 12; Verizon Wireline & Wireless NPRM Comments at 6; AT&T Wireless NPRM Comments at 14.

⁵³⁵ Crown Castle Wireless NPRM Comments at 32 (quoting Town of Amherst, New York, Resolution 2017-674, adopted June 5, 2017).

⁵³⁶ Uniti Fiber Oct. 30, 2017 Wireless NPRM *Ex Parte* Letter at Exh. B.

⁵³⁷ *Id.*

⁵³⁸ See e.g., Frontier Wireline NPRM Comments at 32-33; Conterra Wireline & Wireless NPRM Comments at 28; AT&T Wireline NPRM Comments at 74; Letter from T. Scott Thompson, Counsel to Crown Castle, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 3-4 (filed Aug. 29, 2017) (Crown Castle Aug. 29, 2017 Wireline *Ex Parte* Letter); Letter from T. Scott Thompson, Counsel to Crown Castle, to Marlene H. Dortch, Secretary, FCC,

persistent problems of moratoria imposed by local governments on the processing and acceptance of applications for new sites.⁵³⁹ As another example, AT&T states that a community in Ohio enacted a 145-day moratorium on permits for construction in rights-of-ways.⁵⁴⁰

147. Express moratoria are facially inconsistent with section 253(a). By their terms, express moratoria prohibit the provision of telecommunications services by halting the acceptance, processing, or approval of applications or permits for such services or the facilities used to provide such services.⁵⁴¹ Express moratoria also “have the effect of prohibiting” the provision of telecommunications service. As the record demonstrates, express moratoria limit the provision of service, harm competition, and impose significant costs that impede the deployment of telecommunications infrastructure and thereby exacerbate the digital divide.⁵⁴² And the impact of moratoria extend beyond the telecommunications services market. As the Wireless Internet Service Providers Association states, “a blanket moratorium that freezes all applications across the board will by definition impede the deployment of broadband services and effectively serve as a complete ban on market entry by small broadband providers that cannot afford to endure excessive delays.”⁵⁴³

148. We reject the argument that all “temporary” moratoria are permissible simply because they are of a limited, defined duration.⁵⁴⁴ As an initial matter, the record indicates that some states and localities impose so-called “temporary” moratoria without setting an end date, or continually extend temporary moratoria to create *de facto* indefinite moratoria on deployment.⁵⁴⁵ We agree with commenters

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WC Docket No. 17-84, GN Docket No. 17-83, at 4 (filed Nov. 13, 2017) (Crown Castle Nov. 13, 2017 Wireline *Ex Parte* Letter).

⁵³⁹ See Crown Castle Aug. 29, 2017 Wireline *Ex Parte* Letter at 3-4; Crown Castle Nov. 13, 2017 Wireline *Ex Parte* Letter at 4.

⁵⁴⁰ See AT&T Wireline NPRM Comments at 74.

⁵⁴¹ See Letter from Scott K. Bergmann, SVP Regulatory Aff., CTIA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84 and WTB Docket Nos. 17-79 and 16-421, at 3 (filed July 19, 2018) (stating that “there is no more absolute prohibition on deployment than refusing to accept or act on applications” and that “[a] local law that bars acceptance of applications and a local agency’s refusal to act on them have precisely the same impact—no deployment is permitted—and they are thus per se unlawful”); see also CTIA June 27, 2018 Wireline *Ex Parte* Letter at 4.

⁵⁴² See Conterra Wireline NPRM Comments at 29; Frontier Wireline NPRM Comments at 32; CTIA Wireline & Wireless NPRM Comments, Attach. 1 at 25; Mobile Future Wireless NPRM Comments at 9; Mobilitie Wireline & Wireless NPRM Comments at 7; R Street Institute Wireline NPRM Comments at 13-14; Samsung Wireless NPRM Comments at 7-8; see also Conterra Wireline & Wireless NPRM Comments at 29 (describing situations where deployment on bridges and highways was prohibited, creating situations where the only alternative was to “bore under a significant body of water” at a cost-prohibitive price of \$500,000). Cf. Conterra Wireline & Wireless NPRM Comments at 28 (“In one municipality, applicants were informed there was a moratorium on competitive deployments, allowing incumbent phone companies and cable operators to operate without fear of competitive deployment on the horizon.”); see also *California Payphone*, 12 FCC Rcd at 14206, para. 31 (state or local action effectively prohibits provision of service when it “materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment”).

⁵⁴³ Wireless Internet Service Providers Ass’n (WISPA) Wireline NPRM Comments at 5.

⁵⁴⁴ See City of Norfolk Wireline NPRM Comments at 16; Minnesota Cities Coalition (MCC) Wireline NPRM Comments at 18-19; Washington State City Coalition (WSCC) Wireline NPRM Comments at 17-18; Illinois Municipal League (IML) Wireless NPRM Comments at 2; League of Minnesota Cities (LMC) Wireline NPRM Comments at 10-11; City of New York Wireline NPRM Comments at 4; League of Arizona Cities and Towns et al. (LACT) Wireless NPRM Comments at 12.

⁵⁴⁵ See, e.g., AT&T Wireless NPRM Comments at 14 (“A Florida city imposed a ‘six-month’ moratorium on [right-of-way] wireless siting that was extended multiple times over two years.”); Sprint Wireless NPRM Comments at 41-42 (“One Southern city . . . imposed a moratorium on new builds in the downtown area until it revises its standards for fees, designs, and deployment in underserved areas. This moratorium has continued for 18 months.”);

that even moratoria that are actually time limited “force providers either to delay or cancel their planned deployments.”⁵⁴⁶ Moreover, assertions that “temporary” moratoria are necessary for planning purposes or government study⁵⁴⁷ provide insufficient justification for imposing such moratoria in light of clear congressional intent to severely limit state and local authorities’ ability to take actions that prohibit or have the effect of prohibiting the ability of any entity to provide telecommunications services.⁵⁴⁸ We recognize, and discuss further below, that there may be limited instances where temporary moratorium could fall within the exception of 253(b)⁵⁴⁹ and that 253(c) provides an exception for certain conduct that involves legitimate “rights-of-way” management.⁵⁵⁰ But Congress did not countenance generalized government study and planning that stands in the way of additional competition and service upgrades, and we decline to create additional exceptions beyond those expressed by Congress.

149. *De Facto Moratoria.* We find that section 253(a) also prohibits *de facto* moratoria, which we define for the purpose of this Declaratory Ruling as state or local actions that are not express moratoria, but that effectively halt or suspend the acceptance, processing, or approval of applications or permits for telecommunications services or facilities in a manner akin to an express moratorium.⁵⁵¹ *De facto* moratoria are not formally codified by state or local governments as outright prohibitions but have the same effect as express moratoria since they, by their operation, prohibit or have the effect of prohibiting deployment of telecommunications services and/or telecommunications facilities. Examples of *de facto* moratoria in the record include, but are not limited to, blanket refusals to process applications,⁵⁵² refusals to issue permits for a category of structures,⁵⁵³ frequent and lengthy delays of

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CTIA June 27, 2018 Wireline *Ex Parte* Letter at 5 (stating that “localities can and do extend such ‘temporary’ moratoria”).

⁵⁴⁶ See AT&T Wireline NPRM Comments at 74; see also AT&T Wireless NPRM Comments at 13-14 (explaining how AT&T had to cancel deployment plans after being faced with a supposedly temporary six-month moratorium that was repeatedly extended by a Florida city); CTIA June 27, 2018 Wireline *Ex Parte* Letter at 5 (arguing that section 253 does not exempt temporary bans “because they have the same impact [as permanent moratoria]—no deployment can occur”).

⁵⁴⁷ See City of Norfolk Wireline NPRM Comments at 16; MCC Wireline NPRM Comments at 18–19; WSCC Wireline NPRM Comments at 17; IML Wireless NPRM Comments at 2.

⁵⁴⁸ We observe that if describing a law or regulation as “temporary” was sufficient to insulate that law against section 253(a), every express moratorium would be adopted as “temporary” in order to evade the statute.

⁵⁴⁹ See *infra* at Section IV.B.2.

⁵⁵⁰ 47 U.S.C. § 253(c). We find below that express and *de facto* moratoria do not fall within the section 253(c) exception. See *infra* at Section IV.B.2.

⁵⁵¹ For purposes of this Declaratory Ruling we exclude fees—even highly excessive fees—from the definition of *de facto* moratoria. In doing so, we do not consider what fees may be consistent with section 253(a). Rather, we choose to proceed incrementally and limit our discussion to moratoria as defined herein.

⁵⁵² See WIA Wireless NPRM Comments at 11 (noting multiple jurisdictions in Massachusetts and Illinois that “have not specifically passed ordinances putting moratoria in place, but have informally suspended applications or indicated that all applications will be denied while small wireless facility-targeted policies, procedures, and proposed ordinances are considered”); Mobilite Wireless NPRM Comments at Attach. 2, 11–12 (citing local practices, including refusals to process site permit applications or negotiate master rights-of-way agreements, which, while not explicit moratoria, still have the same practical effect).

⁵⁵³ See Conterra Wireline & Wireless NPRM Comment at 28 (citing instances where “state highway officials have refused to issue permits for deploying fiber on bridges, even where spare conduit is available”); Sprint Wireless NPRM Comments at 41 (stating that “[s]ome municipalities have dragged their feet for such a long time in establishing a process [to act on permitting applications for small cell deployment] that their actions have imposed a *de facto* moratorium on the use of the rights of way”); WIA Wireless NPRM Comments at 11 (stating that while some jurisdictions “have not specifically passed ordinances putting moratoria in place,” they have refused to process requests to deploy small cell facilities or issue permits for small cells); CTIA Wireline & Wireless NPRM

months or even years in issuing permits and processing applications,⁵⁵⁴ and claims that applications cannot be granted until pending local, state, or federal legislation is adopted.⁵⁵⁵

150. We distinguish *de facto* moratoria, which inherently violate section 253(a), from state and local actions that simply entail some delay in deployment.⁵⁵⁶ Situations cross the line into *de facto* moratoria where the delay continues for an unreasonably long or indefinite amount of time such that providers are discouraged from filing applications, or the action or inaction has the effect of preventing carriers from deploying certain types of facilities or technologies. For example, T-Mobile describes one jurisdiction outside Indianapolis, in which small cell right-of-way applications “have been pending for nearly three years, but the jurisdiction will neither approve nor deny the applications.”⁵⁵⁷ WIA states that its members have encountered refusals to process small cell applications in Myrtle Beach, South Carolina, and DeKalb County, Georgia.⁵⁵⁸ CTIA describes situations where localities refuse to process applications to locate or modify wireless facilities until and unless the locality adopts regulations governing small cell deployment.⁵⁵⁹ Other localities allegedly place onerous conditions on accepting or reviewing applications

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Comments, Attach. 1 at 12 (describing several localities that have imposed *de facto* moratoria by declining to process applications to locate new wireless facilities or modify existing facilities).

⁵⁵⁴ See Conterra Wireline & Wireless NPRM Comments at 28 (claiming that “municipally-owned utilities frequently delay issuance of pole attachment applications”); Lighttower Wireline NPRM Comments at 18 (claiming that it has been “involved in a number of scenarios in which, in spite of no pronouncement by local government that a moratorium has been imposed, the governmental entity is simply not moving forward in such a way as to process applications” related to deployment”); T-Mobile Wireline & Wireless NPRM Comments at 37 (complaining of *de facto* moratoria where localities simply fail to act on applications, and citing the example of one jurisdiction outside Indianapolis where small cell rights-of-way applications have been pending for nearly three years without being either approved or denied). Cf. *Sprint Telephony*, 543 F.3d at 580 (municipal ordinance that “impose[s] an excessively long waiting period [could] amount to an effective prohibition”).

⁵⁵⁵ See Conterra Wireline & Wireless NPRM Comments at 29 (citing some instances where local governments cite to pending state or federal legislation as grounds to halt or delay the filing or processing of right-of-way permits or franchise applications); CTIA Wireline & Wireless NPRM Comments at 24 (citing the example of localities that “refuse to process applications, or that tell applicants to wait until the locality develops siting policies, without making any commitment” as to whether or when they will do so).

⁵⁵⁶ This Declaratory Ruling is limited to express and *de facto* moratoria. We do not reach the limits of what actions violate section 253(a) or other provisions of the Act. See Crown Castle July 25, 2018 Wireline *Ex Parte* Letter at 5-6. We view express and *de facto* moratoria as some of the most extreme examples of state or local statutes, regulations, or legal requirements that violate 253(a). We note that Congress used the broad language of 253(a) to invalidate all state or local requirements that “may prohibit or have the effect of prohibiting” service regardless of what the requirements are called, and not all such invalidated requirements will rise to the level of an express or *de facto* moratorium.

⁵⁵⁷ T-Mobile Wireline & Wireless NPRM Comments at 37; see also Verizon Wireline & Wireless NPRM Comments at 6 (describing “jurisdictions, like a Midwestern suburb, where Verizon has been trying unsuccessfully to get approval for small cells since 2014, [that] have no established procedures for small cell approvals and are extremely slow to respond”); Mobilite Wireline & Wireless NPRM Comments, Attach. 2 at 11-12 (describing jurisdictions in Arizona, Minnesota, and New York which are not processing or accepting applications).

⁵⁵⁸ See WIA Wireline & Wireless NPRM Comments at 11. While Myrtle Beach disputes these allegations, we do not decide their validity here. See Letter from Gerard Lavery Lederer, Best Best & Krieger LLP, Counsel to the City of Myrtle Beach, South Carolina, to Marlene H. Dortch, Secretary, FCC, WT Docket Nos. 17-79, 16-421, WC Docket No. 17-84, ET Docket No. 13-84, GN Docket No. 17-83, 1-2 (filed Aug. 1, 2018) (asserting that telecommunications deployment can continue in Myrtle Beach City through the use of excess conduit in major thoroughfares even during periods where access to major thoroughfares is limited by the South Carolina Department of Transportation for traffic management and during hurricane season).

⁵⁵⁹ CTIA Wireline & Wireless NPRM Comments, Attach. 1 at 12; see also WIA Wireline & Wireless NPRM Comments at 11 (stating that jurisdictions in Massachusetts and Illinois “have not specifically passed ordinances putting moratoria in

that would constitute *de facto* moratoria. For instance, Lighttower describes situations where jurisdictions use *de facto* moratoria as punitive measures, stating that where Lighttower “has contested the conditions or costs[] [of deploying telecommunications infrastructure], jurisdictions have often refused to continue processing or grant pending deployment applications.”⁵⁶⁰ Although we do not reach specific determinations on the numerous examples discussed by parties in our record, we find that these types of conduct are prohibited by section 253(a).

151. Like express moratoria, *de facto* moratoria prohibit or have the effect of prohibiting the provision of service, and are thus prohibited by section 253(a). As the examples above show, the presence of a formal, express moratorium is not necessary for a state or locality to take action that violates 253(a). A *de facto* moratorium can prohibit or effectively prohibit an entity from providing telecommunications service if the provider cannot obtain approval or authorization to deploy from the state or local government due to inaction or refusal, even if there is no statute, regulation, or other express legal requirement restricting the acceptance, processing, or grant of applications or authorizations.⁵⁶¹ This is true even though some *de facto* moratoria may leave the hypothetical possibility of a locality taking action on an application; if applicants cannot reasonably foresee when approval will be granted because of indefinite or unreasonable delay, then an impermissible *de facto* moratorium is in place.⁵⁶²

152. There may be situations in which states or localities impose limitations on deployment, but allow for alternative means of deployment in a manner that is reasonably comparable in cost and ease. Providers sometimes inaccurately characterize these limitations as moratoria, but we find that characterization to be inapt where the limitations do not foreclose deployments and carriers’ ability to build the facilities they need to provide service. For example, some “street-cut” requirements, which providers sometimes refer to as moratoria, are not designed to thwart construction, but to promote “dig once” policies “in order to preserve the roadway and incentivize interested providers to deploy telecommunications conduit,” and would not qualify as unlawful moratoria if the state or locality imposing such street-cut requirements does not bar alternative means of deployment such as aerial lines or sublicensing existing underground conduits.⁵⁶³

2. Moratoria Are Generally Not Protected Under the Section 253(b) and (c) Exceptions

153. With rare exception, neither express nor *de facto* moratoria are protected by the exceptions found in either section 253(b) or section 253(c).⁵⁶⁴

154. Section 253(b) allows certain “State” requirements, even if such requirements otherwise violate section 253(a), that are (i) “competitively neutral”; (ii) “consistent with section 254” of the Act;

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place, but have informally suspended applications or indicated that all applications will be denied while small wireless facility-targeted policies, procedures, and proposed ordinances are considered”).

⁵⁶⁰ Lighttower Wireline NPRM Comments at 21.

⁵⁶¹ See, e.g., T-Mobile Wireline & Wireless NPRM Comments at 37; CTIA Wireline & Wireless NPRM Comments at 24, Attach. 1 at 12; Mobilitie Wireline & Wireless NPRM Comments, Attach. 2 at 11; Verizon Wireline & Wireless NPRM Comments at 6; WIA Wireline & Wireless NPRM Comments at 11.

⁵⁶² Section 253(a) does not require that a bar to entry be “insurmountable before the FCC must preempt it.” *RT Commc’ns*, 201 F.3d at 1268.

⁵⁶³ See LACT Wireline NPRM Comments at 13-14; but see Tekify Fiber Wireline NPRM Comments at 2 (arguing against moratoria that require a utility to grind and re-pave entire street lengths). To promote deployment, we encourage state and local governments that enact a street-cut requirement that allows for alternative means of deployment to still provide advance notice to enable providers to deploy in the right-of-way in the least disruptive manner possible. See Liberty Cablevision of Puerto Rico Wireline NPRM Comments at 17 (arguing for six months’ notice in advance of a right-of-way related moratorium for repaving or other work).

⁵⁶⁴ See 47 U.S.C. § 253(b), (c).

and (iii) “necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.”⁵⁶⁵ As an initial matter, we find that no local or municipal moratoria can fall within the section 253(b) exception absent a specific delegation of regulatory authority by a state to the locality or municipality in question.⁵⁶⁶ Given that section 253(c) discusses the authority of “a State or local government,” but section 253(b) only discusses the authority of “a State,” we find Congress’s omission of the phrase “local government” from the latter to be persuasive evidence that the section 253(b) exception does not generally apply to the conduct of local governments.⁵⁶⁷ Indeed, some courts have held that the plain text of section 253(b) requires a finding that the provision protects only certain state activities “and does not speak to local regulation.”⁵⁶⁸ However, consistent with past Commission precedent, we need not go so far and make clear that section 253(b) does not apply to local or municipal legal requirements absent a specific delegation of authority from the state.⁵⁶⁹

155. Further, we find that most moratoria are not competitively neutral—they almost certainly will favor incumbents over new entrants and existing modalities over new technologies. We also find they are unlikely to fall within the ambit of any of the four public interest exceptions contained in section 253(b).⁵⁷⁰ Neither the Commission nor a court has upheld a state requirement that violated section 253(a) on the grounds that it was necessary to “preserve and advance universal service.”⁵⁷¹ Moreover, as a

⁵⁶⁵ 47 U.S.C. § 253(b).

⁵⁶⁶ See *Classic Telephone*, 11 FCC Rcd at 13100-101, para. 34.

⁵⁶⁷ See 47 U.S.C. § 253(b), (c).

⁵⁶⁸ *TCG N.Y., Inc. v. City of White Plains, N.Y.*, 125 F. Supp. 2d 81, 87 (S.D.N.Y. 2000), *aff’d in part, rev’d in part on other grounds* TCG N.Y., 305 F.3d 67; see also *Southwestern Bell Wireless Inc. v. Johnson Cty. Bd. of Cty. Comm’rs*, 199 F.3d 1185, 1192 (10th Cir. 1999) (“[S]ection 253(b) applies only to state, not local, regulation, since, in the remainder of section 253, Congress clearly says ‘State or local’ when it so intends.”); *City of Dallas v. Metropolitan Fiber Systems of Dallas, Inc.*, [98 civ. 2128, 2000 WL 198104, at *4 \(N.D.Tex. Feb.17, 2000\)](#) (holding that section 253(b) was not applicable to municipalities).

⁵⁶⁹ See *Classic Telephone*, 11 FCC Rcd at 13100-101, para. 34; see also *N.J. Payphone Ass’n, Inc. v. Town of W. N.Y.*, 130 F. Supp. 2d 631, 639 (D.N.J. 2001), *aff’d* N.J. Payphone Ass’n, 299 F.3d 235 (3rd Cir. 2001); *Bd. of Cty. Comm’rs of Grant Cty., N.M.*, 169 F. Supp. 2d 1243, 1247 (D.N.M. 2001) (“Local governments may only manage the rights of way, unless specifically delegated authority to impose requirements under § 253(b).”); *AT&T Comm. of the Southwest, Inc. v. City of Dallas*, 8 F. Supp.2d 582, 591 (N.D.Tex.1998), dismissed as moot on other grounds, 243 F.3d 928 (5th Cir. 2001) (“The language of [§ 253](#) is straightforward. Absent explicit delegation by the state legislature, cities do not have the more general authority to regulate to protect public safety and welfare, advance universal service and ensure quality—this is a function reserved to states by § 253(b), not to local governments.”); *Cox Comm. PCS, LP v. City of San Marcos*, 204 F. Supp. 2d 1260, 1264 (S.D. Cal. 2002) (section 253(b) only applies to states, and not municipalities, unless a state specifically delegates authority to its local governments); *BellSouth Telecomm., Inc. v. City of Coral Springs*, 42 F. Supp.2d 1304, 1307 (S.D. Fla.1999), *aff’d in part, rev’d in part on other grounds*, 252 F.3d 1169 (11th Cir. 2001) (“While states may regulate universal service, protect consumers, ensure quality and protect the public safety and welfare, local governments can only manage the public rights-of-way, unless of course a state specifically delegated the state authority to its local governments.”); *BellSouth Telecomm., Inc. v. Town of Palm Beach*, 127 F. Supp. 2d 1348, 1356 (S.D. Fla. 1999) (quoting *BellSouth Telecomm. Inc v. City of Coral Springs*, 42 F. Supp. 2d 1304 (S.D. Fla. 1999)), *aff’d in part, rev’d in part on other grounds*, 252 F.3d 1169 (11th Cir. 2001). To the extent that previous Commission decisions discussed section 253(b) as applying to either state or local requirements, we find that such decisions should be understood to be referring to only those local legal requirements that were enacted pursuant to specific delegated authority from a state. See, e.g., *Public Utility Commission of Texas*, 13 FCC Rcd at 3480, 3501, paras. 41, 83; *Silver Star Telephone*, 12 FCC Rcd at 15647, 15658, paras. 17, 42 (1997), *aff’d sub nom. RT Communications, Inc.*, 201 F.3d 1264; *Sandwich Isles Communications, Inc.*, 32 FCC Rcd at 5885, para. 19 (2017).

⁵⁷⁰ See 47 U.S.C. § 253(b).

⁵⁷¹ 47 U.S.C. § 253(b). While the Commission has never upheld a state requirement on such a basis, it has preempted state requirements on the grounds that they are not necessary to preserve and advance universal service.

practical matter, moratoria run counter to the goal of preserving and advancing universal service as moratoria prevent or materially limit deployments that could assist in achieving universal service. Neither the Commission nor a court has ever evaluated whether a state requirement that violated section 253(a) was permissible on the grounds that it was nevertheless necessary to “ensure the continued quality of telecommunications services,”⁵⁷² and it is difficult to envision how a ban on deployment could conceivably improve the quality of such services. If anything, a moratorium is likely to decrease the quality of telecommunications services by barring competitive entry into the market, reducing the quality and quantity of services available to consumers, and inhibiting providers’ ability to deploy the facilities needed to broaden the geographic areas they can serve, fill coverage gaps, expand capacity, and/or upgrade the technology used in their networks.⁵⁷³

156. With limited exception, moratoria are also unlikely to be necessary to “protect the public safety and welfare” or “safeguard the rights of consumers.”⁵⁷⁴ Both the Eighth and Ninth Circuits have noted that these exceptions can be applicable to legal requirements intended to protect the public from deceptive business practices.⁵⁷⁵ On its own, the public safety and welfare exception has been understood to apply, at a minimum, to legal requirements that ensure emergency services such as 911 are made readily available.⁵⁷⁶ Rather than preserving these vital interests, moratoria on deployment that violate section 253(a) decrease competition—thereby dampening the ability of a free and open market to act as a check against unfair or deceptive practices—and prevent the deployment of facilities that may be used in the provision of emergency services.

157. We recognize that there may be limited situations in the case of a natural disaster or other comparable emergency where an express or *de facto* moratoria that violates section 253(a) may nonetheless be “necessary” to “protect the public safety and welfare” or to “ensure the continued quality

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See, e.g., Federal-State Joint Board on Universal Service Western Wireless Corporation Petition for Preemption of an Order of The South Dakota Public Utilities Commission, CC Docket No. 96-45, Declaratory Ruling, 15 FCC Rcd 15168, 15168-69, paras. 1-2 (2000) (*Western Wireless Preemption Declaratory Ruling*) (finding that the regulation at issue—which required common carriers to provide supported services throughout a service area prior to being designated as eligible telecommunications carriers who may receive federal universal service support—was not competitively neutral, consistent with section 254, or necessary to preserve and advance universal service, and thus did “not fall within the authority reserved to the states in section 253(b)”).

⁵⁷² 47 U.S.C. § 253(b).

⁵⁷³ *See, e.g.*, R Street Wireline NPRM Comments at 13-14; Mobile Future Wireless NPRM June 15, 2017 Comments at 9.

⁵⁷⁴ 47 U.S.C. § 253(b).

⁵⁷⁵ *See Cedar Rapids Cellular Tel., L.P. v. Miller*, 280 F.3d 874, 880 (8th Cir. 2002) (“[T]he Supreme Court has recognized that states have an important interest in protecting the public from deceptive business practices. . . . Federal telecommunications law implicitly acknowledges the importance of this interest by leaving states some latitude to ‘protect the public safety and welfare’ and ‘safeguard the rights of consumers.’”); *Comm’ns Telesystems Int’l v. Cal. Pub. Util. Comm’n*, 196 F.3d 1011, 1017 (9th Cir. 1999) (noting that the California Public Utility Commission has the power under section 253(b) to “implement regulations that are ‘necessary’ to ‘protect the public’ against slamming,” or the unauthorized switching of consumers’ long-distance carriers); *see also Classic Telephone*, 11 FCC Rcd at 13101, para. 35 (“Section 253(b) . . . ensures that States continue to have authority to require telecommunications service providers to make emergency services available to the public and comply with local consumer protection laws.”).

⁵⁷⁶ *See Freeman v. Burlington Broadcasters, Inc.*, 204 F.3d 311, 324 (2d Cir. 2000) (“[T]he legislative history indicates that ‘[b]y “public safety and welfare,” the Committee means, among other things, making certain that emergency services, such as 911, are available to the public.’”); *see also Classic Telephone*, 11 FCC Rcd at 13101, para. 35 (“Section 253(b) . . . ensures that States continue to have authority to require telecommunications service providers to make emergency services available to the public and comply with local consumer protection laws.”).

of telecommunications services.”⁵⁷⁷ For example, in the event of a widespread power or telecommunications outage, a state might need to limit access to poles in a specific, affected area until existing power and telecommunications facilities can be restored. We interpret section 253(b) to allow for these state-imposed “emergency” express moratoria only if they are (1) “competitively neutral,” as expressly required by section 253(b),⁵⁷⁸ (2) necessary to address the emergency or disaster or related public safety needs, and (3) targeted only to those geographic areas that are affected by the disaster or emergency. Given that the emergency giving rise to such an express moratorium will be finite in time, a moratorium that extends beyond the duration of the emergency and associated repair efforts would not be permissible under section 253(b) because it would not be “necessary” to protect the safety and welfare of the public as section 253(b) requires.⁵⁷⁹ Similarly, an express, statewide deployment moratorium that is not targeted to the geographic areas affected by the natural disaster or emergency would not be permissible as it would not be “necessary” in the unaffected areas and would thus be impermissibly overbroad.⁵⁸⁰ We caution that mere assertions that express or *de facto* moratoria are necessary to achieve these goals do not suffice to invoke section 253(b).⁵⁸¹ Emergency moratoria must be identified as such and clearly communicated to applicants; states and localities may not use a natural disaster or similar emergency as a guise for implementing *de facto* moratoria. While narrowly tailored emergency moratoria may be legally permissible under section 253, we encourage states to work collaboratively with providers before resorting to express moratoria in the wake of natural disasters or emergencies. The burden is on states to justify the imposition of a moratorium by specifically demonstrating that a moratorium serves, and is narrowly-tailored in a manner that makes it necessary to achieve, one of the goals articulated in section 253(b).

158. We also take this opportunity to remind states that section 253(b) only permits them to impose requirements that are “necessary” to preserve or advance the interests identified in section 253(b).⁵⁸² Moratoria are “blunt instruments.”⁵⁸³ There may well be instances where a more limited legal requirement could reasonably be said to be “necessary” to advance universal service, protect the public safety, ensure the continued quality of telecommunications services, or safeguard the rights of consumers, but most moratoria are, by their very nature, too broad and far-ranging to satisfy such a strict standard. Such bans cannot be considered “necessary” to further a specific interest if that interest could be advanced by the imposition of some other, more targeted measure.⁵⁸⁴

⁵⁷⁷ 47 U.S.C. § 253(b).

⁵⁷⁸ As the Commission has previously held, to be considered “competitively neutral” for purposes of section 253(b), a legal requirement must have a like effect on all types of providers and technologies, and must not unfairly advantage or hamper one type of provider or technology over another. *See Western Wireless Preemption Declaratory Ruling*, 15 FCC Rcd at 15176-177, paras. 21-22 (citing *Federal-State Joint Board on Universal Service*, 12 FCC Rcd at 8801, para. 47); *see also Nixon v. Mo. Mun. League*, 541 U.S. 125, 137 (2004) (citing the Commission’s holding in *Western Wireless Preemption Declaratory Ruling* and reaffirming that the Commission has “understood § 253(b) neutrality to require a statute or regulation affecting all types of utilities in like fashion”).

⁵⁷⁹ 47 U.S.C. § 253(b); *see also New England Public Communications Council Petition for Preemption Pursuant to Section 253*, CCBPol 96-11, Memorandum Opinion and Order, 11 FCC Rcd 19713, 19722, para. 21 (1996) (*New England Payphone Order*) (stating that “[a]n interpretation of section 253(b) that a state’s action merely be reasonable ignores the specific language of the statute requiring such state action to be ‘necessary’”).

⁵⁸⁰ 47 U.S.C. § 253(b).

⁵⁸¹ *See, e.g., City of Norfolk Wireline NPRM Comments* at 16-17 (claiming generally that “[m]oratoria also allow local officials to consider the legitimate concerns of members of the public, such as health, public safety and environmental issues, and how best to responsibly address them”); *MCC Wireline NPRM Comments* at 18; *WSCC Wireline NPRM Comments* at 17.

⁵⁸² 47 U.S.C. § 253(b).

⁵⁸³ *AT&T Wireline NPRM Comments* at 74.

⁵⁸⁴ *See New England Payphone Order*, 11 FCC Rcd at 19722, para. 22 (rejecting a measure prohibiting incumbent LECs from providing in-state payphone services as “the most restrictive means available” and concluding that the

159. It is even less likely that the section 253(c) exceptions could shield moratoria that violate section 253(a) from preemption. Section 253(c) specifies that “[n]othing in this section affects the authority of the State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and non-discriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.”⁵⁸⁵ For purposes of this Declaratory Ruling, we exclude the imposition of fees from the definition of *de facto* moratoria.⁵⁸⁶ Thus, the applicability of 253(c) depends on whether moratoria may constitute management of the public rights-of-way.⁵⁸⁷

160. While the Act does not define “manage[ment of] rights-of-way,” the Commission has recognized in the context of section 253(c) that “[l]ocal governments must be allowed to perform the range of vital tasks necessary to preserve the physical integrity of streets and highways, to control the orderly flow of vehicles and pedestrians, [and] to manage gas, water, cable . . . and telephone facilities that crisscross the streets and public rights-of-way.”⁵⁸⁸ The Commission has described the “types of activities that fall within the sphere of appropriate rights-of-way management” as including “coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement of building codes, and keeping track of the various systems using the rights-of-way to prevent interference between them.”⁵⁸⁹ Thus, section 253(c) protects certain activities

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record “does not support a finding that such an extreme approach is ‘necessary’” under section 253(b)); *id.*, 11 FCC Rcd at 19722, para. 21 (“An interpretation of section 253(b) that a state’s action merely be reasonable ignores the specific language of the statute requiring such state action to be ‘necessary.’”); *Classic Telephone*, 11 FCC Rcd at 13102, para. 38 (“Congress envisioned that in the ordinary case, States and localities would enforce the public interest goals delineated in section 253(b) through means other than absolute prohibitions on entry.”) (citing S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 1, at 126 (1996)). We recognize that outside the context of section 253(b), the Commission has sometimes interpreted the term “necessary” as simply meaning “used” or “useful.” See *New England Payphone Order*, 11 FCC Rcd at 19723-25, paras. 24-25 (distinguishing the use of the term “necessary” as used in section 253(b) from the duty imposed on ILECs by section 251(c)(6) to provide collocation of equipment that is “necessary” for interconnection or access to unbundled network elements at the ILEC’s premises, and noting that the term “necessary” is interpreted to mean “used” or “useful” in the context of 251(c)(6)). Several courts have also recognized that the word “necessary” may not automatically mean absolutely essential or required. See *U.S. v. Comstock*, 560 U.S. 126, 134 (2010) (interpreting the term as used in the necessary and proper clause of the Constitution) (citing *McCulloch v. Maryland*, 17 U.S. 316, 413-15 (1819)); *Fish v. Kobach*, 840 F.3d 710, 734 (10th Cir. 2016) (interpreting the term as used in the National Voter Registration Act); *Nat. Res. Def. Council v. Thomas*, 838 F.2d 1224, 1236 (D.C. Cir. 1988) (interpreting the term as used in the Clean Air Act); *FTC v. Rockefeller*, 591 F.2d 182, 188 (2d Cir. 1979) (interpreting the term as used in the Federal Trade Commission Act). However, the Commission in the *New England Payphone Order* and *Classic Telephone*, relying in part on congressional guidance, established that it construes “necessary” in section 253(b) as meaning essential.

⁵⁸⁵ 47 U.S.C. § 253(c).

⁵⁸⁶ We do not take up in this Declaratory Ruling the question of the circumstances in which the imposition of fees may violate section 253(a).

⁵⁸⁷ LMC Wireline NPRM Comments at 8–9; WSCC Wireline NPRM Comments at 20; City of Norfolk Wireline NPRM Comments at 2; LACT Wireline & Wireless NPRM Reply at 51. Cf. IML Wireless NPRM Comments at 3-4 (arguing that municipalities have a public duty to regulate the right-of-way).

⁵⁸⁸ *TCI Cablevision of Oakland County, Inc.; Petition for Declaratory Ruling, Preemption and Other Relief Pursuant to 47 U.S.C. §§ 541, 544(e), and 253*, Memorandum Opinion and Order, 12 FCC Rcd 21396, 21441, para. 103 (1997) (*TCI Cablevision of Oakland County*).

⁵⁸⁹ *TCI Cablevision of Oakland County*, 12 FCC Rcd at 21441, para. 103. The Ninth Circuit determined that the following activities were beyond the management of rights-of-way under section 253(c): regulations requiring applicants to submit proof of financial, technical, and legal qualifications; ordinances imposing requirements or other controls over matters not directly related to management of rights-of-way; franchise agreements that contain conditions unrelated to the management of rights-of-way; ordinance requirements that companies provide free and excess capacity for the use of the locality; and ordinances that grant the locality unfettered discretion to insist on unspecified franchise terms and to grant, deny, or revoke a franchise based on unnamed factors. See *City of Auburn*

that involve the actual use of the right-of-way. In contrast, to the extent they implicate rights-of-way issues at all, moratoria bar providers from obtaining approval to access the right-of-way.⁵⁹⁰ Hence, we fail to see how section 253(c) could save a moratorium from preemption.

3. Authority to Act

161. We issue this authoritative interpretation of section 253 pursuant to our authority to interpret key provisions of the Communications Act.⁵⁹¹ We also have authority under the Administrative Procedure Act (APA) and our rules to issue a declaratory ruling to terminate a controversy or remove uncertainty on our own motion.⁵⁹² In this instance, we find issuing a declaratory ruling on our own motion is necessary to remove what the wireline and wireless infrastructure records reveal are substantial uncertainty and significant legal controversies caused by the state and local imposition of moratoria.⁵⁹³

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v. Qwest Corp., 260 F.3d 1160, 1178-79 (9th Cir. 2001), *vacated on other grounds Sprint Telephony*, 543 F.3d at 571.

⁵⁹⁰ See *Minnesota Preemption Order*, 14 FCC Rcd at 12728-29 (while section 253(c) protects state and local governments' authority to issue construction permits regulating how and when road construction may be conducted does not mean that it protects a state or local government's refusal to issue construction permits to most entities); see also AT&T Wireline NPRM Comments at 74 (arguing that moratoria "fall outside the § 253(c) savings clause that allows local governments 'to manage the public rights of way': that authority must be limited to *reasonable* regulations to avoid permitting evasion of the basic purpose of the provision").

⁵⁹¹ See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984) (holding that courts must grant considerable weight to an agency's reasonable interpretation of a statute it is charged with administering where the statute is ambiguous); *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 296 (2013) (stating that statutory ambiguities will be resolved, within the bounds of reasonable interpretation, by the agency that administers the statute); *id.* at 307 (holding that "Congress has unambiguously vested the FCC with general authority to administer the Communications Act through rulemaking and adjudication"); see also *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980-84 (2005) (*NCTA v. Brand X*) (holding that the agency's interpretation of the terms "telecommunications service" and "offer" is entitled to *Chevron* deference and is a reasonable construction of the Act); *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 396 (1999) (holding that the Commission's interpretation of the interconnection requirement in 47 U.S.C. § 252(i) was reasonable); Letter from Rebecca Murphy Thompson, Executive Vice President and General Counsel, Competitive Carriers Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, WT Docket Nos. 17-79, 15-180, at 1 (filed June 25, 2018) (CCA June 25, 2018 Wireline *Ex Parte* Letter) ("The Commission has broad authority to interpret Section[] 253 . . . and to adopt rules and regulations in furtherance of [that section.]").

⁵⁹² 5 U.S.C. § 554(e); 47 CFR § 1.2; see also *City of Arlington, Tex. v. FCC*, 668 F.3d 229, 243 (5th Cir. 2012) (stating that an "agency need not be presented with a specific dispute between two parties in order to use section 554(e)'s declaratory ruling mechanism" and that section 554 "empowers agencies to use declaratory rulings to 'remove uncertainty'" by issuing statutory interpretations in cases involving "concrete and narrow questions of law the resolutions of which would have an immediate and determinable impact on specific factual scenarios"), *aff'd on other grounds*, 569 U.S. 290 (2013); *Chisholm v. FCC*, 538 F.2d 349, 365 (D.C. Cir. 1976) (reiterating that "the choice whether to proceed by rulemaking or adjudication is primarily one for the agency regardless of whether the decision may affect agency policy and have general prospective application") (citing *N.L.R.B. v. Bell Aerospace Co.*, 416 U.S. 267, 291-95 (1974)); *N.C. Utilities Comm'n v. FCC*, 537 F.2d 787, 790 n.2 (4th Cir. 1976), *cert. denied*, 429 U.S. 1027 ("[F]ederal administrative agencies are not restricted to adjudication of matters that are 'cases and controversies' within the meaning of Article III of the Constitution."); *N.Y. State Comm'n on Cable Television v. FCC*, 749 F.2d 804, 815 (D.C. Cir. 1984) (holding that the Commission, in preempting state and local entry regulation of satellite master antenna television, did not abuse its discretion in labeling its action a declaratory ruling and a consolidation of precedent, rather than engaging in a rule-making procedure).

⁵⁹³ See Verizon Wireline NPRM Comments at 33; Conterra Wireline Comments at 30; Frontier Wireline NPRM Comments at 3; Competitive Carriers Association (CCA) Wireline & Wireless NPRM Comments, WC Docket Nos. 17-84 & 17-79, at executive summary (2017); ITTA Wireline NPRM Comments, WC Docket No. 17-84, at 35 (2017); CTIA Wireline & Wireless NPRM Comments at 3; WIA Wireline & Wireless NPRM Reply Comments at executive summary, 17; WISPA Wireline NPRM Comments at 5; Crown Castle Wireline NPRM Reply Comments at iii-iv; Letter from Joshua S. Turner, Counsel to Crown Castle, to Marlene H. Dortch, Secretary, FCC, WC Docket

162. We exercise that authority in this *Declaratory Ruling* to make clear that express and *de facto* moratoria violate section 253(a) as legal requirements that “prohibit or have the effect of prohibiting” the provision of telecommunications service.⁵⁹⁴ We further find the exceptions set forth in sections 253(b) and (c) to be generally inapplicable to express and *de facto* moratoria.

163. We disagree with those commenters that argue that section 253(d) precludes the Commission from interpreting the applicability of section 253(a) to certain kinds of state and local laws or policies.⁵⁹⁵ Nothing in section 253 purports to limit the exercise of our general interpretive authority. There is no dispute that section 253(d) provides an express mechanism for the Commission to preempt specific state or local legal requirements.⁵⁹⁶ However, Congress’ inclusion of this express mechanism to consider whether specific state and local requirements are preempted, does not limit our ability, pursuant to sections 303, 201(b), and other sections of the Act,⁵⁹⁷ to define and provide an authoritative interpretation as to what constitutes a violation of section 253(a) and what qualifies for the section 253(b) or (c) exceptions.

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No. 17-84, at 4 (filed Nov. 10, 2017); Quintillion Networks Wireline & Wireless NPRM Reply, WC Docket Nos. 17-84 & 17-79, at 7; P.R. Telephone Company, Inc. Wireline NPRM Reply, WC Docket No. 17-84, at 16; Lightower Wireline NPRM Comments at 18; Letter from Scott K. Bergmann, VP, Regulatory Aff., CTIA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 12 (filed Sept. 8, 2017); *see also* AT&T Wireless NPRM Comments, WC Docket No. 17-79, at 13-14 (2017); Conterra Wireless NPRM Comments at 28; CTIA Wireline & Wireless NPRM Comments at 23-24; Crown Castle Wireless NPRM Comments at 32; Mobile Future Wireless NPRM Comments at 9; Mobilitie Wireless NPRM Comments at 12; NCTA Wireless NPRM Comments, WC Docket No. 17-79, at 29 (2017); R Street Wireless NPRM Comments, WC Docket No. 17-79, at 5 (2017); Samsung Wireless NPRM Comments at 7; T-Mobile Wireless NPRM Comments, WC Docket No. 17-79, at 36-37 (2017); Verizon Wireless NPRM Comments, WC Docket No. 17-79, at 33 (2017); WIA Wireless NPRM Comments at 55; Letter from Kara Romagnino Graves, Director, Regulatory Affairs, CTIA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, WT Docket Nos. 17-79, 16-421, at 2 (filed June 27, 2018) (CTIA June 27, 2018 Wireline *Ex Parte* Letter).

⁵⁹⁴ 47 U.S.C. § 253(a); *see also* CCA June 25, 2018 Wireline *Ex Parte* Letter at 1 (stating that section 253 provides the “Commission with the necessary authority to take action regarding state and local siting processes that are effectively prohibiting carriers from providing telecommunications services”). Section 253(a) requires that we examine the effect of a state or local action on “any entity” and the effect with respect to “any interstate or intrastate telecommunications service.” 47 U.S.C. § 253(a) (emphasis added). We interpret “service” to mean any covered service a provider wishes to provide, incorporating the abilities and performance characteristics it wishes to employ, including to provide existing services more robustly, or at a higher level of quality—such as through filling a coverage gap, densification, or otherwise improving service capabilities. Thus, a prohibition or effective prohibition could occur not only by rendering a service provider unable to provide an existing service in a new geographic area or by restricting the entry of a new provider, but also by prohibiting or effectively prohibiting the introduction of new services or significant improvements to existing services by an incumbent provider. In this regard, we believe it is appropriate to construe section 253(a) in light of the broader goals outlined by Congress: “to make available . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . .” 47 U.S.C. § 151.

⁵⁹⁵ *See, e.g.*, Public Knowledge Wireline NPRM Comments at 17-18; City of N.Y. Wireline NPRM Comments, WC Docket No. 17-84, at 1-2 (2017); Smart Communities Wireline NPRM Comments, WC Docket No. 17-84, at 10-11 (2017) (Smart Communities Wireline NPRM Comments); City of Alexandria et al. (Virginia Joint Commenters) Wireline NPRM Comments, WC Docket No. 17-84, at 42-43 (2017). *But see* Conterra Wireline & Wireless NPRM Comments at 15-16 (“Section 253(d) is drafted broadly and provides the Commission ample latitude to elect the best procedure for utilizing its preemption power. . . . At a minimum, reviewing courts must afford the Commission broad deference in construing the ambiguous provisions in Section 253.”).

⁵⁹⁶ *See* 47 U.S.C. § 253(d). Section 253(d) expressly grants the Commission preemption authority. As such, we disagree with EEI’s view that the Commission lacks the authority to preempt state and local laws such as moratoria because Congress left such decisions to the states. EEI Wireline NPRM Comments at 4.

⁵⁹⁷ *See Wireless Infrastructure NPRM*, 32 FCC Rcd at 3336, para. 15 & nn. 28-30.

164. Because we interpret section 253(a) and do not specifically preempt any state or local law, the Supreme Court's holding in *City of Rancho Palos Verdes v. Abrams* that "the express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others,"⁵⁹⁸ is not applicable here. In issuing this Declaratory Ruling we are not exercising our authority to enforce a substantive rule; rather, we are interpreting the scope of the substantive prohibition set forth in section 253(a).

165. Moreover, most courts that have considered the matter have *not* read section 253(d) as the exclusive enforcement mechanism for pursuing a claim that a state or local legal requirement violates section 253(a).⁵⁹⁹ Some Circuit courts have held that section 253 includes an implied private cause of action to seek relief.⁶⁰⁰ Other Circuit courts have entertained preemption claims under the Supremacy Clause of the United States Constitution, which is a legal avenue for preemption regardless of whether a statute authorizes a private cause of action.⁶⁰¹ As the First Circuit has explained, "under the Supremacy Clause, any state or local law that is inconsistent with the requirements of §253(a) will be null and void, unless it falls under one of the safe harbor provisions in §253."⁶⁰² Accordingly, courts have concluded that parties may bring section 253(a) preemption challenges directly in federal court, regardless of the availability of the Commission as a forum to resolve preemption disputes pursuant to section 253(d).⁶⁰³ But whatever enforcement mechanisms may be available to preempt specific state and local requirements, nothing in section 253 prevents us from declaring that a category of state or local laws is inconsistent with section 253(a) because it prohibits or has the effect of prohibiting service.

166. Indeed, in issuing our interpretation of section 253(a) and the scope of the section 253(b) and (c) exceptions, we further the notice objectives that underlie section 253(d), which requires that the Commission provide "notice and an opportunity for public comment" prior to taking any preemptive action.⁶⁰⁴ Adopting a general interpretation enhances certainty around frequently arising, factually similar issues. By issuing this Declaratory Ruling, we place states and localities on notice that express and *de facto* moratoria are inconsistent with section 253(a).⁶⁰⁵ In so doing, we provide states and localities the

⁵⁹⁸ *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 121 (2005) (quoting *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001)).

⁵⁹⁹ See, e.g., *P.R. Tel. Co.*, 450 F.3d at 16; *N.J. Payphone Ass'n*, 299 F.3d at 241-42; *Qwest Corp. v. City of Santa Fe, N.M.*, 380 F.3d 1258, 1266 (10th Cir. 2004) (*Qwest Corp. v. City of Santa Fe*); *BellSouth Telecomm., Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1191 (11th Cir. 2001); *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 624 (6th Cir. 2000).

⁶⁰⁰ See *BellSouth Telecomm., Inc.*, 252 F.3d at 1191; *TCG Detroit v. City of Dearborn*, 206 F.3d at 624. But see *Spectra Comm. Group., LLC v. City of Cameron*, 806 F.3d 1113, 1119-20 (8th Cir. 2015); *NextG Networks of N.Y., Inc. v. City of N.Y.*, 513 F.3d 49, 53 (2d Cir. 2008); *Sprint Telephony*, 543 F.3d at 580-81; *Sw. Bell Tel., L.P. v. City of Houston*, 529 F.3d 257, 261 (5th Cir. 2008); *Qwest Corp. v. City of Santa Fe*, 380 F.3d at 1266-67.

⁶⁰¹ See *P.R. Tel. Co.*, 450 F.3d at 16; *N.J. Payphone Ass'n*, 299 F.3d at 242-43; *Qwest Corp. v. City of Santa Fe*, 380 F.3d at 1266. The Supremacy Clause invalidates state or local laws that "interfere with or are contrary to" federal law. U.S. Const. art. VI, Cl. 2.

⁶⁰² *P.R. Tel. Co.*, 450 F.3d at 16 (citing U.S. Const. art. VI, Cl. 2. and *Qwest Corp. v. City of Santa Fe*, 380 F.3d at 1269).

⁶⁰³ See *P.R. Tel. Co.*, 450 F.3d at 16; *N.J. Payphone Ass'n*, 299 F.3d at 242-43; *Qwest Corp. v. City of Santa Fe*, 380 F.3d at 1266.

⁶⁰⁴ See 47 U.S.C. § 253(d).

⁶⁰⁵ The League of Minnesota Cities claims that "[c]ourts continue to uphold moratoria used in limited circumstance as 'interim controls on the use of land that seek to maintain the status quo with respect to land development in an area by either "freezing" existing land uses or by allowing the issuance of . . . permits for only certain land uses that would not be inconsistent with a contemplated zoning plan or zoning change.'" LMC Wireline NPRM Comments at 10 (citing *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Plan. Agency*, 535 U.S. 302 (2002)). While the *Tahoe* case stands for the proposition that moratoria may be permitted under the Fifth Amendment to the U.S. Constitution, the fact that moratoria may be permissible under the Fifth Amendment does not limit our authority to

opportunity to ensure that their requirements comply with federal law. Therefore, construing section 253(d) as not limiting the Commission's authority to interpret the remainder of section 253 furthers important policy goals as well. Otherwise, the Commission would only have authority to act retrospectively to target individual laws, which would be inefficient, increase uncertainty, and impose additional costs on states and localities both from the sunk costs of enacting subsequently preempted legal requirements and the costs of litigating more section 253(d) preemption proceedings and judicial actions.⁶⁰⁶

167. We also disagree with assertions that the change in regulatory classification of broadband Internet access service in the *Restoring Internet Freedom Order* affects the validity of this Declaratory Ruling.⁶⁰⁷ Consistent with prior Commission decisions, we have authority over infrastructure that can be used for the provision of both telecommunications and other services on a commingled basis.⁶⁰⁸ Infrastructure for wireline and wireless telecommunication services frequently is the same infrastructure used for the provision of broadband Internet access service,⁶⁰⁹ and our ruling today will promote broadband deployment,⁶¹⁰ in concert with our actions in the *Restoring Internet Freedom Order*.

168. We expect that this Declaratory Ruling, which provides our authoritative interpretation of the scope of section 253(a) as it pertains to state and local moratoria, will have several consequences that will benefit the public. First, we expect states and localities to comply with federal law by repealing existing moratoria, refusing to enforce moratoria that remain on the books, and declining to adopt new moratoria. Second, the interpretation of section 253 in this Declaratory Ruling will apply when conducting subsequent proceedings under section 253(d) to preempt specific legal rules permitted or

(Continued from previous page)

interpret section 253 as prohibiting moratoria that prohibit or have the effect of prohibiting the ability of an entity to provide telecommunication services.

⁶⁰⁶ Our decision today is consistent with the Commission's earlier decisions that state and local moratoria do not toll the "shot clocks" for state or municipal review of wireless siting applications pursuant to section 332(c)(7)(B)(ii) of the Act; that these "shot clocks continue to run" regardless of whether state or local governments purport to impose moratoria that suspend the acceptance or processing of siting applications for some period of time; and that "applicants can challenge moratoria in court when the shot clock expires without State or local government action." See *Wireless Facilities Siting Order*, 29 FCC Rcd at 12971, paras. 265-67; see also 2009 *Wireless Siting Declaratory Ruling*, 24 FCC Rcd at 14016-19, paras. 56-65 (stating that a state or local agency's failure to render a decision within "shot clock" deadlines – i.e., 90 days for an application to deploy collocated antennas or within 150 days for an application to deploy facilities other than collocations – would presumptively constitute a "failure to act" that may be challenged under section 332(c)(7)(B)(v) of the Act).

⁶⁰⁷ See, e.g., Public Knowledge Wireline NPRM Comments at 13; Smart Communities Wireline NPRM Comments at 5-6; Smart Communities Wireline & Wireless NPRM Reply Comments at 37-39; Cities of San Antonio, Tex. et al. Wireline & Wireless NPRM Reply Comments at 17.

⁶⁰⁸ See *Restoring Internet Freedom*, 33 FCC Rcd at 424-425, para. 188-190 (reaffirming that the Commission retains statutory authority to regulate facilities that provide commingled services where the Commission has statutory authority over one of the services); *Wireless Facilities Siting Order*, 29 FCC Rcd at 12973, para. 270-272 ("[T]o the extent [distributed antenna system] or small-cell facilities, including third-party facilities such as neutral host [distributed antenna system] deployments, are or will be used for the provision of personal wireless services, their siting applications are subject to [section 332(c)(7)]."); *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901, 5924, para. 65 (2007) (applying section 224 to facilities that provide both telecommunications and wireless broadband Internet access service, and applying section 332(c)(7)(B) to facilities providing personal wireless service and wireless broadband Internet access service).

⁶⁰⁹ *Restoring Internet Freedom*, 33 FCC Rcd at 423, 425, paras. 185, 190 (citing Cisco Systems, Inc. Comments, WC Docket No. 17-108, at 2-3 (July 17, 2017)); Mobilitie, LLC Comments, WC Docket No. 17-108, at 4 (July 17, 2017).

⁶¹⁰ See NCTA July 18, 2018 Wireline *Ex Parte* Letter at 1 (asserting that this Declaratory Ruling "would be helpful in promoting continued broadband deployment by cable operators").

imposed by specific states or localities. To further effectuate the benefits of issuing this Declaratory Ruling, we direct the Wireline Competition Bureau and/or the Wireless Telecommunications Bureau to act expeditiously on section 253(d) petitions challenging alleged state or local moratoria.⁶¹¹ Finally, this Declaratory Ruling sets forth the Commission's reasoned interpretation of section 253(a), which will inform judicial resolution of preemption claims brought by providers, states, or localities under the Supremacy Clause of the United States Constitution.

V. PROCEDURAL MATTERS

169. *Congressional Review Act.* The Commission will send a copy of this Third Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking, including a copy of the Final Regulatory Flexibility Certification, in a report to Congress and the Government Accountability Office pursuant to the Congressional Review Act.⁶¹² In addition, the Report and Order and this final certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration (SBA) and will be published in the Federal Register.⁶¹³

170. *Final Regulatory Flexibility Analysis.* As required by the Regulatory Flexibility Act of 1980 (RFA),⁶¹⁴ the Commission has prepared a Final Regulatory Flexibility Analysis (FRFA) relating to this Report and Order. The FRFA is contained in Appendix B.

171. *Paperwork Reduction Act of 1995 Analysis.* The Report and Order contains modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. OMB, the general public, and other federal agencies are invited to comment on the new or modified information collection requirements contained in this proceeding. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4), we seek specific comment on how the Commission might further reduce the information collection burden for small business concerns with fewer than 25 employees.⁶¹⁵

172. In this document, we have assessed the effects of reforming our pole attachment regulations and find that doing so will serve the public interest and is unlikely to directly affect businesses with fewer than 25 employees.

VI. ORDERING CLAUSES

173. Accordingly, IT IS ORDERED that, pursuant to sections 1-4, 201, 224, 253, 303(r), and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 201, 224, 253, 303(r), and 332, and section 5(e) of the Administrative Procedure Act, 5 U.S.C. § 554(e), this *Third Report and Order and Declaratory Ruling* IS ADOPTED.

174. IT IS FURTHER ORDERED that Part 1 of the Commission's rules IS AMENDED as set

⁶¹¹ Petitioners must follow the Commission's previously adopted procedural guidelines for section 253(d) petitions. *See* 47 CFR §§ 1.1204(b) Note 4; 1.1206(a) Note 1; and 1.1206(a)(13) Note 2; *Suggested Guidelines for Petitions for Ruling Under Section 253 of the Communications Act*, Public Notice, 13 FCC Rcd 22970 (1998); *Amendment of 47 C.F.R. § 1.1200 et seq. Concerning Ex Parte Presentations in Commission Proceedings*, GC Docket No. 95-21, Memorandum Opinion and Order, 14 FCC Rcd 18831 (1999). The Commission has adopted similar requirements for certain types of petitions pursuant to section 332(c)(7)(B). *See Procedures for Reviewing Requests for Relief From State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934*, WT Docket No. 97-192, Report and Order, 15 FCC Rcd 22821 (2000).

⁶¹² *See* 5 U.S.C. § 801(a)(1)(A).

⁶¹³ *See* 5 U.S.C. § 605(b).

⁶¹⁴ *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996). The SBREFA was enacted as Title II of the Contract with America Advancement Act of 1996 (CWAAA).

⁶¹⁵ *See Wireline Infrastructure Notice*, 32 FCC Rcd at 3306, para. 127.

forth in Appendix A.

175. IT IS FURTHER ORDERED that this *Report and Order* SHALL BE effective 30 days after publication in the Federal Register, except for sections III.A-E of this *Report and Order*, which will be effective on the latter of six months after release of this *Report and Order* or 30 days after the announcement in the Federal Register of Office of Management and Budget (OMB) approval of information collection requirements modified in this *Report and Order*. OMB approval is necessary for the information collection requirements in 47 CFR §§ 1.1411(c)(1), 1.1411(c)(3), 1.1411(d), 1.1411(d)(3), 1.1411(e)(3), 1.1411(h)(2)-(3), 1.1411(i)(1)-(2), 1.1411(j)(1)-(5), 1.1412(a)-(b), 1.1413(b), and 1.1415(b).

176. IT IS FURTHER ORDERED that the *Declaratory Ruling* and the obligations set forth therein ARE EFFECTIVE upon release of this Order.

177. IT IS FURTHER ORDERED, pursuant to section 253(d) of the Communications Act of 1934, as amended, that the Wireline Competition Bureau and the Wireless Telecommunications Bureau ARE DIRECTED to review specific petitions and, as necessary, preempt state or local statutes, regulations, or other legal requirements that constitute express moratoria or *de facto* moratoria.

178. IT IS FURTHER ORDERED that the Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Report and Order* to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

179. IT IS FURTHER ORDERED that the Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis and this *Declaratory Ruling*, to the Chief Counsel for Advocacy of the SBA.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Final Rules

For the reasons set forth above, Part 1 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 1 – PRACTICE AND PROCEDURE

1. The authority for part 1 is amended to read as follows:

AUTHORITY: 47 U.S.C. 151, 154(i) and (j), 155, 157, 160, 201, 224, 225, 227, 303, 309, 310, 332, 1403, 1404, 1451, 1452, and 1455.

SUBPART J – POLE ATTACHMENT COMPLAINT PROCEDURES

Amend section 1.1402 by adding paragraphs (o), (p), (q), and (r) to read as follows:

§ 1.1402 Definitions.

* * *

(o) The term *make-ready* means the modification or replacement of a utility pole, or of the lines or equipment on the utility pole, to accommodate additional facilities on the utility pole.

(p) The term *complex make-ready* means transfers and work within the communications space that would be reasonably likely to cause a service outage(s) or facility damage, including work such as splicing of any communication attachment or relocation of existing wireless attachments. Any and all wireless activities, including those involving mobile, fixed, and point-to-point wireless communications and wireless internet service providers, are to be considered complex.

(q) The term *simple make-ready* means make-ready where existing attachments in the communications space of a pole could be transferred without any reasonable expectation of a service outage or facility damage and does not require splicing of any existing communication attachment or relocation of an existing wireless attachment.

(r) The term *communications space* means the lower usable space on a utility pole, which typically is reserved for low-voltage communications equipment.

2. Amend section 1.1403 by revising paragraph (c) to read as follows:

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

* * *

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

* * *

(3) Any modification of facilities by the utility other than make-ready noticed pursuant to section 1.1411(e), routine maintenance, or modification in response to emergencies.

* * * * *

3. Amend section 1.1411 by revising paragraphs (a), (c), (d), (e), (f), (g), (h), and (i) and adding paragraph (j) to read as follows:

§ 1.1411 Timeline for access to utility poles.

(a) Definitions.

(1) The term “attachment” means any attachment by a cable television system or provider of telecommunications service to a pole owned or controlled by a utility.

(2) The term “new attacher” means a cable television system or telecommunications carrier requesting to attach new or upgraded facilities to a pole owned or controlled by a utility.

(3) The term “existing attacher” means any entity with equipment on a utility pole.

* * *

(c) Application Review and Survey.

(1) *Application Completeness.* A utility shall review a new attacher’s attachment application for completeness before reviewing the application on its merits. A new attacher’s attachment application is considered complete if it provides the utility with the information necessary under its procedures, as specified in a master service agreement or in requirements that are available in writing publicly at the time of submission of the application, to begin to survey the affected poles.

(i) A utility shall determine within 10 business days after receipt of a new attacher’s attachment application whether the application is complete and notify the attacher of that decision. If the utility does not respond within 10 business days after receipt of the application, or if the utility rejects the application as incomplete but fails to specify any reasons in its response, then the application is deemed complete. If the utility timely notifies the new attacher that its attachment application is not complete, then it must specify all reasons for finding it incomplete.

(ii) Any resubmitted application need only address the utility’s reasons for finding the application incomplete and shall be deemed complete within 5 business days after its resubmission, unless the utility specifies to the new attacher which reasons were not addressed and how the resubmitted application did not sufficiently address the reasons. The new attacher may follow the resubmission procedure in this paragraph as many times as it chooses so long as in each case it makes a bona fide attempt to correct the reasons identified by the utility, and in each case the deadline set forth in this paragraph shall apply to the utility’s review.

(2) *Application Review on the Merits.* A utility shall respond to the new attacher either by granting access or, consistent with § 1.1403(b), denying access within 45 days of receipt of a complete application to attach facilities to its utility poles (or within 60 days in the case of larger orders as described in paragraph (g) of this section). A utility may not deny the new attacher pole access based on a preexisting violation not caused by any prior attachments of the new attacher.

(3) Survey.

(i) A utility shall complete a survey of poles for which access has been requested within 45 days of receipt of a complete application to attach facilities to its utility poles (or within 60 days in the case of larger orders as described in paragraph (g) of this section).

(ii) A utility shall permit the new attacher and any existing attachers on the affected poles to be present for any field inspection conducted as part of the utility’s survey. A utility shall use commercially

reasonable efforts to provide the affected attachers with advance notice of not less than 3 business days of any field inspection as part of the survey and shall provide the date, time, and location of the survey, and name of the contractor performing the survey.

(iii) Where a new attacher has conducted a survey pursuant to § 1.1411(j)(3), a utility can elect to satisfy its survey obligations in this paragraph by notifying affected attachers of its intent to use the survey conducted by the new attacher pursuant to § 1.1411(j)(3) and by providing a copy of the survey to the affected attachers within the time period set forth in paragraph (c)(3)(i) of this section. A utility relying on a survey conducted pursuant to § 1.1411(j)(3) to satisfy all of its obligations under § 1.1411(c)(3)(i) shall have 15 days to make such a notification to affected attachers rather than a 45 day survey period.

(d) *Estimate*. Where a new attacher's request for access is not denied, a utility shall present to a new attacher a detailed, itemized estimate, on a pole-by-pole basis where requested, of charges to perform all necessary make-ready within 14 days of providing the response required by § 1.1411(c)(2), or in the case where a new attacher has performed a survey, within 14 days of receipt by the utility of such survey. Where a pole-by-pole estimate is requested and the utility expects to incur fixed costs that are not reasonably calculable on a pole-by-pole basis, the utility may present charges on a per-job basis rather than present a pole-by-pole estimate for those fixed cost charges. The utility shall provide documentation that is sufficient to determine the basis of all estimated charges, including any projected material, labor, and other related costs that form the basis of its estimate.

* * *

(2) A new attacher may accept a valid estimate and make payment any time after receipt of an estimate, except it may not accept after the estimate is withdrawn.

(3) *Final invoice*. After the utility completes make-ready, if the final cost of the work differs from the estimate, it shall provide the new attacher with a detailed, itemized final invoice of the actual make-ready charges incurred, on a pole-by-pole basis where requested, to accommodate the new attacher's attachment. Where a pole-by-pole invoice is requested and the utility incurs fixed costs that are not reasonably calculable on a pole-by-pole basis, the utility may present charges on a per-job basis rather than present a pole-by-pole invoice for those fixed cost charges. The utility shall provide documentation that is sufficient to determine the basis of all invoiced charges, including any projected material, labor, and other related costs that form the basis of its invoice.

(4) A utility may not charge a new attacher to bring poles, attachments, or third-party equipment into compliance with current published safety, reliability, and pole owner construction standards and guidelines if such poles, attachments, or third-party equipment were out of compliance because of work performed by a party other than the new attacher prior to the new attachment.

(e) * * *

(1) For attachments in the communications space, the notice shall:

(i) Specify where and what make-ready will be performed.

(ii) Set a date for completion of make-ready in the communications space that is no later than 30 days after notification is sent (or up to 75 days in the case of larger orders as described in paragraph (g) of this section).

(iii) State that any entity with an existing attachment may modify the attachment consistent with the specified make-ready before the date set for completion.

(iv) State that if make-ready is not completed by the completion date set by the utility in paragraph

(e)(1)(ii) in this section, the new attacher may complete the make-ready specified pursuant to paragraph (e)(1)(i) in this section.

(v) State the name, telephone number, and e-mail address of a person to contact for more information about the make-ready procedure.

(2) For attachments above the communications space, the notice shall:

(i) Specify where and what make-ready will be performed.

(ii) Set a date for completion of make-ready that is no later than 90 days after notification is sent (or 135 days in the case of larger orders, as described in paragraph (g) of this section).

(iii) State that any entity with an existing attachment may modify the attachment consistent with the specified make-ready before the date set for completion.

(iv) State that the utility may assert its right to 15 additional days to complete make-ready.

(v) State that if make-ready is not completed by the completion date set by the utility in paragraph (e)(2)(ii) in this section (or, if the utility has asserted its 15-day right of control, 15 days later), the new attacher may complete the make-ready specified pursuant to paragraph (e)(2)(i) in this section.

(vi) State the name, telephone number, and e-mail address of a person to contact for more information about the make-ready procedure.

(3) Once a utility provides the notices described in this section, it then must provide the new attacher with a copy of the notices and the existing attachers' contact information and address where the utility sent the notices. The new attacher shall be responsible for coordinating with existing attachers to encourage their completion of make-ready by the dates set forth by the utility in paragraph (e)(1)(ii) for communications space attachments or paragraph (e)(2)(ii) for attachments above the communications space.

(f) A utility shall complete its make-ready in the communications space by the same dates set for existing attachers in paragraph (e)(1)(ii) or its make-ready above the communications space by the same dates for existing attachers in paragraph (e)(2)(ii) of this section (or if the utility has asserted its 15-day right of control, 15 days later).

(g) * * *

(1) A utility shall apply the timeline described in paragraphs (c) through (e) of this section to all requests for attachment up to the lesser of 300 poles or 0.5 percent of the utility's poles in a state.

* * *

(4) A utility shall negotiate in good faith the timing of all requests for attachment larger than the lesser of 3000 poles or 5 percent of the utility's poles in a state.

(5) A utility may treat multiple requests from a single new attacher as one request when the requests are filed within 30 days of one another.

(h) *Deviation from the time limits specified in this section:*

(1) A utility may deviate from the time limits specified in this section before offering an estimate of charges if the parties have no agreement specifying the rates, terms, and conditions of attachment.

(2) A utility may deviate from the time limits specified in this section during performance of make-ready for good and sufficient cause that renders it infeasible for the utility to complete make-ready within the time limits specified in this section. A utility that so deviates shall immediately notify, in writing, the new attacher and affected existing attachers and shall identify the affected poles and include a detailed explanation of the reason for the deviation and a new completion date. The utility shall deviate from the time limits specified in this section for a period no longer than necessary to complete make-ready on the affected poles and shall resume make-ready without discrimination when it returns to routine operations. A utility cannot delay completion of make-ready because of a preexisting violation on an affected pole not caused by the new attacher.

(3) An existing attacher may deviate from the time limits specified in this section during performance of complex make-ready for reasons of safety or service interruption that renders it infeasible for the existing attacher to complete complex make-ready within the time limits specified in this section. An existing attacher that so deviates shall immediately notify, in writing, the new attacher and other affected existing attachers and shall identify the affected poles and include a detailed explanation of the basis for the deviation and a new completion date, which in no event shall extend beyond 60 days from the date the notice described in paragraph (e)(1) of this section is sent by the utility (or up to 105 days in the case of larger orders described in paragraph (g) of this section). The existing attacher shall deviate from the time limits specified in this section for a period no longer than necessary to complete make-ready on the affected poles.

(i) *Self-help remedy.*

(1) *Surveys.* If a utility fails to complete a survey as specified in paragraph (c)(3)(i) of this section, then a new attacher may conduct the survey in place of the utility and, as specified in §1.1412, hire a contractor to complete a survey.

(i) A new attacher shall permit the affected utility and existing attachers to be present for any field inspection conducted as part of the new attacher's survey.

(ii) A new attacher shall use commercially reasonable efforts to provide the affected utility and existing attachers with advance notice of not less than 3 business days of a field inspection as part of any survey it conducts. The notice shall include the date and time of the survey, a description of the work involved, and the name of the contractor being used by the new attacher.

(2) *Make-ready.* If make-ready is not complete by the date specified in paragraph (e) of this section, then a new attacher may conduct the make-ready in place of the utility and existing attachers, and, as specified in §1.1412, hire a contractor to complete the make-ready.

(i) A new attacher shall permit the affected utility and existing attachers to be present for any make-ready. A new attacher shall use commercially reasonable efforts to provide the affected utility and existing attachers with advance notice of not less than 5 days of the impending make-ready. The notice shall include the date and time of the make-ready, a description of the work involved, and the name of the contractor being used by the new attacher.

(ii) The new attacher shall notify an affected utility or existing attacher immediately if make-ready damages the equipment of a utility or an existing attacher or causes an outage that is reasonably likely to interrupt the service of a utility or existing attacher. Upon receiving notice from the new attacher, the utility or existing attacher may either (A) complete any necessary remedial work and bill the new attacher for the reasonable costs related to fixing the damage or outage, or (B) require the new attacher to fix the damage or outage at its expense immediately following notice from the utility or existing attacher.

(iii) A new attacher shall notify the affected utility and existing attachers within 15 days after completion of make-ready on a particular pole. The notice shall provide the affected utility and existing attachers at least 90 days from receipt in which to inspect the make-ready. The affected utility and existing attachers have 14 days after completion of their inspection to notify the new attacher of any damage or code violations caused by make-ready conducted by the new attacher on their equipment. If the utility or an existing attacher notifies the new attacher of such damage or code violations, then the utility or existing attacher shall provide adequate documentation of the damage or the code violations. The utility or existing attacher may either complete any necessary remedial work and bill the new attacher for the reasonable costs related to fixing the damage or code violations or require the new attacher to fix the damage or code violations at its expense within 14 days following notice from the utility or existing attacher.

(3) Self-help shall not be available for pole replacements.

(j) *One-touch make-ready option.* For attachments involving simple make-ready, new attachers may elect to proceed with the process described in this paragraph in lieu of the attachment process described in paragraphs (c)-(f) and (i) of this section.

(1) Attachment Application.

(i) A new attacher electing the one-touch make-ready process must elect the one-touch make-ready process in writing in its attachment application and must identify the simple make-ready that it will perform. It is the responsibility of the new attacher to ensure that its contractor determines whether the make-ready requested in an attachment application is simple.

(ii) The utility shall review the new attacher's attachment application for completeness before reviewing the application on its merits. An attachment application is considered complete if it provides the utility with the information necessary under its procedures, as specified in a master service agreement or in publicly-released requirements at the time of submission of the application, to make an informed decision on the application.

(A) A utility has 10 business days after receipt of a new attacher's attachment application in which to determine whether the application is complete and notify the attacher of that decision. If the utility does not respond within 10 business days after receipt of the application, or if the utility rejects the application as incomplete but fails to specify any reasons in the application, then the application is deemed complete.

(B) If the utility timely notifies the new attacher that its attachment application is not complete, then the utility must specify all reasons for finding it incomplete. Any resubmitted application need only address the utility's reasons for finding the application incomplete and shall be deemed complete within 5 business days after its resubmission, unless the utility specifies to the new attacher which reasons were not addressed and how the resubmitted application did not sufficiently address the reasons. The applicant may follow the resubmission procedure in this paragraph as many times as it chooses so long as in each case it makes a bona fide attempt to correct the reasons identified by the utility, and in each case the deadline set forth in this paragraph shall apply to the utility's review.

(2) *Application Review on the Merits.* The utility shall review on the merits a complete application requesting one-touch make-ready and respond to the new attacher either granting or denying an application within 15 days of the utility's receipt of a complete application (or within 30 days in the case of larger orders as described in paragraph (g) of this section).

(i) If the utility denies the application on its merits, then its decision shall be specific, shall include all relevant evidence and information supporting its decision, and shall explain how such evidence and

information relate to a denial of access for reasons of lack of capacity, safety, reliability, or engineering standards.

(ii) Within the 15-day application review period (or within 30 days in the case of larger orders as described in paragraph (g) of this section), a utility may object to the designation by the new attacher's contractor that certain make-ready is simple. If the utility objects to the contractor's determination that make-ready is simple, then it is deemed complex. The utility's objection is final and determinative so long as it is specific and in writing, includes all relevant evidence and information supporting its decision, made in good faith, and explains how such evidence and information relate to a determination that the make-ready is not simple.

(3) *Surveys.* The new attacher is responsible for all surveys required as part of the one-touch make-ready process and shall use a contractor as specified in §1.1412(b).

(i) The new attacher shall permit the utility and any existing attachers on the affected poles to be present for any field inspection conducted as part of the new attacher's surveys. The new attacher shall use commercially reasonable efforts to provide the utility and affected existing attachers with advance notice of not less than 3 business days of a field inspection as part of any survey and shall provide the date, time, and location of the surveys, and name of the contractor performing the surveys.

(4) *Make-ready.* If the new attacher's attachment application is approved and if it has provided 15 days prior written notice of the make-ready to the affected utility and existing attachers, the new attacher may proceed with make-ready using a contractor in the manner specified for simple make-ready in §1.1412(b).

(i) The prior written notice shall include the date and time of the make-ready, a description of the work involved, the name of the contractor being used by the new attacher, and provide the affected utility and existing attachers a reasonable opportunity to be present for any make-ready.

(ii) The new attacher shall notify an affected utility or existing attacher immediately if make-ready damages the equipment of a utility or an existing attacher or causes an outage that is reasonably likely to interrupt the service of a utility or existing attacher. Upon receiving notice from the new attacher, the utility or existing attacher may either (A) complete any necessary remedial work and bill the new attacher for the reasonable costs related to fixing the damage or outage, or (B) require the new attacher to fix the damage or outage at its expense immediately following notice from the utility or existing attacher.

(iii) In performing make-ready, if the new attacher or the utility determines that make-ready classified as simple is complex, then that specific make-ready must be halted and the determining party must provide immediate notice to the other party of its determination and the impacted poles. The affected make-ready shall then be governed by parts (d)-(i) of this section and the utility shall provide the notice required by part (e) of this section as soon as reasonably practicable.

(5) *Post-make-ready timeline.* A new attacher shall notify the affected utility and existing attachers within 15 days after completion of make-ready on a particular pole. The notice shall provide the affected utility and existing attachers at least 90 days from receipt in which to inspect the make-ready. The affected utility and existing attachers have 14 days after completion of their inspection to notify the new attacher of any damage or code violations caused by make-ready conducted by the new attacher on their equipment. If the utility or an existing attacher notifies the new attacher of such damage or code violations, then the utility or existing attacher shall provide adequate documentation of the damage or the code violations. The utility or existing attacher may either complete any necessary remedial work and bill the new attacher for the reasonable costs related to fixing the damage or code violations or require the

new attacher to fix the damage or code violations at its expense within 14 days following notice from the utility or existing attacher.

4. Amend section 1.1412 by revising paragraphs (a), (b), and (c) to read as follows:

§ 1.1412 Contractors for surveys and make-ready.

(a) *Contractors for self-help complex and above the communications space make-ready.* A utility shall make available and keep up-to-date a reasonably sufficient list of contractors it authorizes to perform self-help surveys and make-ready that is complex and self-help surveys and make-ready that is above the communications space on its poles. The new attacher must use a contractor from this list to perform self-help work that is complex or above the communications space. New and existing attachers may request the addition to the list of any contractor that meets the minimum qualifications in §§1.1412(c)(1)-(5) and the utility may not unreasonably withhold its consent.

(b) *Contractors for simple work.* A utility may, but is not required to, keep up-to-date a reasonably sufficient list of contractors it authorizes to perform surveys and simple make-ready. If a utility provides such a list, then the new attacher must choose a contractor from the list to perform the work. New and existing attachers may request the addition to the list of any contractor that meets the minimum qualifications in §§1.1412(c)(1)-(5) and the utility may not unreasonably withhold its consent.

(i) If the utility does not provide a list of approved contractors for surveys or simple make-ready or no utility-approved contractor is available within a reasonable time period, then the new attacher may choose its own qualified contractor that meets the requirements in paragraph (c) of this section. When choosing a contractor that is not on a utility-provided list, the new attacher must certify to the utility that its contractor meets the minimum qualifications described in paragraph (c) of this section when providing notices required by §§1.1411(i)(1)(ii), 1.1411(i)(2)(i), 1.1411(j)(3)(i), and 1.1411(j)(4).

(ii) The utility may disqualify any contractor chosen by the new attacher that is not on a utility-provided list, but such disqualification must be based on reasonable safety or reliability concerns related to the contractor's failure to meet any of the minimum qualifications described in paragraph (c) of this section or to meet the utility's publicly available and commercially reasonable safety or reliability standards. The utility must provide notice of its contractor objection within the notice periods provided by the new attacher in §§1.1411(i)(1)(ii), 1.1411(i)(2)(i), 1.1411(j)(3)(i), and 1.1411(j)(4) and in its objection must identify at least one available qualified contractor.

(c) *Contractor minimum qualification requirements.* Utilities must ensure that contractors on a utility-provided list, and new attachers must ensure that contractors they select pursuant to paragraph (b)(i) of this section, meet the following minimum requirements:

(1) The contractor has agreed to follow published safety and operational guidelines of the utility, if available, but if unavailable, the contractor shall agree to follow National Electrical Safety Code (NESC) guidelines;

(2) The contractor has acknowledged that it knows how to read and follow licensed-engineered pole designs for make-ready, if required by the utility;

(3) The contractor has agreed to follow all local, state, and federal laws and regulations including, but not limited to, the rules regarding Qualified and Competent Persons under the requirements of the Occupational and Safety Health Administration (OSHA) rules;

(4) The contractor has agreed to meet or exceed any uniformly applied and reasonable safety and reliability thresholds set by the utility, if made available; and

(5) The contractor is adequately insured or will establish an adequate performance bond for the make-ready it will perform, including work it will perform on facilities owned by existing attachers.

* * * * *

5. Amend section 1.1413 by revising to read as follows:

§ 1.1413 Complaints by incumbent local exchange carriers.

(a) A complaint by an incumbent local exchange carrier (as defined in 47 U.S.C. 251(h)) or an association of incumbent local exchange carriers alleging that it has been denied access to a pole, duct, conduit, or right-of-way owned or controlled by a local exchange carrier or that a utility's rate, term, or condition for a pole attachment is not just and reasonable shall follow the same complaint procedures specified for other pole attachment complaints in this part.

(b) In complaint proceedings challenging utility pole attachment rates, terms, and conditions for pole attachment contracts entered into or renewed after the effective date of this section, there is a presumption that an incumbent local exchange carrier (or an association of incumbent local exchange carriers) is similarly situated to an attacher that is a telecommunications carrier (as defined in 47 U.S.C. 251(a)(5)) or a cable television system providing telecommunications services for purposes of obtaining comparable rates, terms, or conditions. In such complaint proceedings challenging pole attachment rates, there is a presumption that incumbent local exchange carriers (or an association of incumbent local exchange carriers) may be charged no higher than the rate determined in accordance with § 1.1406(e)(2). A utility can rebut either or both of the two presumptions in this paragraph (b) with clear and convincing evidence that the incumbent local exchange carrier receives benefits under its pole attachment agreement with a utility that materially advantages the incumbent local exchange carrier over other telecommunications carriers or cable television systems providing telecommunications services on the same poles.

6. Add section 1.1415 to read as follows:

§ 1.1415 Overlapping.

(a) *Prior approval.* A utility shall not require prior approval for: (i) an existing attacher that overlashes its existing wires on a pole; or (ii) for third party overlapping of an existing attachment that is conducted with the permission of an existing attacher.

(b) *Preexisting violations.* A utility may not prevent an attacher from overlapping because another existing attacher has not fixed a preexisting violation. A utility may not require an existing attacher that overlashes its existing wires on a pole to fix preexisting violations caused by another existing attacher.

(c) *Advance notice.* A utility may require no more than 15 days' advance notice of planned overlapping. If a utility requires advance notice for overlapping, then the utility must provide existing attachers with advance written notice of the notice requirement or include the notice requirement in the attachment agreement with the existing attacher. If after receiving advance notice, the utility determines that an overlap would create a capacity, safety, reliability, or engineering issue, it must provide specific documentation of the issue to the party seeking to overlap within the 15 day advance notice period and the party seeking to overlap must address any identified issues before continuing with the overlap either by modifying its proposal or by explaining why, in the party's view, a modification is unnecessary. A utility may not charge a fee to the party seeking to overlap for the utility's review of the proposed overlap.

(d) *Overlashers' Responsibility.* A party that engages in overlashing is responsible for its own equipment and shall ensure that it complies with reasonable safety, reliability, and engineering practices. If damage to a pole or other existing attachment results from overlashing or overlashing work causes safety or engineering standard violations, then the overlashing party is responsible at its expense for any necessary repairs.

(e) *Post-Overlashing Review.* An overlashing party shall notify the affected utility within 15 days of completion of the overlash on a particular pole. The notice shall provide the affected utility at least 90 days from receipt in which to inspect the overlash. The utility has 14 days after completion of its inspection to notify the overlashing party of any damage or code violations to its equipment caused by the overlash. If the utility discovers damage or code violations caused by the overlash on equipment belonging to the utility, then the utility shall inform the overlashing party and provide adequate documentation of the damage or code violations. The utility may either complete any necessary remedial work and bill the overlashing party for the reasonable costs related to fixing the damage or code violations or require the overlashing party to fix the damage or code violations at its expense within 14 days following notice from the utility.

APPENDIX B

Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),¹ an Initial Regulatory Flexibility Analysis (IRFA) was incorporated into the Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment (*Wireline Infrastructure Notice*) and into the Report and Order and Declaratory Ruling, and Further Notice of Proposed Rulemaking (*Wireline Infrastructure Order*) for the wireline infrastructure proceeding.² The Commission sought written public comment on the proposals in the *Wireline Infrastructure Notice* and in the *Wireline Infrastructure Order*, including comment on the IRFA. The Commission received no comments on the IRFA. Because the Commission amends its rules in this Order, the Commission has included this Final Regulatory Flexibility Analysis (FRFA). This present FRFA conforms to the RFA.³

A. Need for, and Objectives of, the Rules

2. In the *Wireline Infrastructure Notice*, the Commission continued its efforts to close the digital divide by removing barriers to broadband infrastructure investment. To this end, the Commission proposed numerous regulatory reforms to existing rules and procedures regarding pole attachments.⁴

3. On November 16, 2017, the Commission adopted the *Wireline Infrastructure Order*, which enacted reforms to pole attachment rules that: (1) bar utility pole owners from charging for certain capital costs that already have been recovered from make-ready fees;⁵ (2) set a 180-day shot clock for resolution of pole access complaints;⁶ and (3) grant incumbent local exchange carriers (LECs) reciprocal access to infrastructure controlled by other LECs.⁷ In addition, the Commission adopted reforms to speed the replacement of copper with fiber and Internet Protocol (OP) technologies.⁸ In the *Further Notice of Proposed Rulemaking*, the Commission sought comment on (1) additional steps to streamline the process for retiring legacy services and network change disclosure and discontinuance processes;⁹ (2) the treatment of overlashing by utilities;¹⁰ and (3) what actions the Commission can take to facilitate the rebuilding and repairing of broadband infrastructure after natural disasters.¹¹

4. Concurrently, the Commission's Broadband Deployment Advisory Committee (BDAC), a federal advisory committee chartered in 2017, formed five active working groups, as well as an ad hoc

¹ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996).

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

³ See 5 U.S.C. § 604.

⁴ See *Wireline Infrastructure Notice*, 32 FCC Rcd at 3266.

⁵ See *Wireline Infrastructure Order*, 32 FCC Rcd at 11131-32, paras. 7-8.

⁶ See *id.* at 11132-34, paras. 9-14.

⁷ See *id.* at 11134-37, paras. 51-21.

⁸ See *id.* at 11137-87, paras. 22-155.

⁹ See *id.* at 11187-94, paras. 156-159, 163-177.

¹⁰ See *id.* at 11188-89, paras. 160-62.

¹¹ See *id.* at 11194, paras. 178-79.

committee on rates and fees, to address the issues raised in the *Wireline Infrastructure Notice*.¹² During five public meetings, BDAC adopted recommendations related to competitive access to broadband infrastructure.¹³ These recommendations informed the Commission's policy decisions on pole attachment reform.

5. Pursuant to the objectives set forth in the *Wireline Infrastructure Notice*, this *Report and Order* and *Declaratory Ruling (Order)* adopts changes to Commission rules regarding pole attachments. The Order adopts changes to the current pole attachment rules that: (1) allow new attachers to perform all work, not reasonably likely to cause a service outage or facility damage, to prepare poles for new wireline attachments (make-ready work) in the communications space of a pole;¹⁴ (2) adopt a substantially shortened timeline for such application review and make-ready work (OTMR pole attachment timeline);¹⁵ (3) require new attachers to use a utility-approved contractor if a utility makes available a list of qualified contractors authorized to perform simple make ready work in the communications space;¹⁶ (4) create a more efficient pole attachment timeline;¹⁷ (5) enhance the new attacher's existing self-help remedy for surveys and make-ready work by extending it to all attachments (both wireless and wireline) above the communications space of a pole;¹⁸ (6) require new attachers to use utility-approved contractors when utilities and existing attachers miss their deadlines and the new attacher elects self-help to complete surveys and make-ready work that is complex or that involves work above the communications space on a pole;¹⁹ (7) require utilities to provide new attachers with detailed, itemized estimates and final invoices for all required make-ready work;²⁰ (8) codify the Commission's existing precedent that prohibits a pre-approval requirement for overlanding, and adopt a rule that allows utilities to establish reasonable advance notice requirements of up to 15 days for overlanding and holds overlanders responsible for ensuring that their practices and equipment do not cause safety or engineering issues;²¹ (9) establish a rebuttable presumption that, for newly-negotiated, newly-renewed, and evergreen pole attachment agreements between LECs and utilities, incumbent LECs will receive comparable pole attachment rates, terms, and conditions as similarly-situated telecommunications carriers or cable television system providing telecommunications services;²² and (10) establish that new attachers are not responsible for costs associated with bringing poles or third-party equipment into compliance with current safety and pole owner construction standards to the extent that such poles or third-party equipment were out of compliance prior to the new attachment.²³ The modifications to our pole attachment rules will facilitate deployment to and reduce barriers to access infrastructure by reducing costs and delays typically associated with the pole attachment process. Ultimately, these pole attachment reforms will contribute to increased broadband deployment, decreased costs for consumers, and increased service speeds.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

6. The Commission did not receive comments addressing the rules and policies proposed in

¹² See *supra* section I.

¹³ See *supra* section I.

¹⁴ See *supra* section III.A.1.a.

¹⁵ See *supra* section III.A.1.c.

¹⁶ See *supra* section III.A.1.b.

¹⁷ See *supra* section III.A.2.a.

¹⁸ See *supra* section III.A.2.b.

¹⁹ See *supra* section III.A.2.c.

²⁰ See *supra* section III.A.2.d.

²¹ See *supra* section III.A.3.

²² See *supra* section III.C.

²³ See *supra* section III.B.

the IRFAs in either the *Wireline Infrastructure Notice* or the *Wireline Infrastructure Order*.

C. Response to Comments by the Chief Counsel for Advocacy of the SBA

7. Pursuant to the Small Business Jobs Act of 2010, which amended the RFA, the Commission is required to respond to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration (SBA), and to provide a detailed statement of any change made to the proposed rules as a result of those comments.²⁴

8. The Chief Counsel did not file any comments in response to this proceeding.

D. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

9. The RFA directs agencies to provide a description and, where feasible, an estimate of the number of small entities that may be affected by the final rules adopted pursuant to the *Order*.²⁵ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”²⁶ In addition, the term “small business” has the same meaning as the term “small-business concern” under the Small Business Act.²⁷ 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.²⁸

10. The changes to our pole attachment rules affect obligations on utilities that own poles, telecommunications carriers and cable television systems that seek to attach equipment to utility poles, and other LECs that own poles.²⁹

11. *Small Businesses, Small Organizations, Small Governmental Jurisdictions.* Our actions, over time, may affect small entities that are not easily categorized at present. We therefore describe here, at the outset, three comprehensive small entity size standards that could be directly affected herein.³⁰ First, while there are industry specific size standards for small businesses that are used in the regulatory flexibility analysis, according to data from the SBA’s Office of Advocacy, in general a small business is an independent business having fewer than 500 employees.³¹ These types of small businesses represent 99.9% of all businesses in the United States which translates to 29.6 million businesses.³²

12. Next, the type of small entity described as a “small organization” is generally “any not-

²⁴ 5 U.S.C. § 604 (a)(3)

²⁵ See 5 U.S.C. § 604(a)(4).

²⁶ See 5 U.S.C. § 601(6).

²⁷ See 5 U.S.C. § 601(3) (incorporating by reference the definition of “small-business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

²⁸ See 15 U.S.C. § 632.

²⁹ The definitions of utility and telecommunications carrier for purposes of our pole attachment rules are found in 47 U.S.C. § 224(a)(1) and (a)(5), respectively.

³⁰ See 5 U.S.C. § 601(3)-(6).

³¹ See SBA, Office of Advocacy, “Frequently Asked Questions, Question 1 – What is a small business?” <https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2017-WEB.pdf> (Aug. 2017)

³² See SBA, Office of Advocacy, “Frequently Asked Questions, Question 2- How many small business are there in the U.S.?” <https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2017-WEB.pdf> (Aug. 2017).

for-profit enterprise which is independently owned and operated and is not dominant in its field.”³³ Nationwide, as of August 2016, there were approximately 356,494 small organizations based on registration and tax data filed by nonprofits with the Internal Revenue Service (IRS).³⁴

13. Finally, the small entity described as a “small governmental jurisdiction” is defined generally as “governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.”³⁵ U.S. Census Bureau data from the 2012 Census of Governments³⁶ indicate that there were 90,056 local governmental jurisdictions consisting of general purpose governments and special purpose governments in the United States.³⁷ Of this number there were 37,132 general purpose governments (county³⁸, municipal and town or township³⁹) with populations of less than 50,000 and 12,184 special purpose governments (independent school districts⁴⁰ and special districts⁴¹) with populations of less than 50,000. The 2012 U.S. Census Bureau data for most types of governments in the local government category show that the majority of these governments have populations of less than 50,000.⁴² Based on this data we estimate that at least 49,316 local government jurisdictions fall in the category of “small governmental jurisdictions.”⁴³

³³ 5 U.S.C. § 601(4).

³⁴ Data from the Urban Institute, National Center for Charitable Statistics (NCCS) reporting on nonprofit organizations registered with the IRS was used to estimate the number of small organizations. Reports generated using the NCCS online database indicated that as of August 2016 there were 356,494 registered nonprofits with total revenues of less than \$100,000. Of this number, 326,897 entities filed tax returns with 65,113 registered nonprofits reporting total revenues of \$50,000 or less on the IRS Form 990-N for Small Exempt Organizations and 261,784 nonprofits reporting total revenues of \$100,000 or less on some other version of the IRS Form 990 within 24 months of the August 2016 data release date. See <http://nccsweb.urban.org/tablewiz/bmf.php> where the report showing this data can be generated by selecting the following data fields: Show: “Registered Nonprofit Organizations”; By: “Total Revenue Level (years 1995, Aug to 2016, Aug)”; and For: “2016, Aug” then selecting “Show Results”.

³⁵ 5 U.S.C. § 601(5).

³⁶ See 13 U.S.C. § 161. The Census of Government is conducted every five years compiling data for years ending with “2” and “7.” See also Program Description Census of Government, <https://factfinder.census.gov/faces/affhelp/jsf/pages/metadata.xhtml?lang=en&type=program&id=program.en.COG#>.

³⁷ See U.S. Census Bureau, 2012 Census of Governments, Local Governments by Type and State: 2012 - United States-State, <https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG02.US01>. Local governmental jurisdictions are classified in two categories - General purpose governments (county, municipal and town or township) and Special purpose governments (special districts and independent school districts).

³⁸ See U.S. Census Bureau, 2012 Census of Governments, County Governments by Population-Size Group and State: 2012 - United States-States, <https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG06.US01>. There were 2,114 county governments with populations less than 50,000.

³⁹ See U.S. Census Bureau, 2012 Census of Governments, Subcounty General-Purpose Governments by Population-Size Group and State: 2012 - United States – States, <https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG07.US01>. There were 18,811 municipal and 16,207 town and township governments with populations less than 50,000.

⁴⁰ See U.S. Census Bureau, 2012 Census of Governments, Elementary and Secondary School Systems by Enrollment-Size Group and State: 2012 - United States-States, <https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG11.US01>. There were 12,184 independent school districts with enrollment populations less than 50,000.

⁴¹ See U.S. Census Bureau, 2012 Census of Governments, Special District Governments by Function and State: 2012 - United States-States, <https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG09.US01>. The U.S. Census Bureau data did not provide a population breakout for special district governments.

⁴² See U.S. Census Bureau, 2012 Census of Governments, County Governments by Population-Size Group and State: 2012 - United States-States, <https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG06.US01>; Subcounty General-Purpose Governments by Population-Size Group and State: 2012 - United States–States,

14. *Wired Telecommunications Carriers*. The U.S. Census Bureau defines this industry as “establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired communications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services, wired (cable) audio and video programming distribution, and wired broadband internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.”⁴⁴ The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees.⁴⁵ Census data for 2012 show that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees.⁴⁶ Thus, under this size standard, the majority of firms in this industry can be considered small.

15. *Local Exchange Carriers (LECs)*. Neither the Commission nor the SBA has developed a size standard for small businesses applicable to local exchange services. The closest applicable NAICS Code category is for Wired Telecommunications Carriers, as defined in paragraph 14 of this FRFA. Under that size standard, such a business is small if it has 1,500 or fewer employees.⁴⁷ Census data for 2012 show that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees.⁴⁸ The Commission therefore estimates that most providers of local exchange carrier service are small entities that may be affected by the rules adopted.

16. *Incumbent Local Exchange Carriers (incumbent LECs)*. Neither the Commission nor the SBA has developed a small business size standard for incumbent local exchange services. The closest applicable NAICS Code category is Wired Telecommunications Carriers as defined in paragraph 14 of this FRFA. Under that size standard, such a business is small if it has 1,500 or fewer employees.⁴⁹ According to Commission data, 3,117 firms operated in that year. Of this total, 3,083 operated with fewer than 1,000 employees.⁵⁰ Consequently, the Commission estimates that most providers of incumbent local

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<https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG07.US01>; and Elementary and Secondary School Systems by Enrollment-Size Group and State: 2012 - United States-States, <https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG11.US01>. While U.S. Census Bureau data did not provide a population breakout for special district governments, if the population of less than 50,000 for this category of local government is consistent with the other types of local governments the majority of the 38, 266 special district governments have populations of less than 50,000.

⁴³ *Id.*

⁴⁴ U.S. Census Bureau, 2012 NAICS Definitions, “517311 Wired Telecommunications Categories,” <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

⁴⁵ See 13 C.F.R. § 120.201, NAICS Code 517311.

⁴⁶ 2012 U.S. Economic Census, NAICS Code 517311, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ2&prodTpe=table.

⁴⁷ See 13 C.F.R. § 120.201, NAICS Code 517311, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ2&prodTpe=table.

⁴⁸ 2012 U.S. Economic Census, NAICS Code 517311, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ2&prodTpe=table.

⁴⁹ See 13 C.F.R. § 120.201, NAICS Code 517311.

⁵⁰ 2012 U.S. Economic Census, NAICS Code 517311, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ2&prodTpe=table

exchange service are small businesses that may be affected by the rules and policies adopted. One thousand three hundred and seven (1,307) Incumbent Local Exchange Carriers reported that they were incumbent local exchange service providers.⁵¹ Of this total, an estimated 1,006 have 1,500 or fewer employees.⁵²

17. *Competitive Local Exchange Carriers (competitive LECs), Competitive Access Providers (CAPs), Shared-Tenant Service Providers, and Other Local Service Providers.* Neither the Commission nor the SBA has developed a small business size standard for these service providers. The appropriate NAICS Code category is Wired Telecommunications Carriers, as defined in paragraph 14 of this FRFA. Under that size standard, such a business is small if it has 1,500 or fewer employees. U.S. Census data for 2012 indicate that 3,117 firms operated during that year. Of that number, 3,083 operated with fewer than 1,000 employees.⁵³ Based on this data, the Commission concludes that the majority of Competitive LECs, CAPs, Shared-Tenant Service Providers, and Other Local Service Providers are small entities. According to Commission data, 1,442 carriers reported that they were engaged in the provision of either competitive local exchange services or competitive access provider services.⁵⁴ Of these 1,442 carriers, an estimated 1,256 have 1,500 or fewer employees. In addition, 17 carriers have reported that they are Shared-Tenant Service Providers, and all 17 are estimated to have 1,500 or fewer employees.⁵⁵ In addition, 72 carriers have reported that they are Other Local Service Providers.⁵⁶ Of this total, 70 have 1,500 or fewer employees.⁵⁷ Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, Shared-Tenant Service Providers, and Other Local Service Providers are small entities that may be affected by the adopted rules.

18. *Interexchange Carriers (IXCs).* Neither the Commission nor the SBA has developed a definition for Interexchange Carriers. The closest NAICS Code category is Wired Telecommunications Carriers as defined in paragraph 14 of this FRFA. The applicable size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees.⁵⁸ According to Commission data, 359 companies reported that their primary telecommunications service activity was the provision of interexchange services.⁵⁹ Of this total, an estimated 317 have 1,500 or fewer employees and 42 have more than 1,500 employees.⁶⁰ Consequently, the Commission estimates that the majority of interexchange service providers are small entities that may be affected by the adopted rules.

19. *Other Toll Carriers.* Neither the Commission nor the SBA has developed a size standard for small businesses applicable to Other Toll Carriers. This category includes toll carriers that do not fall within the categories of interexchange carriers, operator service providers, prepaid calling card providers, satellite service carriers, or toll resellers. The closest applicable NAICS Code category is for Wired

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⁵¹ See Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, Trends in Telephone Service at 5-5, Tbl. 5.3 (2010), (*Trends in Telephone Service*).

⁵² *Id.*

⁵³ Employment Size of Firms for the U.S., 2012 Economic Census, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ5&prodType=table.

⁵⁴ See Trends in Telephone Service at 5-5, Tbl. 5.3.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ 13 C.F.R. § 121.201, NAICS Code 517311.

⁵⁹ See Trends in Telephone Service at 5-5, Tbl. 5.3.

⁶⁰ *Id.*

Telecommunications Carriers, as defined in paragraph 14 of this FRFA. Under that size standard, such a business is small if it has 1,500 or fewer employees.⁶¹ Census data for 2012 shows that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees.⁶² Thus, under this category and the associated small business size standard, the majority of Other Toll Carriers can be considered small. According to Commission data, 284 companies reported that their primary telecommunications service activity was the provision of other toll carriage.⁶³ Of these, an estimated 279 have 1,500 or fewer employees.⁶⁴ Consequently, the Commission estimates that most Other Toll Carriers that may be affected by our rules are small.

20. *Wireless Telecommunications Carriers (Except Satellite).* This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves, such as cellular services, paging services, wireless internet access, and wireless video services.⁶⁵ The appropriate size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees. For this industry, Census data for 2012 show that there were 967 firms that operated for the entire year. Of this total, 955 firms had fewer than 1,000 employees.⁶⁶ Thus under this category and the associated size standard, the Commission estimates that the majority of wireless telecommunications carriers (except satellite) are small entities. Similarly, according to internally developed Commission data, 413 carriers reported that they were engaged in the provision of wireless telephony, including cellular service, Personal Communications Service (PCS), and Specialized Mobile Radio (SMR) services.⁶⁷ Of this total, an estimated 261 have 1,500 or fewer employees.⁶⁸ Consequently, the Commission estimates that approximately half of these firms can be considered small. Thus, using available data, we estimate that the majority of wireless firms can be considered small.

21. *Cable Companies and Systems (Rate Regulation).* The Commission has developed its own small business size standards for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers nationwide.⁶⁹ Industry data indicate that there are currently 4,600 active cable systems in the United States.⁷⁰ Of this total, all but nine cable operators nationwide are small under the 400,000-subscriber size standard.⁷¹ In addition, under the Commission's rate regulation rules, a "small system" is a cable system serving 15,000 or fewer

⁶¹ 13 C.F.R. § 121.201, NAICS Code 517311.

⁶² Employment Size of Firms for the U.S., 2012 Economic Census, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ5&prodTtype=table.

⁶³ See Trends in Telephone Service at 5-5, Tbl. 5.3.

⁶⁴ *Id.*

⁶⁵ NAICS Code 517210 (2012), <https://www.census.gov/econ/isp/sampler.php?naicscode=517210&naicslevel=6#>.

⁶⁶ Employment Size of Firms for the U.S., 2012 Economic Census, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ5&prodTtype=table.

⁶⁷ See Trends in Telephone Service at 5-5, Tbl. 5.3.

⁶⁸ *Id.*

⁶⁹ 47 C.F.R. § 76.901(e)

⁷⁰ Federal Communications Commission, Assessment and Collection of Regulatory Fees for Fiscal Year 2014; Assessment and Collection of Regulatory Fees for Fiscal Year 2013; and Procedures for Assessment and Collection of Regulatory Fees, 80 Fed. Reg. 66815 (Oct. 30, 2015) (citing Aug. 15, 2015 Report from the Media Bureau based on data contained in the Commission's Cable Operations and Licensing System (COALS)). See www.fcc.gov/coals.

⁷¹ See SNL KAGAN, <https://www.snl.com/interactiveX/MyInteractive.aspx?mode=4&CDID=A-821-38606&KLPT=8> (subscription required).

subscribers.⁷² Current Commission records show 4,600 cable systems nationwide.⁷³ Of this total, 3,900 cable systems have fewer than 15,000 subscribers, and 700 systems have 15,000 or more subscribers, based on the same records.⁷⁴ Thus, under this standard as well, we estimate that most cable systems are small entities.

22. *Cable System Operators (Telecom Act Standard).* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is “a cable operator that, directly or through an affiliate, serves in the aggregate fewer than one percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000 are approximately 52,403,705 cable video subscribers in the United States today.”⁷⁵ Accordingly, an operator serving fewer than 524,037 subscribers shall be deemed a small operator if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.⁷⁶ Based on available data, we find that all but nine incumbent cable operators are small entities under this size standard.⁷⁷ We clarify that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million.⁷⁸ Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed \$250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under *the* definition in the Communications Act.

23. *All Other Telecommunications.* “All Other Telecommunications” is defined as follows: “This U.S. industry is comprised of establishments that are primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Establishments providing Internet services or voice over Internet protocol (VoIP) services via client supplied telecommunications connections are also included in this industry.”⁷⁹ The SBA has developed a small business size standard for “All Other Telecommunications,” which consists of all such firms with gross annual receipts of \$32.5 million or less.⁸⁰ For this category, Census Bureau data for 2012 show that there were 1,442 firms that operated for the entire year. Of those firms, a total of 1,400 had annual

⁷² 47 C.F.R. § 76.901(c).

⁷³ Federal Communications Commission, Assessment and Collection of Regulatory Fees for Fiscal Year 2014; Assessment and Collection of Regulatory Fees for Fiscal Year 2013; and Procedures for Assessment and Collection of Regulatory Fees, 80 Fed. Reg. 66815 (Oct. 30, 2015) (citing August 15, 2015 Report from the Media Bureau based on data contained in the Commission’s Cable Operations and Licensing System (COALS)). See www.fcc.gov/coals.

⁷⁴ *Id.*

⁷⁵ *Assessment and Collection of Regulatory Fees for Fiscal Year 2016, Notice of Proposed Rulemaking*, 31 FCC Rcd 5757, Appendix E para. 23 (2016) (citing Office of Management and Budget (OMB) Memorandum M-10-06, Open Government Directive, Dec. 8, 2009).

⁷⁶ 47 C.F.R. § 76.901(f).

⁷⁷ *Assessment & Collection of Regulatory Fees for Fiscal Year 2016, Notice of Proposed Rulemaking*, 31 FCC Rcd 5757, Appx. E para. 23 (2016).

⁷⁸ The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to section 76.901(f) of the Commission's rules. See 47 C.F.R. § 76.901(f).

⁷⁹ NAICS Code 517919 (2012), <https://www.census.gov/econ/isp/sampler.php?naicscode=517919&naicslevel=6>.

⁸⁰ 13 C.F.R. § 121.201; NAICS Code 517919, <https://www.census.gov/econ/isp/sampler.php?naicscode=517919&naicslevel=6>.

receipts less than \$25 million.⁸¹ Consequently, we conclude that the majority of All Other Telecommunications firms can be considered small.

24. *Electric Power Generation, Transmission and Distribution.* The Census Bureau defines this category as follows: “This industry group comprises establishments primarily engaged in generating, transmitting, and/or distributing electric power. Establishments in this industry group may perform one or more of the following activities: (1) operate generation facilities that produce electric energy; (2) operate transmission systems that convey the electricity from the generation facility to the distribution system; and (3) operate distribution systems that convey electric power received from the generation facility or the transmission system to the final consumer.”⁸² This category includes electric power distribution, hydroelectric power generation, fossil fuel power generation, nuclear electric power generation, solar power generation, and wind power generation. The SBA has developed a small business size standard for firms in this category based on the number of employees working in a given business.⁸³ According to Census Bureau data for 2012, there were 1,742 firms in this category that operated for the entire year.⁸⁴

25. *Natural Gas Distribution.* This economic census category comprises: “(1) establishments primarily engaged in operating gas distribution systems (e.g., mains, meters); (2) establishments known as gas marketers that buy gas from the well and sell it to a distribution system; (3) establishments known as gas brokers or agents that arrange the sale of gas over gas distribution systems operated by others; and (4) establishments primarily engaged in transmitting and distributing gas to final consumers.”⁸⁵ The SBA has developed a small business size standard for this industry, which is all such firms having 1,000 or fewer employees.⁸⁶ According to Census Bureau data for 2012, there were 422 firms in this category that operated for the entire year.⁸⁷ Of this total, 399 firms had employment of fewer than 1,000 employees, 23 firms had employment of 1,000 employees or more, and 37 firms were not operational.⁸⁸ Thus, the majority of firms in this category can be considered small.

26. *Water Supply and Irrigation Systems.* This economic census category “comprises establishments primarily engaged in operating water treatment plants and/or operating water supply systems. The water supply system may include pumping stations, aqueducts, and/or distribution mains.

⁸¹ U.S. Census Bureau, 2012 *Economic Census of the United States*, Table EC0751SSSZ1, Information: Subject Series - Establishment and Firm Size: Receipts Size of Firms for the United States: 2012 NAICS Code 517919, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ1&prodType=table.

⁸² U.S. Census Bureau, 2017 NAICS Definitions, “2211 Electric Power Generation, Transmission and Distribution,” https://www.census.gov/eos/www/naics/2017NAICS/2017_NAICS_Manual.pdf.

⁸³ U.S. Small Business Administration, Table of Small Business Size Standards Matched to North American Classification System Codes, “Sector 22 - Utilities” at 5 (2016), https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf.

⁸⁴ U.S. Census Bureau, 2012 Economic Census, Subject Series: Utilities, “Establishment and Firm Size: Summary Statistics by Employment Size of Firms for the U.S.: 2012,” NAICS codes 221111, 221112, 221113, 221114, 221115, 221116, 221117, 221118, 22112, 221121, (issued Mar. 2016), <https://www.census.gov/data/tables/2012/econ/census/utilities.html>.

⁸⁵ U.S. Census Bureau, 2017 NAICS Definitions, “221210 Natural Gas Distribution,” https://www.census.gov/eos/www/naics/2017NAICS/2017_NAICS_Manual.pdf.

⁸⁶ U.S. Small Business Administration, Table of Small Business Size Standards Matched to North American Classification System Codes, “Sector 22 - Utilities” at 5 (2016), https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf.

⁸⁷ U.S. Census Bureau, 2012 Economic Census, Subject Series: Utilities, “Establishment and Firm Size: Summary Statistics by Employment Size of Firms for the U.S.: 2012,” NAICS code 2212 (issued Mar. 2016), <https://www.census.gov/data/tables/2012/econ/census/utilities.html>.

⁸⁸ *Id.*

The water may be used for drinking, irrigation, or other uses.”⁸⁹ The SBA has developed a small business size standard for this industry, which is all such firms having \$27.5 million or less in annual receipts.⁹⁰ According to Census Bureau data for 2012, there were 3,261 firms in this category that operated for the entire year.⁹¹ Of this total, 3,035 firms had annual sales of less than \$25 million⁹² Thus, the majority of firms in this category can be considered small.

E. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

27. *One-Touch Make Ready (OTMR) Alternative Pole Attachment Process.* The Order adopts an OTMR pole attachment alternative to the Commission’s existing pole attachment timeline. New attachers may perform all simple make-ready work required to accommodate new wireline attachments in the communications space on a pole. First, any OTMR work will be performed by a utility-approved contractor, although a new attacher can use its own qualified contractor to perform OTMR work when the utility does not provide a list of approved contractors. Second, new attachers must provide advanced notice and allow representatives of existing attachers and the utility a reasonable opportunity to be present when OTMR surveys and make-ready work are performed. Third, new attachers must allow existing attachers and the utility the ability to inspect and request any corrective measures soon after the new attacher performs the OTMR work.

28. The Order sets forth that the OTMR process begins upon utility receipt of a complete application by a new attacher to attach to its facilities. A complete application is defined as one that provides the utility with the information necessary under its procedures, as specified in a master service agreement or in publicly-released requirements at the time of submission of the application, to begin to survey the affected poles. The Order further establishes that a utility has ten business days after receipt of a pole attachment application to determine if the application is complete and notify the attacher of that decision. If the utility notifies the attacher that its application is not complete within the ten business-day review period, then the utility must specify where and how the application is deficient. If the utility provides no response within ten business days, or if the utility rejects the application as incomplete but fails to specify any deficiencies in the application, then the application is deemed complete. If the utility timely notifies the attacher that its application is incomplete and specifies the deficiencies, then a resubmitted application need only supplement the previous application by addressing the issues identified by the utility, and the application will be deemed complete within five business days after its resubmission, unless the utility specifies which deficiencies were not addressed. A new attacher may follow the resubmission procedure as many times as it chooses, so long as in each case it makes a bona fide attempt to correct the issues identified by the utility. A utility must respond to new attachers within 15 days of receiving complete pole attachment, or within 30 days for larger requests.

29. The Order provides that under the OTMR process, it is the responsibility of the new attacher to conduct a survey of the affected poles to determine the make-ready work to be performed. In performing a field inspection as part of any pre-construction survey, the new attacher must permit representatives of the utility and any existing attachers potentially affected by the proposed make-ready

⁸⁹ U.S. Census Bureau, 2017 NAICS Definitions, “221310 Water Supply and Irrigation Systems,” https://www.census.gov/eos/www/naics/2017NAICS/2017_NAICS_Manual.pdf.

⁹⁰ U.S. Small Business Administration, Table of Small Business Size Standards Matched to North American Classification System Codes, “Sector 22 - Utilities” at 5 (2016), https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf.

⁹¹ U.S. Census Bureau, 2012 Economic Census, Subject Series: Utilities, “Establishment and Firm Size: Summary Statistics by Employment Size of Firms for the U.S.: 2012,” NAICS code 221310 (issued Mar. 2016), <https://www.census.gov/data/tables/2012/econ/census/utilities.html>.

⁹² U.S. Census Bureau, 2012 Economic Census, Subject Series: Utilities, “Establishment and Firm Size: Summary Statistics by Revenue Size of Firms for the U.S.: 2012,” NAICS code 221310 (issued Mar. 2016), <https://www.census.gov/data/tables/2012/econ/census/utilities.html>.

work to be present for the survey, using commercially reasonable efforts to provide advance notice of the date, time, and location of the survey of not less than three (3) business days.

30. The Order requires that the new attacher ensures that its contractor determines whether the make-ready work identified in the survey is simple or complex, subject to an electric utility's right to reasonably object to the determination. The new attacher – if it wants to use the OTMR process and is eligible to do so based on the survey – must elect OTMR in its pole attachment application and identify in its application the simple make-ready work to be performed. The Order requires an electric utility that wishes to object to a simple make-ready determination to raise such an objection during the 15-day application review period (or within 30 days in the case of larger orders). Any such objection by the electric utility is final and determinative, so long as it is specific and in writing, includes all relevant evidence and information supporting its decision, provides a good faith explanation of how such evidence and information relate to a determination that the make-ready is not simple. In this case, the work is deemed complex and must follow the existing pole attachment timeline that is modified in this Order. If the make-ready work involves a mix of simple and complex work, then the new attacher may elect to bifurcate the work and must submit separate applications for simple and complex work.

31. The Order provides that the new attacher can elect to proceed with the necessary simple make-ready work by giving 15 days' prior written notice to the utility and all affected existing attachers. The new attacher may provide the required 15-day notice any time after the utility deems its pole attachment application complete. If the new attacher cannot start make-ready work on the date specified in its 15-day notice, then the new attacher must provide 15 days' advance notice of its revised make-ready date. The new attacher's notice must provide representatives of the utility and existing attachers: (1) the date and time of the make-ready work, (2) a description of the make-ready work involved, (3) a reasonable opportunity to be present when the make-ready work is being performed, and (4) the name of the contractor chosen by the new attacher to perform the make-ready work. Further, the new attacher must notify the existing attacher immediately if the new attacher's contractor damages another company's or the utility's equipment or causes an outage that is reasonably likely to interrupt the provision of service.

32. Finally, the Order requires the new attacher to provide notice to the utility and affected existing attachers within 15 days after OTMR make-ready work is completed on a particular pole. In its post-make-ready notice, the new attacher must provide the utility and existing attachers at least a 90-day period for the inspection of make-ready work performed by the new attacher's contractors. The Order requires the utility and the existing attachers to notify the new attacher of any damage or any code violations caused to their equipment by the new attacher's make-ready work and provide adequate documentation of the damage or violations within 14 days after any post-make ready inspection. The utility or existing attacher can either complete any necessary remedial work and bill the new attacher for reasonable costs to fix the damage or violations, or require the new attacher to fix the damage at its expense within 14 days following notice from the utility or existing attacher.

33. The Order also establishes that new attachers must use a utility-approved contractor to perform OTMR if a utility makes available a list of qualified contractors authorized to perform simple make-ready work in the communications space of its poles. New and existing attachers may request that contractors meeting the minimum qualification requirements be added to the utility's list and utilities may not unreasonably withhold consent to add a new contractor to the list. To be reasonable, a utility's decision to withhold consent must be prompt, set forth in writing that describes the basis for rejection, nondiscriminatory, and based on fair application of commercially reasonable requirements for contractors relating to issues of safety or reliability. If the use of an approved contractor is not required by the utility or no approved contractor is available within a reasonable time period, then the Order allows new attachers to use qualified contractors of their choosing to perform simple make-ready work in the communications space of poles. The utility may mandate additional commercially reasonable requirements for contractors relating to issues of safety and reliability, but such requirements must clearly communicate the safety or reliability issue, be non-discriminatory, in writing, and publicly available. New attachers must provide the name of their chosen contractor in the three-business-day advance notice

for surveys or the 15-day notices sent to utilities and existing attachers in advance of commencing OTMR work. The utility may veto any contractor chosen by the new attacher as long as the veto is based on reasonable safety or reliability concerns related to the contractor's ability to meet one or more of the minimum qualifications or the utility's previously posted safety standards, and the utility identifies at least one qualified contractor available to do the work. When vetoing an attacher's chosen contractor, the utility must identify at least one qualified contractor available to do the work. The utility must exercise its veto within either the three-business-day notice period for surveys or the 15-day notice period for make-ready. The objection by the utility is determinative and final.

34. The utility or new attacher must certify to the utility, within either the three-business-day notice period for surveys or the 15-day notice period for make-ready, that any contractors perform OTMR meet the following minimum requirements: (1) follow published safety and operational guidelines of the utility, if available, but if unavailable, the contractor agrees to follow NESC guidelines; (2) read and follow licensed-engineered pole designs for make-ready work, if required by the utility; (3) follow all local, state, and federal laws and regulations including, but not limited to, the rules regarding Qualified and Competent Persons under the requirements of the Occupational and Safety Health Administration (OSHA) rules; (4) meet or exceed any uniformly applied and reasonable safety record thresholds set by the utility, if made available, *i.e.*, the contractor does not have an unsafe record of significant safety violations or worksite accidents; and (5) be adequately insured or be able to establish an adequate performance bond for the make-ready work it will perform, including work it will perform on facilities owned by existing attachers. The utility may mandate additional commercially reasonable requirements for contractors relating to issues of safety and reliability, but such requirements must be non-discriminatory, in writing, and publicly-available (*i.e.*, on the utility's website).

35. *Existing Pole Attachment Process Reforms.* The Order makes targeted changes to the Commission's existing pole attachment timeline for attachments that are not eligible for the OTMR process and attachers that prefer the existing process. These reforms include revising the definition of a complete pole attachment application and establishing a timeline for a utility's determination whether application is complete; requiring utilities to provide at least three business days' advance notice of any surveys to the new attacher; establishing a 30-day deadline for all make-ready work in the communications space; streamlining the utility's notice requirements; eliminating the 15-day utility make-ready period for communications space attachments; streamlining the utility's notice requirements; requiring utilities to provide detailed estimates and final invoices to new attachers regarding make-ready costs; enhancing the new attacher's self-help remedy by making the remedy available for surveys and make-ready work for all attachments anywhere on the pole in the event that the utility or the existing attachers fail to meet the required deadlines; and revising the contractor selection process for a new attacher's self-help work.

36. The Order retains the existing requirement that the pole attachment timeline begins upon utility receipt of a complete application to attach facilities to its poles, but revises the definition of a complete application to an application that provides the utility with the information necessary under its procedures, as specified in a master service agreement or in publicly-released requirements at the time of submission, to begin to survey the affected poles. The Order then adopts the same timeline as set out in the OTMR-process for a utility to determine whether a pole attachment application is complete.

37. The Order also requires a utility to permit the new attacher and any existing attachers potentially affected by the new attachment to be present for any pole surveys. The utility must use commercially reasonable efforts to provide at least three business days' advance notice of any surveys to the new attacher and each existing attacher, including the date, time, location of the survey, and the name of the contractor performing the survey. The Order provides that the utility may meet the survey requirement of our existing timeline by electing to use surveys previously prepared on the poles in question by new attachers.

38. The Order amends the existing make-ready timeline by (1) reducing the deadlines for both simple and complex make-ready work from 60 to 30 days (and from 105 to 75 for large requests in

the communications space); and (2) eliminating the optional 15-day extension for the utility to complete communications space make-ready work. The Order maintains the current make-ready deadline of 90 days (and 135 days for large requests) for make-ready above the communications space. However, for all attachments, the Order retains as a safeguard our existing rule allowing utilities to deviate from the make-ready timelines for good and sufficient cause when it is infeasible for the utility to complete make-ready work within the prescribed timeframe. Further, an existing attacher may deviate from the 30-day deadline for complex make-ready in the communications space (or the 75-day deadline in the case of larger orders) for reasons of safety or service interruption that renders it infeasible for the existing attacher to complete complex make-ready by the deadline. An existing attacher that so deviates must immediately notify, in writing, the new attacher and other affected existing attachers, identify the affected poles, and include a detailed explanation of the basis for the deviation and a new completion date, which cannot extend beyond 60 days from the date of the utility make-ready notice to existing attachers (or 105 days in the case of larger orders). The existing attacher cannot deviate from the complex make-ready time limits for a period longer than necessary to complete make-ready on the affected poles. If complex make-ready is not complete within 60 days from the date that the existing attacher sends notice to the new attacher, the new attacher can complete the work using a utility-approved contractor. Existing attachers must act in good faith in obtaining an extension. The Order also provides that when a utility provides the required make-ready notice to existing attachers, then it must provide the new attacher with a copy of the notice, plus the contact information of existing attachers to which the notices were sent, and thereafter the new attacher (rather than the utility) must take responsibility for encouraging and coordinating with existing attachers to ensure completion of make-ready work on a timely basis.

39. Expanding upon the Commission's existing make-ready cost estimate requirement for utilities, the Order requires a utility to detail all make-ready cost estimates and final invoices on a per-pole basis where requested by the new attacher. Fixed costs that are not necessarily charged on a per-pole basis may be submitted on a per-job basis, rather than a pole-by-pole basis, even where a pole-by-pole estimate or invoice is requested. As part of the detailed estimate, the utility is required to disclose to the new attacher its projected material, labor, and other related costs that form the basis of its estimate, including specifying what, if any costs, the utility is passing through to the new attacher from the utility's use of a third-party contractor. The utility must also provide documentation that is sufficient to determine the basis of all charges in the final invoice, including any material, labor and other related costs. If a utility completes make-ready and the final cost of the work does not differ from the estimate, it is not required to provide the new attacher with the invoice.

40. To increase broadband deployment, the Order modifies our existing pole attachment rules by extending a new attacher's self-help remedy for surveys and make-ready work to all attachments above the communications space, including the installation of wireless 5G small cells, when the utility or existing attachers have not met make-ready work deadlines. To address the safety concerns of utilities with regard to self-help work, the Order requires that new attachers, when invoking the self-help remedy, (1) use a utility-approved contractor to do the make-ready work; (2) provide no less than three business days advance notice for self-help surveys and five business days advance notice of when self-help make-ready work will be performed and a reasonable opportunity to be present; (3) provide notice to the utility and existing attachers no later than 15 days after make-ready is complete on a particular pole so that they have an opportunity to inspect the make-ready work. The advance notice must include the date and time of the work, nature of the work, and the name of the contractor being used by the new attacher. The new attacher is required to provide immediate notice to the affected utility and existing attachers if the new attacher's contractor damages equipment or causes an outage that is reasonably likely to interrupt the provision of service.

41. The Order adopts a contractor selection process for self-help that requires a new attacher electing self-help for simple work in the communications space to select a contractor from a utility-maintained list of qualified contractors that meet the same safety and reliability criteria as contractors authorized to perform OTMR work, where such a list is available. New and existing attachers may request the addition to the list of any contractor that meets the minimum qualification requirements and

the utility may not unreasonably withhold consent. If no list is available or no approved contractor is available within a reasonable time period, the new attacher must select a contractor that meets the same safety and reliability criteria as contractors authorized to perform OTMR work and any additional non-discriminatory, written, and publicly-available criteria relating to safety and reliability that the utility specifies. The utility may veto the new attacher's contractor selection so long as such veto is prompt, set forth in writing that describes the reasonable basis for rejection, nondiscriminatory, and based on fair application of commercially reasonable requirements for contractors relating to issues of safety and reliability. Additionally, the utility must offer another available, qualified contractor. For complex work and work above the communications space, the Order requires (1) the utility to make available and keep up-to-date reasonably sufficient list of contractors it authorizes to perform complex and non-communications space self-help surveys and make-ready work; and (2) the new attacher to choose a contractor from the utility's list. New and existing attachers may request that qualified contractors be added to the utility's list and that the utility may not unreasonably withhold its consent for such additions. A utility's decision to withhold consent must be prompt, set forth in writing that describes the reasonable basis for the rejection, nondiscriminatory, and based on fair application of commercially reasonable requirements for contractors relating to issues of safety.

42. *Additional Pole Attachment Reforms.* The Order codifies the Commission's existing precedent that prohibits a pre-approval requirement for overlashing. In addition, the Order adopts a rule on overlashing that allows utilities to establish a reasonable 15-day advance notice requirement, and holds overlashers responsible for ensuring that their practices and equipment do not cause safety or engineering issues. If after receiving advance notice, a utility determines that an overlash create a capacity, safety, reliability, or engineering issue, it must provide specific documentation of the issue to the party seeking to overlash within the 15 day advance notice period and the party seeking to overlash must address any identified issues before continuing with the overlash either by modifying its proposal or by explaining why, in the party's view, a modification is unnecessary. The Order also provides that a utility may not charge a fee to the party seeking to overlash for the utility's review of the proposed overlash. The Order also includes a post-overlashing review process where an overlashing party is required to notify the affected utility within 15 days of completion of the overlash on a particular pole. The notice must provide the affected utility 90 days from receipt in which to inspect the overlash. The utility has 14 days after completion of its inspection to notify the overlashing party of any damage to its equipment caused by the overlash. If the utility discovers damage caused by the overlash on equipment belonging to the utility, then the utility must inform the overlashing party and provide adequate documentation of the damage. The Order sets forth that the utility may either (A) complete any necessary remedial work and bill the overlashing party for the reasonable costs related to fixing the damage, or (B) require the overlashing party to fix the damage at its expense within 14 days following notice from the utility.

43. The Order provides that a utility may not prevent an attacher from overlashing because another attacher has not fixed a preexisting violation or require an existing attacher that overlashes its existing wires on a pole to fix preexisting violations caused by another existing attacher. The Order sets forth that new attachers are not responsible for the costs associated with bringing poles or third-party equipment into compliance with current safety and pole owner construction standards to the extent such poles or third-party equipment were out of compliance prior to the new attachment. Further, utilities may not deny new attachers access to the pole solely based on safety concerns arising from a pre-existing violation. They also cannot delay completion of make-ready while the utility attempts to identify or collect from the party who should pay for correction of the preexisting violation. The Order also establishes a presumption that, for newly-negotiated, newly renewed, and evergreen pole attachment agreements between incumbent LECs and utilities, an incumbent LEC will receive comparable pole attachment rates, terms, and conditions as a similarly-situated telecommunications carrier or telecommunications attacher, unless the utility can rebut the presumption with clear and convincing evidence that the incumbent LEC receives net benefits under its pole attachment agreement with the utility, that materially advantage the incumbent LEC over other telecommunications attachers. If the presumption is rebutted, the pre-2011 *Pole Attachment Order* telecommunications carrier rate is the maximum rate that the utility and incumbent LEC may negotiate.

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

44. In this Order, the Commission modifies its pole attachment rules to improve the efficiency and transparency of the pole attachment process, as well as to increase access to infrastructure for certain types of broadband providers. Overall, we believe the actions in this document will reduce burdens on the affected carriers, including any small entities.

45. The Order also finds that adopting the OTMR process will reduce delays and costs for new attachers, enhance competition, improve public safety and reliability of networks, and accelerate broadband buildout. As detailed in the Order, the Commission rejects alternative proposals, such as “right-touch, make-ready” and NCTA’s “ASAP” proposal – which merely modify the current framework. These approaches diffuse responsibility among parties that lack the new attacher’s incentive to ensure that the work is done quickly, cost effectively, and properly. Further, these proposals fail to address the existing problems created by sequential make-ready, such as numerous separate climbs and construction stoppages in the public-rights-of-way.

46. As described in the Order, applying targeted changes to the existing pole attachment process, such as a more efficient pole attachment timeline, detailed and itemized estimates and final invoices on a per-pole basis, and an enhanced self-help remedy, will increase broadband deployment by reducing the number of unreasonable delays, and encouraging transparency and collaboration between all interested parties at an early stage in the pole attachment process. The Order also concluded that codifying the Commission’s existing precedent prohibiting a pre-approval requirement for overloading, and adopting a rule allowing utilities to require advance notice of overloading will eliminate the industry uncertainty that currently exists regarding overloading, a practice that is essential to broadband deployment. In addition, by eliminating outdated disparities between the pole attachment rates that incumbent carriers must pay compared to other similarly-situated cable and telecommunications attachers, the Order sought to increase incumbent LEC access to infrastructure by addressing the bargaining disparity between utilities and incumbent LECs.

G. Report to Congress

47. The Commission will send a copy of the *Report and Order*, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.⁹³ In addition, the Commission will send a copy of the *Report and Order*, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the Order and FRFA (or summaries thereof) will also be published in the Federal Register.⁹⁴

⁹³ See 5 U.S.C. § 801(a)(1)(A).

⁹⁴ See 5 U.S.C. § 604(b).

**STATEMENT OF
CHAIRMAN AJIT PAI**

Re: *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84; *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79.

Last year, I visited Detroit. Some long ago wrote off the Motor City, but as I saw for myself, there's an unmistakable energy and optimism to the place. Part of the reason why is Rocket Fiber. This small startup is aiming to provide high-speed, high-quality Internet access to residents and increase competition along the way. From a boxing ring to a mobile van that they use to sign up customers, I could feel the enthusiasm for the company's work, and by extension, the city's future.

But Rocket Fiber faces some big hurdles—among them the difficulty of attaching its broadband equipment to utility poles. For a competitive entrant, especially a small company, breaking into the market can be hard, if not impossible, if your business plan relies on other entities to make room for you on those poles. Today, a broadband provider that wants to attach fiber or other equipment to a pole first must wait for, and pay for, each existing attacher to sequentially move existing equipment and wires. This can take months. And the bill for multiple truck rolls adds up. For companies of any size, pole attachment problems represent one of the biggest barriers to broadband deployment.

All of this got me thinking about a policy that would allow a single entity to do the requisite work on the utility pole—a policy commonly known as “one-touch make-ready.” Today, we adopt one-touch make-ready (OTMR) in order to help accelerate broadband deployment and competition across the country.

OTMR promises to substantially lower the cost and shorten the time to deploy broadband on utility poles. It allows a new provider who wants to attach to a pole to move all the wires and equipment in just one “touch.” It's a bit like having to go to the grocery, the dry cleaner, and the bank. The slow way to do this would be to visit each business but return home each time. The rational thing we all do is to do each errand, one after the other, all on one trip. That's essentially what OTMR is.

Also, we make clear today that it is a violation of federal law for states or localities to impose moratoria on broadband deployment. There may be many reasonable ways local governments can regulate network deployments in their jurisdiction, but blocking competition and better services for American consumers is not one of them.

Let me address several claims about the OTMR process which have been raised. Some have said that state law will not provide sufficient protection for existing attachers and that we need new attachers to broadly indemnify existing attachers. I certainly believe new attachers should be responsible for damage they cause, which is why we've put in place protections. But Google Fiber has explained that blanket indemnification “would tilt the playing field even further toward existing attachers” and “would expose new attachers to potentially unbounded liability—and without any corresponding benefit.”

It's also been suggested that OTMR undercuts collective bargaining agreements. Again, Google Fiber points out that “no other proposal is more self-serving than . . . insistence that new attachers be obligated to honor existing attachers' collective bargaining agreements Google Fiber has no problem using union contractors that have been approved by the pole owner. But the reality is that, in many areas, no such contractors exist; instead, in some of these places, the only [union] members covered by . . . collective bargaining agreements are [the] employees [of existing attachers].”

And we've heard that an existing attacher should have veto rights on determinations that make-ready work is simple. Google Fiber lays out how this “would gut OTMR by giving existing attachers the power to decide when OTMR can be used. This would perpetuate the existing power imbalance, in which incumbent attachers have the ability to delay and even prevent deployment of new networks by

competitors.” “By allowing existing attachers to both unilaterally determine whether make-ready is simple or complex . . . , [this proposal] would obliterate those few remedies available to new attachers under the current system and would destroy new attachers’ ability to have any control over the timing of their own deployment.”

This Commission is heading forward, not backward. We’re favoring competition, not status quo. We’re embracing the promise of new entrants that want nothing more than a chance to compete, not the fears of those who always find a way to say no.

Finally, we would not have arrived on this pro-competitive path without the tireless work of the Broadband Deployment Advisory Committee, or BDAC. One of the major recommendations from the BDAC’s work was that the Commission should adopt an OTMR regime. And I’m pleased that today’s *Order* largely follows the path prescribed by the BDAC. I know there were many long hours of debate, and plenty of genuine disagreements, but at the end of the day the BDAC was able to coalesce around a solid, balanced policy. I promised the members of the BDAC early on that they wouldn’t just be marking time. And I stood by my word. Make-ready is not make-work—it is a major step toward better, faster, and cheaper Internet access for all Americans.

Lastly, I want to thank the staff who have worked so hard on this item. From the Wireline Competition Bureau: Annick Banoun, Matthew Collins, Adam Copeland, Dan Kahn, Billy Hupp, Lisa Hone, Dick Kwiatkowski, Kris Monteith, Terri Natoli, Eric Ralph, Mike Ray, Jaclyn Rosen, Marvin Sacks, Deborah Salons, Mason Shefa, Anthony Patrone, and John Visclosky; from the Wireless Telecommunications Bureau: Garnet Hanly, Betsy McIntyre, Jiaming Shang, David Sieradzki, Don Stockdale, and Suzanne Tetreault; from the Enforcement Bureau: Michael Engel, Lisa Griffin, Rosemary McEnery, and Lisa Saks; from the Office of General Counsel: Malena Barzilai, Ashley Boizelle, Tom Johnson, Billy Layton, and Rick Mallen; and from the Office of Strategic Planning & Policy Analysis, Paul LaFontaine.

**STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY**

Re: *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84; *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79.

I believe there is near universal agreement, certainly among my colleagues here at the FCC, that broadband services of sufficient functionality should be available to all Americans that seek access. If used properly, broadband can bring enormous benefits to individuals and society as a whole. From critical news and information to educational materials and entertainment, broadband can improve the lives of our citizens in ways not imagined just a few decades ago. It is also completely interwoven into almost every aspect of the business and commercial world. And, the technologies in the works and on drawing boards suggest it will be an astronomically more connected universe.

Persistent and known obstacles, however, are preventing many Americans from accessing private sector broadband services. In many cases, the economics make it incredibly challenging to extend network build-outs to the farthest corners of our nation. It's why I have spent so much time working to modernize and strengthen the Commission's Connect America Fund and have pushed hard for the initiation of the Remote Areas Fund. Similarly, a large percentage of State and local governments are due kudos for stepping forward to make the process for obtaining broadband deployment approvals, to the extent it is necessary, more efficient.

At the same time, a select group of State and local governments have defied reason and actually slowed down or stifled deployment work to feed their own egos, power, or push for shakedown bounties. This is unacceptable. Today, the Commission takes its second step in our larger effort to confront the practices of these bad actors. This has been over a 30-year fight with some of these communities and the associations representing them, so you will excuse me if I don't buy the arguments that all it takes is more cooperation and time working together.

While I support the one-touch make-ready (OTMR) provisions, I want to start my comments on the second portion of today's item, the moratorium section. Anyone who has worked in this space for quite a while knows that State and local governments have been on notice for decades that Congress wanted to end: 1) moratoriums on wireless towers and antennas, and 2) tower siting decisions based on aesthetics. Let me make this clear for those local officials who may not have been listening in the past: NO MORATORIUMS; NO MORATORIUMS; ABSOLUTELY NO MORATORIUMS.

It is beyond me that we are still having to deal with this outrageous practice after so many years, especially given how important broadband can be to the very citizens residing in these areas. In addition to the existing provisions of section 332, today's item declares section 253 as a statutory authority for prohibiting applicable moratoriums. While I know it will be challenged in court, my simple reaction is hallelujah. Every ounce of Congressional authority provided to the Commission must be used as a counterforce against moratoriums, which is just another word for "mindless delay" or "extortion attempts to generate some local officials' wish list." And, the record is replete with examples of such out-of-bound practices, such as digital inclusion funds, that unnecessarily create political slush funds and raise the cost of service for consumers.

During to the first portion of the item, I want to thank the Chairman and his team for making a few key edits to the one touch make ready provisions. My revisions will not fundamentally alter the direction of the item or undermine its necessary efforts. Instead, it will smooth some rougher parts of the OTMR by bolstering the recourse for damages or non-compliance resulting from OTMR work, ensuring that make-ready work damage to existing attachers' facilities are rectified immediately, increasing post-OTMR inspection periods, allowing existing attachers to continue work on their networks during the advance notice period, reducing the burdens of per-pole estimates and invoices, permitting overlash of

facilities upon permission of the host without the pole owners advance approval, amongst others.

In the end, the item will greatly aid the private sector expansion of broadband services throughout America, producing a more competitive and capable nation. I look forward to further actions later this year by Commissioner Carr to further extend wireless buildout relief, including other preemptive measures, to complement our work here today. I approve.

**STATEMENT OF
COMMISSIONER BRENDAN CARR**

Re: *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-84; *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79.

The first utility poles in the country went up not far from here back in 1844. They formed a 38-mile line between the U.S. Capitol and the Mount Clare railroad station in Baltimore, Maryland. The poles went up along the right-of-way used by the Baltimore and Ohio Railroad. The idea came from an engineer, Ezra Cornell, who had been working with Samuel Morse on a way to quickly and efficiently string a telegraph line between the two points. With the poles and wire line in place, Morse and his partner Alfred Vail were able to send the world's first long-distance telegram on May 24, 1844.

So the humble utility pole is one of the oldest forms of infrastructure used for communications. And it is that same utility pole that will support the next-gen networks of tomorrow. Take 5G – we need thousands of new small cell deployments over the next few years. And the lion's share of these are expected to go up on utility poles in rights-of-ways. You can already see the leading edge of these deployments in communities across the country. I have seen it in Sioux Falls, South Dakota, where city officials showed me some of the small cells that have gone up across their downtown. I have seen it on top of a wooden pole outside a high school in rural Woodstock, Virginia, where a small cell is adding the capacity needed to power students' coding classes and cloud-based learning.

At the FCC, we have been working to streamline and reduce barriers to these small cell deployments. And today's decision is another good step in that direction. By making it easier for providers to safely and efficiently attach broadband-capable fiber and cable lines to utility poles, we can bring down the cost of the backhaul needed to connect all these small cell deployments.

In this decision, we also take the commonsense step of repeating our long-standing view that moratoria on telecom deployments violate federal law. This decision will provide even greater certainty as we look to promote next-gen deployments in communities across the country.

I want to thank the Wireline Competition Bureau and the Wireless Telecommunications Bureau in particular for their work on this item. It has my support.

**STATEMENT OF
COMMISSIONER JESSICA ROSENWORCEL
APPROVING IN PART, DISSENTING IN PART**

Re: *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-84; *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79.

In this country we build. We are a nation of doers. Clearing the obstacles in our way is deep in our DNA. I believe this instinct has served us well and over time there has been a lot of evidence this is true before the Federal Communications Commission. You see it in the way as a country we connected all through the public switched telephone network. You see it in the way we led the world in the deployment of 4G wireless services. You see it, too, in the cities and towns that are clamoring for better broadband service, because they know that without it their communities will not have a fair shot in the digital age.

You also see the influence of this spirit in this decision. It is designed to expedite access to utility poles. That may not seem grand at first blush, but clearing the way to access these lowly facilities is a big deal. It means building more broadband in more places, more competitive broadband, and enhanced access to the next generation of wireless services.

For this reason, I support one-touch make-ready pole attachment. By allowing for the modification or replacement of the lines or equipment on a utility pole to accommodate additional facilities, I believe we can speed the way to a future with more digital age infrastructure deployment across the country.

But as with all things, the devil is in the details. We are dealing with a complex and heady mix of federal authority, state preemption, local realities, and the possibility of job losses for workers and service outages for consumers. Getting it right is essential. I believe that in some ways, this decision runs roughshod over the details when clearer and more specific direction is required.

First, in our rush to put out rules, this agency accepts too much ambiguity in the one-touch make-ready regime we adopt today. Ideally these policies would be crystal clear so that there are no disputes about just what deployments qualify for one-touch make-ready procedures. But I am concerned that is not the case here. And I believe this is going to slow down deployment—not speed it up. Indeed, even determining what counts as simple make-ready work is not so simple. That’s because our definitions of simple and complex processes do not provide enough real-world guidance to attachers and utilities, setting the stage for disputes and delays. Worse, we decide not to give any voice in this process to the parties that are well-positioned to make these tricky determinations—the existing attachers. This is hard to justify.

Second, we could do more to protect jobs and safety. By giving short shrift to employees covered by collective bargaining agreements, this decision threatens to invalidate private contracts negotiated between existing attachers and union workers. But going forward, this agency could put those employees out of work. This is not right. Moreover, it is not an outcome we can simply ignore.

Third, we should give more thought to what happens to existing attachers on poles. With only superficial analysis, we conclude that existing contract and tort law will protect their interests. This is not so simple because in many cases there is no privity of contract between these parties. Our one-touch make-ready regime—and the public at large—would be better served by mechanisms that would allow existing attachers to hold a new attacher or contractor accountable for the consequences of performing shoddy work, especially when they lead to consumer outages.

Finally, I fear that for all our desire to expedite deployment all this decision will do is speed the way for litigation. Nowhere is this clearer than in the declaratory ruling. This agency determines that state or local requirements that prevent or have the effect of suspending the processing of siting

applications for new communications infrastructure violate Section 253(a) of the Communications Act and are preempted. The legal analysis here is seriously lacking. A basic canon of statutory interpretation requires that this agency give meaning to all relevant portions of the law. Interpretations that support statutory consistency are valued over those that do not. And yet, there is no way to square this declaratory ruling regarding Section 253(a) with Section 253(d). That's because Section 253(d) provides the express mechanism for this agency to preempt state and local requirements on a case-by-case basis after notice and opportunity for public comment. Moreover, our interpretation of Section 253(a) preemption all but reads Section 332(c) out of the law, which provides a specific due process remedy for the failure to act on wireless facilities siting.

So what does that mean in the real world? Take Myrtle Beach, South Carolina, just for example. It's a coastal community. There are laws that limit the ability of private entities to dig up roads during certain times of the year, namely during the height of hurricane season and during peak tourist times. These rules are limited in time and scope. They are informed by local traffic and public safety authorities. They are reasonably related to the police powers of municipalities. And yet, going forward, three unelected officials sitting here today preempt these local policies because they believe Washington knows better.

This is unfortunate. Because I believe we need smart one-touch make-ready policies—and others like it—to expedite the deployment of more broadband and wireless services in more places. We need to find a modern way to balance the needs for national deployment policies with local realities so that across the board government authorities support what we need everywhere—digital age infrastructure. I believe there is a thoughtful way to do this, but the reasoning in today's decision falls short.

While I approve our adoption of one-touch make-ready policies in concept, the deficiencies in our analysis are too significant for me to offer my full support. As a result, I approve in part and dissent in part.