

Public Service Commission of West Virginia

201 Brooks Street, P.O. Box 812
Charleston, West Virginia 25323



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November 7, 2019

Connie Graley, Executive Secretary
Public Service Commission
Post Office Box 812
Charleston, West Virginia 25323

09:17 AM NOV 07 2019 EXEC SEC DIV

GENERAL ORDER NO. 261

In the Matter of Adopting and Implementing
Rules Governing Pole Attachments and
Assumption of Commission Jurisdiction Over
Pole Attachments, 150 C.S.R. 38

Dear Ms. Graley:

Enclosed for filing in the above-referenced proceeding, please find an original and twelve copies of *Staff's Initial Comments*. A copy has been provided to those individuals shown on the attached *Certificate of Service*.

Sincerely,

A handwritten signature in black ink, appearing to read "L. Bouvette".

Linda S. Bouvette
Staff Attorney
West Virginia State Bar I.D. No. 5926

LSB/vm
Enclosure
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PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

GENERAL ORDER NO. 261

In the Matter of Adopting and Implementing
Rules Governing Pole Attachments and
Assumption of Commission Jurisdiction Over
Pole Attachments, 150 C.S.R. 38

09:18 AM NOV 07 2019 EXEC SEC DIV

STAFF'S INITIAL COMMENTS

On March 5, 2019, the West Virginia Legislature passed Senate Bill 3, effective immediately, which required the Public Service Commission of West Virginia (PSC) to adopt and implement rules governing pole attachments and assume jurisdiction over pole attachments pursuant to new W.Va. Code §31G-4-4.

On June 4, 2019, the Commission initiated a general investigation into the adoption of rules governing pole attachment procedures pursuant to W.Va. Code §31G-4-4. The Commission noted that currently the Federal Communications Commission (FCC) regulates pole attachments in West Virginia pursuant to 47 U.S. Code §224 and the FCC implementing regulations set forth in 47 C.F.R. §§1.1401-1.1425.

On October 11, 2019, the Commission issued an Order, instituting a rulemaking proceeding for the proposed Rules for the Government of Pole Attachments (Pole Attachment Rules), 150 C.S.R. 38. Initial Comments were due on October 30, 2019, with Reply Comments due on November 14, 2019.

On October 15, 2019, the Commission entered an Amended Order reformatting the proposed Pole Attachment Rules to conform to the Secretary of State's Administrative Law Division requirements and modifying the due dates of the Initial and Reply Comments.

On October 22, 2019, Appalachian Power Company, Wheeling Power Company, Monongahela Power Company and The Potomac Edison Company jointly filed a motion to extend the due date for written comments to the Pole Attachment Rules.

On October 24, 2019, the Commission entered an order revising the dates that Initial and Reply Comments were due. The Initial Comments are now due on November 7, 2019, with Reply Comments due on November 14, 2019.

Staff reviewed the proposed Pole Attachment Rules and has the following comments.

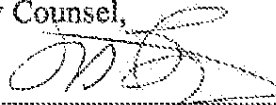
1. The Commission left out of the proposed Pole Attachment Rules, any reference to 47 C.F.R. §1.725, Joinder of complainants and causes of action. This section does not conflict with any of the Commission's rules and should be included in the proposed Pole Attachment Rules.
2. The Commission left out of the proposed Pole Attachment Rules, any reference to 47 C.F.R. §1.1406(e) allowing certain ILECs to opt out of using ARMIS data in favor of GAAP data to set attachment rates. The Commission should clarify whether the omission was intentional.
3. The Commission should clarify in 150 C.S.R. §38-2, that the definitions contained therein are applicable only to the Pole Attachment Rules, to avoid confusion over the definition of "utility", which is defined differently in W.Va. Code §24-1-2 and §24-2-1.

4. The Commission should also clarify that the damages provision, 150 C.S.R. §38-17 applies only to the claims filed under the Pole Attachment Rules.
5. Unless already in existence, the Commission should establish an escrow account for the purpose of receiving deposits pursuant to 150 C.S.R. §38-17.6, and develop rules for its management and operation.

Respectfully submitted this the 7th day of November, 2019.

STAFF OF THE PUBLIC SERVICE
COMMISSION OF WEST VIRGINIA

By Counsel,



LINDA S. BOUVETTE, Staff Attorney
West Virginia State Bar I.D. 5926

CHRIS HOWARD, Staff Attorney
West Virginia State Bar I.D. 8688

PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

GENERAL ORDER NO. 261

In the Matter of Adopting and Implementing
Rules Governing Pole Attachments and
Assumption of Commission Jurisdiction Over
Pole Attachments, 150 C.S.R. 38

CERTIFICATE OF SERVICE

I, Linda S. Bouvette, Counsel for the Public Service Commission of West Virginia, do hereby certify that a copy of the foregoing "*Staff Initial Comments*" has been served upon the following parties of record by First Class, United States Mail, postage prepaid this 7th day of November, 2019.

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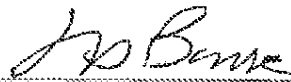
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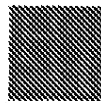
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November 7, 2019

VIA HAND DELIVERY

Connie Graley
Executive Secretary
Public Service Commission
201 Brooks Street
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12:21 PM NOV 07 2019 EXEC SEC DIV

Re: General Order No. 261
In the Matter of Adopting and Implementing
Rules Governing Pole Attachments and
Assumption of Commission Jurisdiction Over
Pole Attachments.

Dear Ms. Graley:

On behalf of CTIA, enclosed are an original and twelve (12) copies of the **Initial Comments of CTIA**.

Sincerely,

David B. Hanna
WV State Bar # 8813
dhanna@hannalawpllc.com

DBH/dh

Enclosures

cc: C. Howard, Esq.
L. Bouvette, Esq.
J. Roberts, Esq.

**Before the
PUBLIC SERVICE COMMISSION OF WEST VIRGINIA**

In the Matter of Adopting and Implementing)	
Rules Governing Pole Attachments and)	General Order No. 261
Assumption of Commission Jurisdiction)	
Over Pole Attachments)	12:21 PM NOV 07 2019 EXEC SEC DIV
)	

INITIAL COMMENTS OF CTIA

CTIA¹ respectfully submits its initial comments in response to the Public Service Commission of West Virginia's ("Commission's") Commission Order ("Order") entered October 11th, 2019 in the above-captioned docket, and the proposed rules on pole attachments therein.

CTIA agrees with the Order's conclusion that "the Commission should adopt rules that reflect, as closely as possible, the substantive requirements and processes set forth in the [Federal Communications Commission ("FCC")] Regulations and FCC Procedural Rules while eliminating those provisions that contain requirements and processes that are unique to FCC operations and do not apply or make sense under the Commission's current structure and operations."² As CTIA noted in the proceeding leading to the promulgation of the proposed rules, adoption of the FCC regulations will help streamline pole attachment deployment and promote efficiency in the process.³ CTIA appreciates the Commission's work to improve the

¹ CTIA—The Wireless Association® ("CTIA") (www.ctia.org) represents the U.S. wireless communications industry and the companies throughout the mobile ecosystem that enable Americans to lead a 21st century connected life. The association's members include wireless carriers, device manufacturers, suppliers as well as apps and content companies. CTIA vigorously advocates at all levels of government for policies that foster continued wireless innovation and investment. The association also coordinates the industry's voluntary best practices, hosts educational events that promote the wireless industry and co-produces the industry's leading wireless tradeshow. CTIA was founded in 1984 and is based in Washington, D.C.

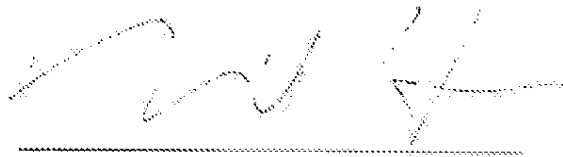
² Order at 12.

³ See Comments of CTIA, Case No. 19-0551-T-GI (July 15, 2019) at 3, 5.

infrastructure deployment process in West Virginia, and supports the Commission's prompt adoption of the proposed rules.

Beyond encouraging their prompt adoption, CTIA has no further substantive comment on the proposed rules at this time, but reserves the right to reply to any issues raised in initial comments.

CTIA
By Counsel



David B. Hanna, Esq. (WVSB # 8813)
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P.O. Box 3967
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dhanna@hannalawrllc.com

November 7, 2019

CERTIFICATE OF SERVICE

I, David B. Hanna, counsel for CTIA hereby certify that copies of the foregoing **Initial Comments of CTIA**, have been served upon the following, by first class United States mail, postage prepaid, this 7th day of November 2019:

Jacqueline Lake Roberts, Director
Consumer Advocate Division
700 Union Building
723 Kanawha Boulevard, East
Charleston, WV 25301

VIA HAND DELIVERY

Chris Howard, Esq.
Linda Bouvette, Esq.
Legal Division
Public Service Commission
201 Brooks Street
Charleston, WV 25301



DAVID B. HANNA



LEWIS GLASSER

rgottlieb@lewisglasser.com

November 7, 2019

Hand Delivery

Connie Graley, Acting Executive Secretary
Public Service Commission of West Virginia
201 Brooks Street
Charleston, West Virginia 25301

12:07 PM NOV 07 2019 EXEC SEC DIV

CASE NO.

GO 261

General Investigation into Adopting and
Implementing Rules Governing Pole Attachments and
Assumption of Commission Jurisdiction over Pole Attachments

Dear Ms. Graley:

Enclosed please find for filing in the above-referenced matter the original and twelve (12) copies of *INITIAL COMMENTS OF WEST VIRGINIA CABLE TELECOMMUNICATIONS ASSOCIATION*.

Thank you for your attention in this matter.

Very truly yours,

Richard L. Gottlieb

Richard L. Gottlieb

RLG/dc

Enc.

cc: All counsel of record

LEWIS GLASSER PLLC

300 Summers Street | BB&T Square, Suite 700 | Post Office Box 1746 | Charleston, WV 25326

304.345.2000

**PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON**

)	
General Investigation into adopting and)	
Implementing Rules Governing Pole)	Case No. 19-0551-T-GI
Attachments and Assumption of Commission)	
Jurisdiction over Pole Attachments)	
)	

**INITIAL COMMENTS OF WEST VIRGINIA CABLE
TELECOMMUNICATIONS ASSOCIATION**

I. Introduction

The West Virginia Cable Telecommunications Association (“WVCTA”) respectfully submits its initial comments in response to the Public Service Commission’s (“Commission”) Notice of Proposed Rulemaking (“Notice”) issued on October 11, 2019 in the captioned proceeding. The Commission’s “Proposed Rules for the Government of Pole Attachments” (“Proposed Rules”) implements W. Va. Code §31G-4-4, which provides that the Commission will replace the Federal Communications Commission (“FCC”) as the regulator of pole attachments in West Virginia.¹ Section 31G-4-4 directs the Commission to “adopt the rates, terms, and conditions of access to and use of poles, ducts, conduits, and rights-of-way as provided in 47 U.S.C. §224 and 47 C.F.R. §§1.1401 - 1.1415, inclusive, of the dispute resolution process incorporated by reference in those regulations....”²

¹ The FCC generally regulates pole attachments under 47 U.S.C. §224, subject to “reverse preemption” by states that certify that they will regulate such attachments pursuant to 47 U.S.C. §224(c). Section 224 is hereafter referred to as the “Pole Attachment Act.”

² W. Va. Code §31 G-4-4(b).

The WVCTA commends the Commission on the Proposed Rules, which substantially accomplish the objectives of West Virginia law while reconciling various provisions of the FCC's rules with certain pre-existing rules of the Commission (e.g. dispute resolution processes and damages). The adoption of such rules consistent with the FCC, and with the large body of case law that accompanies the rules, promotes uniformity in pole attachment regulation and will facilitate broadband deployment and competition in West Virginia.³

To ensure that the objectives of Section 31G-4-4 are fully achieved, the WVCTA urges the Commission to make one modification to Proposed Rule 4.1, as more fully explained below.

II. Proposed Rule 4.1 -- Incremental Cost Standard

Proposed Rule 4.1 largely tracks FCC rule 1.1406(a) regarding the burden of proof required in pole attachment complaint proceedings. However, the Proposed Rule materially deviates from the FCC rule regarding the utility's burden if it argues that a proposed rate is below the utility's incremental costs. Proposed Rule 4.1 provides that:

... If, however, a utility argues that the proposed rate is lower than its incremental costs, the utility has the burden of establishing that such rate is below a just and reasonable rate *based primarily on cost*...⁴

This is inconsistent with FCC rule 1.1406(a) which states:

... If, however, a utility argues that the proposed rate is lower than its incremental costs, the utility has the burden of establishing that such rate is below the *statutory minimum* just and reasonable rate...⁵

³ The WVCTA notes that the Commission's exclusion of FCC Rule 1.1406(e) from the Proposed Rules is appropriate. Rule 1.1406(e) addresses the circumstance where a LEC opts to use GAAP accounting instead of FCC Part 32 accounting (i.e. ARMIS pole data) to calculate pole attachment rates. The provision establishes a 12-year phase-in for rate changes that result when GAAP is used instead of Part 32. However, because Commission rules require LECs to maintain Part 32 data, which is relied upon by attachers to calculate pole attachment rates (see Commission Rule 150-6-1.8), LECs do not have the option to use GAAP accounting for those purposes in West Virginia. Accordingly, the rate phase-in mechanism provided in Rule 1.1406(e) is not necessary.

⁴ See Proposed Rule 4.1 (emphasis added).

⁵ See 47 C.F.R. § 1.1406(a) (emphasis added).

Significantly, Section 224(d)(1) of the Pole Attachment Act specifies the “statutory minimum” rate for pole attachments that is referred to in the FCC’s rule – “...a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments...”⁶ The Proposed Rules provide no explanation for why the language in Section 4.1 deviates from the FCC’s rules in this manner. However, the deviation is material as the FCC’s statutory minimum, incremental cost standard is based entirely on “the additional costs of providing pole attachments...”

The Proposed Rule’s reference to “based primarily on cost” introduces ambiguity into the concept set out in the Pole Attachment Act and FCC’s rules. By deviating from the language in Section 224 that is referenced by the FCC’s rules, there could be debates about whether some standard other than the FCC’s (and Pole Attachment Act’s) concept of incremental cost should be applied in West Virginia. What factors other than the “additional costs of providing pole attachments” will be considered relevant by the Commission in a determination “based primarily on cost”? This ambiguity in what constitutes incremental cost for purposes of pole attachment rates will undermine the objective of the West Virginia legislature to follow the FCC’s pole attachment rate rules (and the body of law that interprets them) to promote uniformity in the regulation of pole attachments.

The Commission can remedy this departure from the FCC’s rate rules (and the legislature’s intent in Section 31G-4-4) by revising Section 4.1 as follows:

...If, however, a utility argues that the proposed rate is lower than its incremental costs, the utility has the burden of establishing that such rate is below the additional costs of providing pole attachments.

⁶ 47 U.S.C. §224(d)(1).

WHEREFORE, for the reasons stated above, the Commission should modify Proposed Rule 4.1.

Respectfully Submitted,

West Virginia Cable Telecommunications Association

By Counsel



Richard L. Gottlieb (WV Bar #1447)

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**PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON**

CASE NO. 19-0551-T-GI

**General Investigation into Adopting and
Implementing Rules Governing Pole Attachments and
Assumption of Commission Jurisdiction over Pole Attachments**

CERTIFICATE OF SERVICE

I, Richard L. Gottlieb, Counsel for the West Virginia Cable Telecommunications Association (WVCTA), does hereby certify that a copy of the foregoing **INITIAL COMMENTS OF WEST VIRGINIA CABLE TELECOMMUNICATIONS ASSOCIATION** has been served upon the following parties of record by First Class, United States Mail; postage prepaid, this 7th day of November, 2019.

John Conwell
Senior Director Regulatory Affairs
Comcast Phone of West Virginia, LLC
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Jacqueline Roberts, Director
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Mark Polen
West Virginia Cable Telecommunications Assoc.
LCCR Government Solutions
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Linda S. Bouvette
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Chris Howard
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Richard L. Gottlieb
WV State Bar No. 1447

SEGRA™

November 7, 2019

VIA HAND DELIVERY

Connie Graley
Executive Secretary
Public Service Commission of West Virginia
P.O. Box 812
Charleston, WV 25323

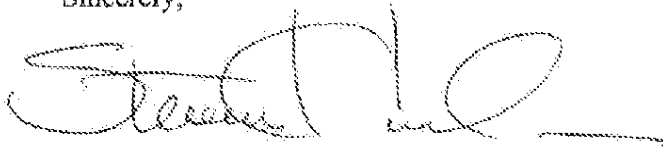
Re: General Order No. 261
In the matter of Adopting and Implementing
Rules Governing Pole Attachments and Assumption
of Commission Jurisdiction Over Pole Attachments

Dear Ms. Graley:

Enclosed for filing please find an original and twelve (12) copies of the "Initial Comments of Segra" in the above-captioned proceeding.

If you have any questions regarding this filing, please feel free to contact me at your earliest convenience.

Sincerely,



STEVEN HAMULA (SB# 4580)
Associate General Counsel
Lumos Networks LLC dba Segra and
Lumos Networks of West Virginia Inc. dba Segra

SH/s
Enclosure

THE PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

GENERAL ORDER NO. 261

In the matter of Adopting and Implementing
Rules Governing Pole Attachments and Assumption
of Commission Jurisdiction Over Pole Attachments

INITIAL COMMENTS OF SEGRA

I. Introduction

Lumos Networks, LLC dba Segra and Lumos Networks of West Virginia Inc. dba Segra (collectively "Segra"), by counsel, respectfully files these initial comments on the proposed Rules For the Government of Pole Attachments ("Pole Attachment Rules") issued pursuant to the Commission Order of October 11, 2019 in the above-captioned proceeding. Overall, Segra believes the Commission has done an excellent job in adopting rules based primarily upon the Federal Communications Commission existing pole attachment rules. These include the proposed rules identified as §150-38-1 through §150-38-14. The foregoing notwithstanding, Segra believes that the proposed adoption of rules identified as §150-38-15 through §150-38-29, which are principally procedural in nature, are unnecessarily complex, unneeded given the Commission's existing procedural rules, and present an unwieldy and overly burdensome procedural course for attachers seeking a timely remedy for pole attachment complaints.

II. The Adoption of the Proposed Rules Promulgated by the Commission, including §150.38-1 through §150.38-14 is Appropriate.

As Segra noted in its reply comments filed in Case No. 19-0551-T-GI, the simplest and most expedient way for this Commission to assume jurisdiction over pole

attachments from the FCC is to adopt those FCC's rules that do not substantially conflict with its own administrative capabilities and statutory requirements, including any subsequent updates promulgated by the FCC. As Segra correctly pointed out, adoption of the existing FCC rules allows the Commission to take advantage of the FCC's "fully vetted" regulations, minimizes disruption to attachers, and thereby provides predictability and uniformity necessary to facilitate continued investment in broadband facilities in West Virginia. In addition to the promotion of consistency and uniformity, this approach enables the Commission to conserve valuable resources by effectively eliminating the need to develop pole attachment rules from scratch. This approach would likewise promote efficiency by allowing providers and pole owners that do business in more than one state to resolve disputes under a common set of rules.

To its credit, the Commission did indeed elect to largely adopt the FCC's existing pole attachment rules, and Segra supports the Commission's action with respect to the proposed rules embodied in §150-38-1 through §150-38-14. These proposed regulations include, among other things, §150-38-10 outlining the various timelines necessary for the timely processing of pole attachment applications, and §150-38-11 governing the use of outside contractors for the performance of survey and make-ready work. The adoption of these rules will contribute to the timely deployment of vital broadband services in West Virginia, which in turn, will foster future economic growth and technological innovation.

That being said, Segra would recommend that the Commission include a proposed rule that provides for adoption of prospective updates of the FCC's pole attachment rules unless the Commission either initiates an action on its own motion or via a petition filed

by an attachers, pole owner, or other interested party seeking to initiate a rulemaking to further investigate and examine the modifications being made to the federal pole attachment rules. This will allow both attachers and pole owners in West Virginia to immediately take advantage of any regulatory developments as soon as such are codified by the FCC, while preserving the ability of the Commission to expeditiously address any unique issues or circumstances that may require West Virginia-specific changes to the FCC's existing regulatory framework.

III. The Proposed Rules Promulgated by the Commission, including §150.38-15 through §150.38-29 Are Overly Complex and Not Necessary.

Although the Commission made the correct decision regarding the proposed adoption of the rules embodied in §150.38-1 through §150.38-14, Segra believes that the corresponding decision to adopt the rules embodied in §150.38-15 through §150.38-29 adds unnecessary complexity for attachers seeking a timely resolution of pole attachment disputes. Indeed, Segra maintains that the proposed rules contained in §150.38-15 through §150.38-29 create a labyrinth of new procedural complaint requirements that will result in an even more complex and adversarial process.

As Segra and other commenters have advised in the comments previously filed in Case No. 19-0551-T-GI, the Commission should move forward with the adoption of all of the FCC's rules that do not substantially conflict with its own administrative capabilities and statutory requirements. By largely adopting the FCC's current complaint processing framework in §150.38-15 through §150.38-29, the Commission has ignored this advice and has instead adopted overly detailed and complex complaint processing requirements only applicable to pole attachment disputes in West Virginia. Such a result

is neither required nor unnecessary for the orderly adjudication of pole attachment complaints coming before the Commission.

For example, the Commission previously pointed out that the adoption of the FCC's dispute resolution process was significantly more technical and rigid than the dispute resolution process that the Commission has employed historically to adjudicate informal and formal complaints for all public utilities subject to the Commission's jurisdiction in West Virginia. Similarly, the Commission previously acknowledged that the FCC's dispute resolution regulations included provisions related to the consideration of damages, which also represented a significant departure from the Commission's historical regulatory role in West Virginia in which interested parties could only pursue the award of damages in circuit court in accordance with West Virginia Code §24-4-7.

Rather than continue down this path of adding unnecessary procedural regulations, Segra would recommend that the Commission scuttle the proposed regulations contained in §150.38-15 through §150.38-29, and simply utilize its current procedural rules for the processing of informal and formal complaints until such time as the Commission gains more real world experience in the handling of pole attachment complaints. The Commission's current Rules of Practice and Procedure are familiar to all parties who appear before the Commission and present a more than satisfactory vehicle for the timely resolution of pole attachment complaints. If at some point thereafter the Commission determines that the more detailed procedural requirements currently found in the FCC's regulations are necessary for use in West Virginia, the Commission can always initiate a further rulemaking proceeding designed for that purpose.

Although the Commission may not believe it is in a position to deviate from the statutory requirements found in Senate Bill 3, which, among other things, required the Commission to adopt the rates, terms, and conditions of access to and use of poles, ducts, conduits, and rights-of-way as provided for in 47 U.S.C. § 224 and 47 C.F.R. § 1.1401 – 1.1415, it is interesting to note that the Commission elected not to promulgate a state rule in West Virginia to correspond to the FCC’s current rule §1.1405 concerning the dismissal of pole attachment complaints for lack of jurisdiction. The Commission took this step despite the fact that Senate Bill 3, as noted hereinabove, would appear to require the adoption of rule §1.1405.

Presumably, the Commission made this decision because FCC rule §1.1405 is in reality only applicable to actions brought before the FCC and would not be germane to this Commission’s regulation of pole attachments in West Virginia. This is important distinction and should provide the Commission with adequate justification to abandon the proposed rules in §150.38-15 through §150.38-29. Although these particular rules may be proper for pole attachment proceedings at the FCC, they are neither necessary nor particularly helpful procedurally for adjudicating pole attachment complaints in West Virginia. Indeed, Segra submits that wholesale adoption of the FCC dispute resolution procedures as proposed in rules §150.38-15 through §150.38-29 establishes a procedural framework fraught with multiple complexities and ambiguities that will hamper the timely resolution of pole attachment complaints before this Commission.

As Frontier correctly noted in its initial comments in Case No. 19-0551-T-GI, the Commission can reasonably interpret West Virginia Code §31G-4-4 in such a manner as to avoid so-called “absurd” results, and adopt the FCC’s current pole attachment

regulations specifically applicable to the actual substantive process for setting rates, terms and conditions for attachments.

In this regard, Frontier pointed out the FCC's pole attachment regulations contain certain procedural requirements that are applicable to the FCC, but not to the Commission. For example, 47 C.F.R. § 1.1404(c) requires that a pole attachment complaint "*contain a statement that the State has not certified to the FCC that it regulates the rates, terms and conditions for pole attachments.*" Similarly, Frontier pointed out several other areas within the FCC regulations that clearly would not be applicable in West Virginia such as the FCC Staff issuing rulings on discovery disputes or requiring parties to pole attachment disputes to utilize the FCC's electronic filing system for the submission of filings.

Segra would respectfully submit that other examples of "absurd" results include the proposed requirement in §150-38-15.15 prohibiting the filing of amendments or supplements to complaints in order to add new claims or requests for relief; the proposed requirement in §150-38-16.7 mandating the conduct and conclusion of executive-level discussions between parties prior to the actual filing of a complaint; the entirety of §150-38-17 et seq. requiring the consideration of claims for the recovery of damages; and §150-38-18.1 allowing any defendant to a pole attachment complaint proceeding thirty (30) calendar days for the filing of its answer following service of the complaint.

As noted earlier herein, Segra has supported the Commission's exercise of jurisdiction over pole attachment related matters in West Virginia on the expectation that such would provide a convenient forum for the efficient and expedient resolution of pole attachment complaints. By layering on the procedural complexities contained within the

FCC's existing complaint processing regulations, however, the Commission will effectively stifle that expectation and frustrate the ability of attachers in West Virginia to have their pole attachment complaints resolved in a timely manner.

Thus, the Commission should reconsider its interpretation of West Virginia Code §31G-4-4(b) to require the adoption of only those provisions of the FCC's pole attachment regulations that actually apply to the specific process for setting rates, terms and conditions of pole attachments in West Virginia, and not the purely procedural rules applicable only to the FCC's rather unique complaint processing procedures. Instead of proposing the adoption of the unnecessarily complex procedures contained in §150-38-15 through §150-38-16.29, the Commission should simply rely upon the formal complaint, mediation, and adjudicative procedures already provided for within its Rules of Practice and Procedure.

WHEREFORE, for all of the foregoing reasons, Lumos Networks LLC dba Segra and Lumos Networks of West Virginia Inc. dba Segra respectfully request that the Commission adopt and modify accordingly the proposed Rules for the Government of Pole Attachments consistent with these initial comments.

Respectfully submitted this 7th day of November, 2019.

Lumos Networks LLC dba Segra and Lumos Networks
of West Virginia Inc. dba Segra

By Counsel,



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November 7, 2019

Via Hand Delivery

Connie Graley
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201 Brooks Street
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03:44 PM NOV 07 2019 EXEC SEC DIV

**Re: GENERAL ORDER NO. 261
In the Matter of Adopting and Implementing
Rules Governing Pole Attachments and
Assumption of Commission Jurisdiction Over
Pole Attachments**

Dear Ms. Graley:

Please find enclosed for filing in the original plus 12 copies of the **Initial Comments of Frontier West Virginia Inc. and Citizens Telecommunications Company of West Virginia, D/B/A Frontier Communications of West Virginia** in the above-referenced matter.

Thank you for your attention to this matter.

Sincerely,


Joseph J. Starsick, Jr.
(State Bar No. 3576)

JJSjr/sc
Enclosure

cc: Service List

PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

GENERAL ORDER NO. 261

In the Matter of Adopting and Implementing
Rules Governing Pole Attachments and
Assumption of Commission Jurisdiction Over
Pole Attachments

03:44 PM NOV 07 2019 EXEC SEC DIV

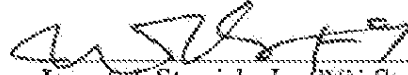
INITIAL COMMENTS OF FRONTIER WEST VIRGINIA INC. AND CITIZENS
TELECOMMUNICATIONS COMPANY OF WEST VIRGINIA, D/B/A FRONTIER
COMMUNICATIONS OF WEST VIRGINIA

Frontier West Virginia Inc. and Citizens Telecommunications Company of West Virginia, d/b/a Frontier Communications of West Virginia (collectively, "Frontier") appreciate the opportunity to comment on the Commission's proposed rules implementing West Virginia Code § 31G-4-4 ("Section 4"). Frontier believes that the proposed rules would fully implement Section 4's requirement that the Commission "adopt the rates, terms, and conditions of access to and use of poles, ducts, conduits, and rights-of-way as provided in 47 U.S.C. §224 and 47 C.F.R. §§1.1401 – 1.1415, inclusive, of the dispute resolution process incorporated by reference in those regulations."¹ Frontier, therefore, does not have any additional comments at this time, but it reserves its right to submit a reply in response any other comments that the Commission may receive in this proceeding.

¹ West Virginia Code § 31G-4-4(b).

Respectfully submitted,

**FRONTIER WEST VIRGINIA INC. AND CITIZENS
TELECOMMUNICATIONS COMPANY OF WEST
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Attorney for Frontier West Virginia Inc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Initial Comments of the Frontier West Virginia Inc. and Citizens Telecommunications Company of West Virginia, d/b/a Frontier Communications of West Virginia* were served upon the parties of record this 7th day of November, 2019, via first-class U.S. mail, postage prepaid.

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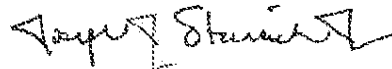
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November 7, 2019

VIA E-Mail and Overnight Mail

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Executive Secretary,
Public Service Commission of West Virginia
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Charleston, WV 25323

RE: GENERAL ORDER NO. 261 In the Matter of Adopting and Implementing
Rules Governing Pole Attachments and Assumption of Commission Jurisdiction Over
Pole Attachments

Dear Secretary Graley:

CenturyLink supports the Public Service Commission of West Virginia's proposed Rules for the Government of Pole Attachments, (Pole Attachment Rules) 150 C.S.R. 38, issued on October 11, 2019.

CenturyLink owns over 2 million poles across the country and is a major pole attacher, having facilities attached to over 5 million poles nationally. Our perspective on pole attachments, including the time frames for completing make-ready work, is balanced by our competing concerns in having attachments completed in a timely manner and in meeting those same time frames that we are proposing when CenturyLink is the pole owner. We continue to build infrastructure in our markets which will require timely access to pole attachments at reasonable terms and conditions. CenturyLink applauds the Public Service Commission's adoption of Pole Attachment rules. These rules are consistent with the best practices and expedited time frames adopted by the FCC in its recent revisions to its pole attachment rules.

There is a national focus on pole attachment issues right now, and the FCC and other reverse preemption states are implementing rules to shorten time frames for attaching, improving the pole attachment process by eliminating cumbersome processes, and taking measures to ensure that costs are fair and reasonable. The West Virginia Pole Attachment Rules incorporate a measured and flexible approach that mirror changes recently made at the FCC to drive out delays and streamline the process for pole attachments. Further, these rules facilitate industry cooperation and include an expedited dispute resolution process if business-to-business negotiations fail. All of these provisions are critical to ensuring the pole attachment processes are not a source of delay in broadband deployment.

The Pole Attachment Rules achieve that critical balance of ensuring ease of access to poles without burdensome processes for pole owners. The Pole Attachment Rules are consistent with the legislative intent in SB 3 and are in the public interest. CenturyLink appreciates the opportunity to comment and provide recommendations to the Public Service Commission on adoption of its Pole Attachment Rules.

If you have any questions, please do not hesitate to contact me at (317)713-8977.

Sincerely,

/s/ Pamela Hollick

Pamela H. Hollick, Esq.
Indiana Bar #17552-53

Online Comment

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Subject: Comment in Support of Case No. GO 261

Date of Comment: 11/07/2019 07:31 PM

Date Email Confirmed: 11/07/2019 07:32 PM

Date Printed: 11/08/2019 09:02 AM

Comment

CenturyLink supports the Public Service Commission of West Virginia's proposed Rules for the Government of Pole Attachments, (Pole Attachment Rules) 150 C.S.R. 38, issued on October 11, 2019.

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BY HAND DELIVERY

03:07 PM NOV 07 2019 EXEC SEC DIV

Connie Graley, Executive Secretary
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Re: GENERAL ORDER NO. 261
In the matter of Adopting and Implementing Rules
Governing Pole Attachments and Assumption of
Commission Jurisdiction over Pole Attachments

Dear Ms. Graley:

I am filing on behalf of Appalachian Power Company, Wheeling Power Company, Monongahela Power Company, and The Potomac Edison Company the enclosed Joint Initial Comments of the AEP Companies and the FirstEnergy Companies in the above-referenced matter.

Very truly yours,

William C. Porth
(W.Va. State Bar #2943)

Counsel for
Appalachian Power Company and
Wheeling Power Company

WCP:sr
Enclosure
cc: Service List

PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

CASE NO. 19-0551-T-GI

General Investigation into Adopting and
Implementing Rules Governing Pole
Attachments and Assumption of Commission
Jurisdiction over Pole Attachments

CERTIFICATE OF SERVICE

I, William C. Porth, counsel for Appalachian Power Company and Wheeling Power Company, do hereby certify that true copies of the foregoing comments were served by hand delivery or U.S. mail on this 7th day of November, 2019, addressed to the following:

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PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

GENERAL ORDER NO. 261

In the Matter of Adopting and Implementing
Rules Governing Pole Attachments and
Assumption of Commission Jurisdiction Over
Pole Attachments

03:07 PM NOV 07 2019 EXEC SEC DIV

JOINT INITIAL COMMENTS OF APPALACHIAN POWER COMPANY, WHEELING
POWER COMPANY, MONONGAHELA POWER COMPANY,
AND THE POTOMAC EDISON COMPANY

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Date: November 7, 2019

EXECUTIVE SUMMARY

- ❖ The Commission correctly recognized in its October 11, 2019 order that it is not bound to adopt FCC rules “that contain requirements and processes that are unique to FCC operations and do not apply or make sense under the Commission’s current structure and operations.” The Commission can and should adopt rules that fulfill the purpose of Chapter 31G (and in a way that meets the purpose of the FCC’s rules), while at the same time protecting electric distribution infrastructure and ensuring that West Virginia electric ratepayers are not unfairly burdened with the cost of communications deployment.
- ❖ Many of the FCC’s existing rules are a function of either federal statutory requirements or federal statutory limitations. The Commission is not similarly constrained and should adopt rules that make sense for West Virginia. For example, the FCC’s definition of “pole attachment” does not include attachments made by broadband-only service providers (like Google Fiber). This is a function of federal statutory limitations that the Commission should not mirror, as it would run contrary to the overarching purpose of Chapter 31G.
- ❖ The Commission should exclude the communication worker safety zone from the definition of “usable space.” The communication worker safety zone, which is typically 40 inches, is space the electric utility neither needs nor uses in the provision of electric service. But without excluding this space from the definition of “usable space,” it leaves electric ratepayers in the position of paying for space that has nothing to do with the provision of electricity. The Commission should follow the lead of other states that have assigned the cost of this space to the attaching entities.
- ❖ The Commission should delete Section 5.4.2 (the telecom rate formula) in its entirety. Proposed Section 5.4.2 would adopt the FCC’s “new telecom rate” formula, which the FCC created through a tortured methodology solely to yield a result identical to the “cable rate formula” which the Commission is proposing to adopt as Section 5.4.1. The FCC’s new telecom rate formula exists solely to pay lip service to a particular part of the federal Pole Attachments Act. In other words, there is no need for the Commission to adopt this formula. It is not only byzantine and counterintuitive, but also completely unnecessary in light of the FCC’s objectives.
- ❖ The Commission should not adopt the FCC’s self-help remedy for work in the electric power supply space. The FCC’s rule is bad policy, for sure. But it is also directly contrary to W.Va. Code § 31G-4-3 which provides: “Notwithstanding any provision of this code to the contrary, the provisions of this article shall not apply to...Facilities above the Communication Worker Safety Zone...or Any electric supply facilities wherever located.”
- ❖ The Commission should not adopt the FCC’s ILEC complaint rule. The agreements under which electric utilities and telephone companies share space on each other’s poles are unlike basic “pole attachment agreements.” “Joint use agreements” between electric utilities and ILECs were the contractual vehicles that enabled ubiquitous deployment of electric and telephone service at the lowest cost to West Virginians and have always been within the

Commission's regulatory authority. Adoption of the FCC's rule would not only undermine the consideration within the joint use agreements, but also undermine the Commission's existing authority to regulate these important relationships.

- The Commission should not adopt the FCC's formal complaint procedures. The Commission's existing complaint procedure rules are sufficient, if not superior, to the FCC's rules, and they have the added benefit of familiarity to most stakeholders. Further, the complaint rules the Commission has proposed to adopt are not specific to FCC pole attachment complaints—they are rules intended to cover various types of complaints brought before the FCC (not just pole attachment complaints). It would be awkward, to say the least, for the Commission to jettison its existing procedural rules in favor of a set of procedural rules that are not specific to pole attachment complaints.
- The Companies do not believe that the West Virginia legislature empowered the Commission to regulate pole attachments solely to follow the FCC's regulations lock-step. If that were the legislature's intent, why empower the Commission to regulate pole attachments at all? For this reason, it is imperative that the Commission balance competing interests, promote West Virginia's best interest, and make improvements to the proposed rules.

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**PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON**

GENERAL ORDER NO 261

**In the Matter of Adopting and Implementing
Rules Governing Pole Attachments and
Assumption of Commission Jurisdiction over
Pole Attachments**

**JOINT INITIAL COMMENTS OF APPALACHIAN POWER COMPANY, WHEELING
POWER COMPANY, MONONGAHELA POWER COMPANY,
AND THE POTOMAC EDISON COMPANY**

COME NOW Appalachian Power Company (“APCo”), Wheeling Power Company (“WPCo”) (“collectively, the “AEP Companies”), Monongahela Power Company (“Mon Power”), and The Potomac Edison Company (“PE”) (collectively the “FirstEnergy Companies”) (all four companies collectively, the “Companies”) and together respectfully submit their initial comments on the proposed rules governing pole attachment procedures.¹ Attachment A sets forth the specific red-lined changes recommended to the proposed rules.

I. THE COMMISSION SHOULD MAKE CERTAIN TARGETED REVISIONS TO THE PROPOSED DEFINITIONS IN SECTION 2.

A. The Commission Should Revise the Definition of “Pole Attachment” (Section 2.2) in Two Important Ways.

The proposed definition for the term “pole attachment”—which is essential to defining the rights and obligations elsewhere within the proposed rules—is as follows: “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.” Though this definition is identical to the

¹ *In the Matter of Adopting and Implementing Rules Governing Pole Attachments and Assumption of Commission Jurisdiction Over Pole Attachments*, General Order No. 261, Case No. 19-0551-T-GI, Commission Order (Oct. 11, 2019); *In the Matter of Adopting and Implementing Rules Governing Pole Attachments and Assumption of Commission Jurisdiction Over Pole Attachments*, General Order No. 261, Amended Commission Order (Oct. 15, 2019).

FCC's definition of the same term, the FCC's definition is a function of the limitations of 47 U.S.C. § 224. The Commission, on the other hand, is not limited by 47 U.S.C. § 224 and should revise the definition of "pole attachment" in two important ways to help fulfill the purpose of Chapter 31G.

- 1. The Commission should replace the term "provider of telecommunications service" with the term "telecommunications carrier" in the definition of "pole attachment."**

The phrase "provider of telecommunications service" and "telecommunications carrier" mean the same thing under federal law. 47 U.S.C. § 153(51) (defining "telecommunications carrier" to mean "any provider of telecommunications services"). Nonetheless, the specific term used throughout the FCC's pole attachment rules, and in turn the Commission's proposed rules, is the term "telecommunications carrier." In fact, excluding the definitions of "telecommunications carrier" and "pole attachment," the term "telecommunications carrier" is used twenty-five times throughout the Commission's proposed rules. *See* Sections 2.4, 2.5, 2.6, 2.13, 3.1, 3.2, 3.3, 3.3.1, 3.3.4, 4.4, 4.4.2, 4.6, 4.7, 5.2, 5.4.1, 5.4.2, 5.4.3, 10.1.2, 12.2 & 28.3. In contrast, excluding the definitions of "pole attachment" and "telecommunications carrier," the term "provider of telecommunications service" is used only twice, and both appear to be in error. *See* Sections 10.1.1 & 13.1. Section 10.1.1 defines "attachment" for purposes of the access timelines to mean "any attachment by a cable television system or provider of telecommunications service," but the term "attachment" (standing apart from the separately defined term "existing attachment") within the access timeline rules is used almost exclusively in conjunction with the term "new attacher" which, itself, is limited to mean "a cable television system or telecommunications carrier requesting to attach new or upgraded facilities to a pole owned or controlled by a utility." Section 10.1.2. Section 13.1 purports to govern the review

period for pole access complaints “where a cable television system operator or provider of telecommunications service claims it has been denied access to a pole,” but it is “telecommunications carriers”—not “providers of telecommunications service”—that have access rights under Section 3.1 and could conceivably file a complaint arising out of a denial of access.

Further, the term “provider of telecommunications service” is not a defined term within the Commission’s proposed rules. Moreover, all of the key rights under the Commission’s proposed rules inure to the benefit of “telecommunications carriers”—not “providers of telecommunications services.” See, e.g., Sections 2.4 and 2.5 (defining “complaint” and “complainant” to include “telecommunications carriers” but not “providers of telecommunications service”); Section 3.1 (providing access rights to cable television systems and telecommunications carriers); Section 5.4 (establishing maximum rates for “telecommunications carriers” but not “providers of telecommunications services”); Section 10 (providing access timeline rights and remedies to “new attachers” which does not include “providers of telecommunications services”).

Replacing the term “provider of telecommunications service” with the term “telecommunications carrier” will not impair the procedural right of ILECs to file complaint proceedings arising out of their joint use agreements with electric utilities. As set forth in the Companies’ July 15, 2019 and July 25, 2019 comments and reply comments in this docket, and as set forth below in part VIII, the Commission already has jurisdiction to hear such complaints and, in fact, has previously heard such complaints. See, e.g., *Appalachian Power Company and Wheeling Power Company v. Frontier West Virginia Inc.*, Case No. 12-0284-E-T-C; *Verizon*

West Virginia Inc. v. Appalachian Power Company and Wheeling Power Company, Case No. 07-1279-E-C.

2. The Commission should include entities whose sole purpose is to provide broadband service within the definition of “pole attachment.”

The purpose of Article 4, and the purpose of Chapter 31G more broadly, is to promote broadband deployment in West Virginia. The West Virginia legislature stated:

That it is a primary goal of the Governor, the Legislature and the citizens of this state, by the year 2020, to make every municipality, community, and rural area in this state, border to border, accessible to Internet communications through the expansion, extension and general availability of broadband services and technology.

W. Va. Code § 31G-1-1(1). There are numerous entities—like Google Fiber—that provide broadband service but are neither a “cable television system” nor a “telecommunications carrier.” Though the FCC’s corresponding rule does not include broadband-only providers like Google Fiber, that is because of specific limitations in 47 U.S.C § 224 that operate in conjunction with the regulatory classification of broadband service. Currently, broadband service is classified as an “information service” rather than a “telecommunications service.” *In the Matter of Restoring Internet Freedom*, WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd. 311, 318 at ¶ 20 (Jan. 4, 2018). For this reason, broadband-only providers are neither “providers of telecommunications service” nor “telecommunications carriers” and thus fall outside of the protection of 47 U.S.C. § 224 and the FCC rules promulgated pursuant to that statute.

The Commission is not similarly limited and can help fulfill the purpose of Chapter 31G, generally, and Article 4, specifically, by including attachments of broadband-only service providers within the definition of “pole attachment.” This would, for example, provide entities like Google Fiber with access rights to electric and telephone utility poles at regulated rates

instead of solely through negotiated rates, terms and conditions. This puts broadband-only providers on the same footing as other attachers and is consistent with the Companies' interest in fair and balanced rules that fulfill the intent of the West Virginia Legislature.

B. The Commission Should Revise the Definition of "Usable Space" (Section 2.3) to Exclude the Communication Worker Safety Zone.

The proposed definition of "usable space"—which not only carries operational implications but also forms the basis of the Commission's proposed rate formulas in Section 5.4 (and Attachments A, B, C and D)—is as follows: "the space on a utility pole above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment and which includes space occupied by the utility." This definition is correct, as far as it goes, but should explicitly exclude the communication worker safety zone (a/k/a the "safety space") because this space is not used "for the attachment of wires, cables, and associated equipment...." The communication worker safety zone, which is defined in the National Electrical Safety Code ("NESC"), is the required separation between electric and communications facilities. NESC, § 235C4, at p. 139 (2007 ed.); *see also* W. Va. Code R. § 150-6-3 (requiring telecommunications plant to be "designed, constructed, maintained, and operated in accordance with the provisions outlined in the current National Electric Safety Code..."). NESC Rule 235C4 provides:

The clearances specified in Rules 235C and 238 create a *communication worker safety zone* between the facilities located in the supply space and facilities located in the communications space, both at the structure and in the span between structures. Except as allows by Rules 238C, 238D, and 239, no supply or communication facility shall be located in the communication worker safety zone.

NESC, § 235C4, at p. 139 (italics in original; bold-underline emphasis added).

Though the precise amount of clearance varies depending on the conditions, the most typical required separation at the pole is 40 inches (3.33 feet). The presence of this space on

poles owned by electric utilities is solely the result of communications attachments. Electric utilities do not need or use this space for the provision of electric service.² The communications attachments are the cost-causers of this space and therefore should bear at least a pro rata share of this cost. See, e.g., *Carlton F. Collins, 904 Old Oakvale Road, Princeton, Mercer County, Complainant, v. Citizens Telecommunications Company of West Virginia, doing business as Frontier Communications of West Virginia, a corporation, Defendant*, 2002 W. Va. PUC LEXIS 2694, at *13 (Jul. 1, 2002) (“A major tenet of ratemaking has long been that the cost causer should bear the cost incurred.”); *In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Report and Order and Order on Reconsideration, 26 FCC Red. 5240, 5302 at ¶ 143 n. 426 (Apr. 7, 2011) (“2011 Order”) (“These capital costs would not have been incurred ‘but for’ the pole attachment demand and the attacher—the cost causer—pays for these costs.”).

However, if the communication worker safety zone is not excluded from the meaning of “usable space,” the result is that an electric utility pole owner bears the entire cost of the communication worker safety zone, which serves no other purpose than to protect communications workers. This is because the pro rata share of pole costs allocated through the Commission’s proposed formula is based on “the percentage of the total usable space...which is occupied by the pole attachment.” Section 5.2; see also Section 5.4.1 & Attachment A. Even if the Commission reassigns only 3 feet of the communication worker safety zone from “usable space” to “unusable space,” this has the mathematic effect of changing the cost allocated to a single attachment from 7.4% (1/13.5) to 9.5% (1/10.5) of the annual pole cost. Though this still

² While it is true that streetlights are sometimes installed within the safety space on electric utility poles, this represents a small fraction of the total number of poles and is generally done at the request of municipalities to promote public safety. Moreover, streetlights can usually be installed in the electric supply space when other space is not available. Therefore, public policy would not be promoted by charging this use of the safety space against electric utilities for every single pole they own.

leaves the pole owner bearing the vast majority of the cost of the communication worker safety zone, it at least allocates some of the cost to the actual cost causers.

To accomplish the reassignment of the communication worker safety zone from “usable” to “unusable” space, the first sentence of the definition of “usable space” (Section 2.3) should be revised as follows:

With respect to poles, the term “usable space” means the space on a utility pole above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment and which includes space occupied by the utility, but does not include the communication worker safety zone.³

Though excluding the communication worker safety zone would admittedly be a slight departure from the FCC’s rules, it would follow the lead of a number of states that have reverse preempted the FCC’s pole attachment jurisdiction, including but not limited to Arkansas—the most recent state to reverse preempt the FCC’s pole attachment jurisdiction. Arkansas defines “unusable space” as explicitly including the “safety space” (i.e., it is excluded from the meaning of “usable space”):

“Unusable Space.” The Unusable Space is equal to the length of the pole minus the Usable Space. Safety Space is included in the Unusable Space.

126-03 Ark. Code R. § 028 (emphasis added); *see In the Matter of a Rulemaking Proceeding to Consider Changes to the Arkansas Public Service Commission’s Pole Attachment Rules*, Docket No. 15-019-R, Order, 2016 Ark. PUC LEXIS 360, *22-23 (Oct. 12, 2016) (rejecting attachers’ arguments that safety space is used by electric utilities and treated as “usable space,” reaffirming its classification of safety space as “unusable space” to be allocated amongst the parties, and finding its approach “balances the interest of the parties and properly allocates costs”); *see also* Or. Admin. R. 860-028-0020(34) (“Usable space” means all the space on a pole, except the

³ The Companies are also proposing a revision to Section 9.1 in part V below to adjust the space factor presumptions accordingly.

portion below ground level, the 20 feet of safety clearance space above ground level, and the safety clearance space between the communications and power circuits....") (emphasis added).

The reassignment of the communication worker safety zone from "usable" to "unusable" space becomes even more critical if the Commission disturbs existing joint use agreements between electric utilities and ILECs. Joint use agreements have typically included provisions that either expressly or implicitly share the cost of the communication workers safety zone between the parties under the premise that such space was of equal benefit to both parties throughout the network (of benefit to electric utilities on poles owned by ILECs and of benefit to ILECs on poles owned by electric utilities).

C. The Commission Should Revise the Definition of "Unusable Space" (Section 2.12) to include the Communication Worker Safety Zone.

Consistent with part I.B. above, the definition of "unusable space" should be revised as follows:

With respect to poles, the term "unusable space" means both the space on a utility pole below the usable space, including the amount required to set the depth of the pole, and the communication worker safety zone, and the communication worker safety zone.

This revision, together with the proposed revision to the definition of "usable space," will help ensure that West Virginia electric ratepayers are not bearing the cost of space that is not used for the provision of electric service and that is only required because of the presence of communications facilities on electric utility poles.

D. The Commission Should Revise the Definition of "Carrying Charge Rate" (Section 2.20) to Specifically Include an Administrative and General Component and a Rate of Return Component.

The proposed definition of "carrying charge rate"—which is a crucial component of the Commission's proposed rate formulas in Section 5.4 (and Attachments A, B, C and D)—includes

“capital costs including income taxes, depreciation, taxes other than income taxes, and an operation and maintenance expense factor.” This is a definition that does not appear in the FCC’s pole attachment rules. Though the FCC’s rules do not include a definition of “carrying charge rate,” the actual components of the carrying charge rate are well defined under FCC⁴⁸⁸ precedent and specifically include the following components: (1) operations and maintenance expense; (2) administrative and general expense; (3) a depreciation expense; (4) a tax expense; and (5) a rate of return. *See, e.g., In the Matter of Amendment of Commission's Rules and Policies Governing Pole Attachments; In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*, CS Docket No. 97-98, CS Docket No. 97-151, Consolidated Partial Order on Reconsideration, 16 FCC Rcd. 12103, 12156 at ¶ 110 (May 25, 2001). These five components of the carrying charge rate have been part of the FCC’s pole attachment rate formula since the FCC first implemented its statutory authority. *See In the Matter of Adoption of Rules for the Regulation of Cable Television Pole Attachments*, CC Docket No. 78-144, Notice of Proposed Rulemaking, 68 F.C.C.2d 3, *6 at ¶ 6 (May 9, 1978) (“The annual carrying charge would typically include the return upon pole investment, maintenance, depreciation, administration costs, and taxes.”). Though the Commission’s proposed definition appears to specifically account for three of these components (O&M, taxes and depreciation), and though the reference to “capital costs” could fairly be construed as including the rate of return (i.e. cost of capital), the proposed definition contains no reference to the administrative and general expenses, except to the extent it is deemed to be a part of the “operating expenses...attributable to the entire pole.” *See* Section 5.2; *accord* 47 U.S.C. § 224(d)(1) and FCC Rule 1.1406(b). If the Commission is going to define the term “carrying charge rate” at all, it should eliminate

ambiguity by specifically including all components that comprise the carrying charge rate under FCC precedent.

II. THE COMMISSION SHOULD REVISE SECTION 3.1 TO CLARIFY THAT ATTACHING ENTITIES MUST OBTAIN WRITTEN AUTHORIZATION BEFORE UTILIZING EASEMENTS AND LICENSES ON PRIVATE PROPERTY.

The first sentence of Section 3.1 states: "A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right of way owned or controlled by it." The right of way and easement agreements that the Companies have secured from West Virginia landowners provide for the electric utility to be able to place its facilities on poles. It does not grant the right for other third party attachers to place their facilities on the real property of others and does not provide rights of ingress or egress. In order to have that right, the attachers must seek and obtain written easement or license permission from the landowners. Therefore, a provision should be added at the end of section 3.1 stating, "provided however that any attacher must secure and obtain the written authorization from the landowner for the placement of attacher's facilities on real property prior to being granted access to the utility's facilities." This will eliminate any confusion over who is responsible for obtaining the underlying land rights to enable a third party to make an attachment to a utility pole.

III. THE COMMISSION SHOULD MAKE REVISIONS IN SECTION 5 TO ELIMINATE AMBIGUITIES, TO DELETE MEANINGLESS PROVISIONS AND TO CORRECT TECHNICAL ERRORS.

A. The Commission Should Revise Section 5.1 to Make It Consistent with the Corresponding FCC Rule.

Section 5.1 should be revised to track the language of corresponding FCC Rule 1.1406(a), which provides:

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

47 C.F.R. § 1.1406(a) (emphasis added) (italics in original). Section 5.1 omits the emphasized language above, and in its place, the Commission has substituted language that provides little guidance in determining the so-called “lower bound” of a “just and reasonable” rate:

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

Section 5.1 (emphasis added). The Commission’s piecemeal adoption of FCC Rule 1.1406 poses at least two problems.

First, by substituting the clause “a just and reasonable rate based primarily on cost,” Section 5.1 obfuscates what the Companies must demonstrate to establish that a rate falls below a “just and reasonable” rate. In contrast, by using the language “statutory minimum just and reasonable rate,” FCC Rule 1.1406(a) incorporates the “lower bound” of rate regulation established under its enabling statute, i.e., “a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments...” 47 U.S.C. § 224(d)(1). By incorporating § 224(d)’s statutory limit on rate regulation, FCC Rule 1.1406(a) provides a level of clarity that is notably absent in Section 5.1. Moreover, the “statutory minimum” language of Section 1.1406(a) has been further refined through both judicial and FCC precedent. *See, e.g., Ala. Power Co. v. FCC*, 773 F.2d 362, 364 (D.C. Cir. 1985) (interpreting

“statutory minimum” to mean the “incremental costs” associated with an attachment); 2011 Order at 5296, ¶ 127 (equating “statutory minimum” with “additional costs of providing pole attachments”). The Commission’s substituted language is novel and lacks any precedential guidance.

Second, FCC Rule 1.1406(a)’s incorporation of the “statutory minimum” under 47 U.S.C. § 224(d)(1) also serves an important constitutional interest. As noted above, it establishes the “lower bound” of the FCC’s rate regulation authority, i.e., the boundary between a merely low rate and a rate that constitutes a “taking” under the Fifth Amendment. *See, e.g., Ala. Power Co. v. FCC*, 311 F.3d 1357, 1367-71 (11th Cir. 2002) (noting that § 224’s “lower bound” generally satisfies the constitutional bar on takings without just compensation). Without this limiting clause, Section 5.1 does not clearly establish a lower bound on the Commission’s rate regulation authority.

Accordingly, the Companies recommend the following revisions to Section 5.1:

The complainant shall have the burden of establishing a prima facie case that the rate, term, or condition is not just and reasonable or that the denial of access violates 47 U.S.C. § 224(f). If, however, a utility argues that the proposed rate is lower than its incremental costs, the utility has the burden of establishing that such rate ~~is below a just and reasonable rate based primarily on cost~~ does not allow for the recovery of the additional costs of providing pole attachments. In a case involving a denial of access, the utility shall have the burden of proving that the denial was lawful, once a prima facie case is established by the complainant.

The proposed language closely tracks 47 U.S.C. § 224(d)(1). As noted above, § 224(d)(1) establishes a “statutory minimum” rate that guarantees electric utilities “the recovery of not less than the additional costs of providing pole attachments.” Revising Section 5.1 to explicitly recognize the “statutory minimum” rate for pole attachments effectuates the West Virginia

Legislature's intent that the terms and conditions of § 224 be adopted. *See* W.Va. Code § 31G-4-4.

B. The Commission Should Revise the Last Sentence of Section 5.2 to Conform to the FCC's Corresponding Rule on Capital Cost Reimbursements.

The last sentence of Section 5.2 states: "The Commission shall deduct from actual capital costs contributions or advances in aid of construction received by the utility and will exclude from operation and maintenance expenses and taxes any reimbursements received from cable operators and telecommunications carriers." The comparable provision of the FCC's rules is FCC Rule 1.1406(b), the last sentence of which provides: "The Commission shall exclude from actual capital costs those reimbursements received by the utility from cable operators and telecommunications carriers for non-recurring costs."

If "[t]he proposed Pole Attachment Rules were drafted on the basis that the Commission should adopt rules that reflect, as closely as possible, the substantive requirements and processes set forth in the FCC Regulations and FCC Procedural Rules," then the Commission should adopt the above-quoted language of FCC Rule 1.1406(b) rather than its proposed Section 5.2. General Order No. 261 (the "Order") at 12. FCC Rule 1.1406(b) is clear and reflects the longstanding practice of treating make-ready reimbursements—and all customer contributions in aid of construction for that matter—as rate base neutral. In other words, if it costs an electric utility \$2,500 to change out a pole and transfer its electric facilities to the new pole, and a communications attacher reimburses the electric utility \$2,500, the \$2,500 is credited to the same capital and expense accounts to which the work was originally charged. By way of contrast, the proposed Commission rule is ambiguous and confusing.

C. The Commission Should Delete Section 5.4.2 (the "Telecom Rate") and Revise Section 5.4.1 (the "Cable Rate") So That the Same Rate Formula in Appendix A Applies to All Pole Attachments.

The reason there are two different rate formulas under the FCC's pole attachment rules is because the federal Pole Attachments Act (47 U.S.C. § 224) requires two different formulas. The original Pole Attachments Act, passed by Congress in 1978, protected only cable television companies and included a single formula applicable to all attachments. This formula, the statutory parameters for which exist in 47 U.S.C. § 224(d)(1), is embodied in current FCC Rule 1.1406(d)(1) (which is identical to proposed Section 5.4.1 and Attachment A). The rate yielded by this formula is known as the "cable rate." As part of the Telecommunications Act of 1996, Congress added a new category of attaching entities with protections under the Pole Attachments Act—telecommunications carriers. But rather than giving telecommunications carriers access to utility poles at the same price as cable television companies, Congress adopted a different formula which, rather than allocating the unusable space pro rata based on the amount of usable space occupied, allocated 2/3 of the cost of unusable space equally among all attaching entities. *See* 47 U.S.C. § 224(e)(2). The rate yielded by this formula is known as the "telecom rate." The intent of the telecom rate formula, as initially recognized by the FCC and the courts, was that telecom carriers would pay a higher rate than cable television companies. *See Ala. Power Co. v. FCC*, 311 F.3d 1357, 1371 n.23 (11th Cir. 2002) (noting that "the Telecom Rate provided in 47 U.S.C. § 224(e) yields a higher rate for telecommunications attachments than the Cable Rate provides for cable attachments"); *In the matter of Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, Report and Order, 13 FCC Rcd. 6777, 6796-97 at ¶ 34 (Feb. 6, 1998) ("We note that in the one case where Congress affirmatively wanted a higher rate for a particular service offered by a cable system, it provided for one in

section 224(e).”). As initially implemented by the FCC, the telecom rate formula yielded a rate that was between 2-3 times the amount yielded by the cable rate formula.

As more cable television attachments became subject to the higher telecommunication rate based on the types of services offered by cable television companies, the FCC intervened to protect the cable companies. But the FCC could not simply declare that the cable rate applied to all attachments because of the statutory constraints within the Pole Attachments Act. To accomplish its goal, the FCC re-defined the “cost” allocated through the telecom rate formula such that the result of the formula was roughly equal to the result under the cable rate formula. *In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Order on Reconsideration, 30 FCC Rcd. 13731, 13738-45 at ¶¶ 16-30 (Nov. 24, 2015) (“2015 Order On Reconsideration”) (“We take this step to further our goal of promoting consistent, cross-industry attachment rates...by fulfilling the Commission’s intent, expressed clearly in 2011 and upheld in 2013, to bring cable and telecom rates for pole attachments into parity at the cable-rate level.”). This is why current FCC Rule 1.1406(d)(2)(i) defines “cost” as a fraction of the actual cost based on the number of attaching entities. The number of attaching entities, of course, has nothing to do with the actual cost being allocated, and the FCC has never even contended that it did. It was nothing more than algebra designed to achieve a particular mathematic result (parity with the cable rate) under the constraints of the statutory telecom rate formula. This rate yielded by this new iteration of the telecom rate formula is known as the “new telecom rate.”

In essence, FCC Rule 1.1406(d)(2) is a nullity because it exists—in its current form—solely to counteract the requirements of 47 U.S.C. § 224(e) in a way that creates parity between the cable and telecom rate formulas. The Commission is not similarly constrained and need not

adopt a formula that exists solely to shoehorn a result consistent with the cable rate formula. The Commission can, instead, simply adopt the cable rate formula as the rate formula applicable to attachments by cable television systems and telecommunications carriers. This approach would simplify the Commission's rules and yield a result not only consistent with the FCC's Rules, but also specifically intended by the FCC. See 2015 Order on Reconsideration at 13738-45, ¶¶ 16-30.

D. The Conduit Rate Formula in Section 5.4.3 (Formula D) Contains Errors that Render the Formula Invalid.

Section 5.4.3 purports to propose the adoption of the FCC's conduit rate formula, FCC Rule 1.1406(d)(3). Section 5.4.3 provides: "Formula D shown on Attachment D shall apply to attachments to conduit by cable operators and telecommunications carriers." According to Attachment D to the Commission's proposed rules, Formula D provides as follows:

$$\frac{\text{Maximum Rate per Linear ft/m}}{\left[\frac{1}{\text{Number of Ducts}} \times \frac{\text{Number of Ducts}}{\text{(Percentage of Conduit Capacity)}} \right]} \times \left[\frac{\text{Net Conduit Investment}}{\text{System Duct Length (ft/m)}} \right] \times \text{Carrying Charge Rate}$$

(Net Linear Cost of a Conduit)

Portions of Formula D, as noted in the red boxes above, deviate from the FCC's conduit rate formula and render Formula D invalid.

If the Commission chooses to adopt the FCC's existing conduit rate formula, the Commission should adopt the FCC's formula verbatim. The FCC's conduit rate formula is set forth below:

$$\frac{\text{Maximum Rate per Linear ft/m}}{\left[\frac{1}{\text{Number of Ducts}} \times \frac{1 \text{ Duct}}{\text{No. of Inner Ducts}} \right]} \times \left[\frac{\text{No. of Ducts} \times \text{Net Conduit Investment}}{\text{System Duct Length (ft/m)}} \right] \times \text{Carrying Charge Rate}$$

(Net Linear Cost of a Conduit)

47 C.F.R. § 1.1406(d)(3).

IV. THE COMMISSION SHOULD, CONSISTENT WITH PART III.C. ABOVE, DELETE SECTION 8.

Section 8 of the proposed rules (“Allocation of Unusable Space Costs”) only matters if the Commission retains Section 5.4.2 (the telecom rate formula). If Section 5.4.2 is deleted, then the cost of the unusable space would be allocated pro rata based on the percentage of usable space occupied through Section 5.4.1 and Attachment A. Though the text of Section 8 tracks FCC Rule 1.1409 almost verbatim, as set forth above, the FCC has neutralized the effectiveness of this language through subsequent rulemakings designed to lower the telecom rate to the cable rate.

V. THE COMMISSION SHOULD REVISE SECTION 9.1 TO CORRECT ERRORS AND REFLECT THE EXCLUSION OF THE COMMUNICATION WORKER SAFETY ZONE FROM THE DEFINITION OF “USABLE SPACE.”

The first sentence of proposed rule 9.1 states: “With respect to the formulas referenced in Rules 5.4.2.a. and 5.4.2.b, the space occupied by an attachment is presumed to be one foot.” For the reasons set forth above in part III.C, the references to Rules 5.4.2.a. and 5.4.2.b should be deleted. But even if the Commission does not delete the references to Rules 5.4.2.a. and 5.4.2.b, the Commission needs to add a reference to Rule 5.4.1 in order to maintain consistency with corresponding FCC Rule 1.1410. The first sentence of FCC Rule 1.1410 states: “With respect to the formulas referenced in §1.1406(d)(1) and (d)(2), the space occupied by an attachment is presumed to be one foot.” The references to FCC Rules 1.1406(d)(1) and (d)(2) collectively include both the cable rate and telecom rate formulas whereas the references to Sections 5.4.2.a. and 5.4.2.b include only the telecom rate formulas.

The second and third sentences of proposed Section 9.1 state: “The amount of usable space is presumed to be 13.5 feet. The amount of unusable space is presumed to be 24 feet.” As

set forth in part I.B&C above, the communication worker safety zone should be excluded from the “usable space” on a pole. The communication worker safety zone is typically 40 inches (3.33 feet). For purposes of utilizing round numbers, the Companies propose adjusting the amount of presumed usable space to 10.5 feet and the presumed amount of unusable space to 27 feet.

VI. THE COMMISSION SHOULD MAKE SEVERAL REVISIONS TO SECTION 10 TO AFFORD THE PARTIES GREATER FLEXIBILITY IN SATISFYING CERTAIN OBLIGATIONS AND TIMELINES, TO SHIFT CERTAIN OBLIGATIONS AND COSTS TO THE COST-CAUSING ENTITIES, AND TO SAFEGUARD THE SAFETY AND RELIABILITY OF THE ELECTRIC FACILITIES.

- A. Section 10.3.4 Should Be Revised to Reduce the Burden of Surveys on Utilities and to Require New Attaching Entities to Provide Notification to Existing Attachers of any Surveys.**

Proposed Section 10.3.4.b provides that:

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.

Section 10.2.4.b (emphasis added). The Commission should revise the above-quoted language from mandatory to permissive in order to lessen the burden on electric utilities associated with surveys. Additionally, proposed attachers should be required to include in their application any known information on other attachers on the poles or pole lines on which they are applying to attach. Finally, the notice for a survey should be reduced from three business days to 24 hours.

Further, under Section 10.3.4.c, the new attacher should be responsible for notifying affected attachers. The Commission should replace the phrase “a utility can elect to satisfy its

survey obligations in this paragraph by notifying” with the phrase “the new attacher shall notify” affected attachers.

B. Section 10.4 Should Be Revised to Place the Obligations and Costs Incurred in Connection with Make-Ready Estimates on the New Attachers, i.e. the Cost-Causers.

1. Electric Utilities Should Not be Responsible for Gathering or Presenting Costs of Third-Party Make-Ready to the New Attacher.

The requirement in Section 10.4 that electric utilities serve as a clearing house to gather estimates from each of the existing attachers on the pole and present them to the new attacher is completely at odds with Section 10.5.3, which places the burden of coordinating make-ready on the new attacher. The proposed rule also ignores the fact that it is the new attacher, not the electric utility, that is motivated to obtain estimates from the existing attachers to the pole so that it can proceed with its work. The FCC got this rule wrong, and the Commission should not follow in the FCC’s footsteps.

2. The Commission Should Delete the Requirement in Section 10.4 that Utilities Provide Estimates on a Pole-by-Pole Basis.

Section 10.4 provides attachers with an option of requesting detailed make-ready estimates from utilities. The Companies already provide reasonably detailed make-ready estimates and, thus, do not oppose a rule requiring that estimates be reasonably detailed. However, Section 10.4 should not go so far as to require an “itemized estimate” on a “pole-by-pole basis.”

There are a number of problems with the pole-by-pole estimate requirement. First, with respect a project of any size, the administrative burden associated with generating any such break down would be time and cost prohibitive. Second, make-ready estimates do not always lend themselves to a per-pole cost breakdown because certain costs cannot be accurately assigned on

a per-pole basis. Fixed costs—like traffic-control, lock-out/tag-out, and rolling a truck to the work site—would ordinarily be priced into the total job (which almost always includes multiple poles). These fixed costs cannot be allocated on a pole-by-pole basis, because the costs do not change just because one pole is removed from the job. There are also other costs that are neither fixed nor per pole, but affect more than one pole— e.g., resagging a conductor to meet mid-span clearance requirements. Third, the electronic work order systems used by some utilities do not allow them to break down make-ready costs on a per-pole basis. These are the same systems utilities are using to provide cost estimates to their electric service customers. The Commission should not require electric utilities to implement make-ready estimate tools for attachers that are different from those they already use for their core electric service construction. However, if attachers are permitted to request “itemized estimates” on a “pole-by-pole basis” under Section 10.4, then Section 10.4 should be amended to allow pole owners to recover any additional costs flowing from such a request.

C. Section 10.5.3 Should Be Revised to Place the Make-Ready Notice Requirements on New Attachers.

The notices of make-ready that the utility is required to send under Section 10.5 are burdensome on the utility and should instead be issued by the new attacher. The make-ready is being done at the request of and for the sole benefit of the new attacher. It should thus be the new attacher, and not the electric utility, that is saddled with the burden of sending make-ready notices to existing attachers on the pole. The existing electronic notification systems used by the Companies and other electric utilities are not designed to forward this type of notice to existing attachers.

D. Section 10.9.2 Should Be Revised to Limit the Self-Help Remedy to the Communications Space Only.

The Companies strongly oppose proposed Section 10.9.2 creating a self-help remedy above the communications space. The FCC's corresponding rule, FCC Rule 1.1411(i)(2), is the subject of both an appeal in the Ninth Circuit (by a group of electric utilities that includes AEP) and a Petition for Reconsideration with the FCC (by a group of utilities that includes First Energy). *See Am. Elec. Power Serv. Corp. v. FCC*, Docket Nos. 1872689, 19-70490 (9th Cir. 2019); Petition for Reconsideration of the Coalition of Concerned Utilities, WC Docket No. 17-84, WT Docket No. 17-79 (Oct. 15, 2018).

First, Section 10.9.2 is in direct conflict with W.Va. Code Section 31G-4-3(a), which provides:

Notwithstanding any provision of this code to the contrary, the provisions of this article shall not apply to: (1) Facilities located above the "Communications Worker Safety Zone" as such term is defined in the National Electric Safety Code; or (2) Any electric supply facilities wherever located.

W.Va. Code § 31G-4-3. Just as "Staff recommended that the Commission adopt those provisions of the FCC Procedural Rules that do not conflict with applicable statutes...", the Commission should also not adopt the substantive FCC power supply space self-help rule that conflicts with existing W.Va. Code § 31G-4-3.

Second, the purpose of the power supply space self-help remedy adopted by the FCC was allegedly to speed deployment by allowing new attachers to hire contractors to perform self-help make-ready in the power supply space where electric utilities failed to meet the deadlines for such make-ready imposed by the FCC. *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, FCC 18-111, WC Docket No. 17-84, WT Docket No. 17-79, 33 FCC Rcd. 7705, 7751 at ¶ 96 (Aug. 3, 2018) (the "2018 Order"). However, electric utility make-ready is not what causes delays in the make-ready process; and it represents a small minority of the overall work to be

performed in that process. Further, there is no indication that electric utilities in West Virginia have routinely failed to meet power supply space make-ready deadlines or that such self-help will meaningfully accelerate deployment without cutting corners or skipping steps. The Companies, for their part, adhere to applicable power supply space make-ready deadlines. The Commission should not even consider adopting a rule as dangerous as power space self-help where there is simply no reason for such a remedy in West Virginia.

Third, a power supply space self-help remedy such as the one adopted by the FCC presents a serious danger to the safety of workers and the public by placing attaching entities in control of contractors working in the power supply space. This is extremely dangerous for several reasons. First, it is the experience of the Companies that attaching entities value speed to market over safety and reliability. Second, allowing entities that are not the power company to work in the power supply space creates a situation where entities working in that space may not be familiar with essential protocols of the electric utility such as, for example, lock-out-tag-out procedures, whereby electricity is suspended to a particular feeder while work is performed on certain poles. As stated by First Energy in the FCC rulemaking preceding the 2018 Order:

First...it is imperative that FirstEnergy retain control of the contractors performing make-ready work in the power space. While there are many responsible telecommunications providers who can be trusted to direct contractors' efforts to follow the applicable construction and safety standards, there are also many who will apply relentless pressure to cut corners to increase speed and lower costs. Work in the communications space alone is already quite dangerous, as dozens of workers are badly injured or killed each year. It is abundantly clear to FirstEnergy through years of experience that its telecommunications provider partners simply do not place the same emphasis on safety that FirstEnergy does, and many of them do not have electrical or structural engineers on staff qualified to direct power space construction by contractors. One split-second lack of safety precautions and someone doesn't go home to loved ones that night. It is FirstEnergy's primary objective to prevent injury-not react after it occurs.

FirstEnergy places safety as our #1 priority, and reliability of electric service as #2. Allowing other companies to work on our facilities will seriously jeopardize these priorities. As for safety, FirstEnergy considers OSHA and NESC as the minimum accepted standard for safety--our Company standards often exceed these minimums in order to better protect workers and the public. Will third party self-help contractors-with whom FirstEnergy would not have privity of contract-stringently apply FirstEnergy's safety rules, for just one example, using "glove and sleeve" for voltages above 15 kV? Many attacher comments and ex parte communications in this proceeding clearly articulate disagreement with-and outright animosity towards-any standard going above and beyond the bare minimums.

Second, even for the responsible actors, it is almost certain that third party oversight of work on electric distribution facilities will reduce reliability of the electric grid and lower the quality of electric service. It is difficult to convey the full complexity of the interconnected grid and the intricacies of coordinating work which often includes scheduled outages for pole attachment work as well as for regular electric system work. Lines are not de-energized at single poles-they are de-energized for entire circuits or sections of circuits, resulting in the deliberate or unplanned re-routing of energy flows onto other circuits. Not infrequently such re-routing implicates transmission lines as well as distribution lines, potentially affecting hundreds or thousands of customers. Without careful coordination, unplanned changes in energy flows are likely to overload circuits and may cause wider area forced outages. Further, FirstEnergy protocols provide for a longer notice of unforced outages to customers-14 days for outages affecting more than 10 customers-nearly three times an attacher's required notice under the Draft Order....

Letter from Thomas R. Pryatel, P.E., First Energy Service Co., to Chairman Pai, WC Docket No. 17-84, at pp. 1-2 (Jul. 20, 2018). While the FCC may be able to ignore the dangers inherent in this remedy, the Commission—which has jurisdiction over electric utilities and understands how this could lead to outages and even deaths—cannot.

It is also worth pointing out that the FCC's Broadband Deployment Advisory Committee, the industry group comprised largely of attaching entity representatives that helped create consensus rules upon which much of the 2018 Order is based, did not propose a power supply space self-help remedy. Further, no state public utility commission has adopted such a rule.

In light of the foregoing, the following changes to Section 10.9.2 are warranted:

Make-ready. If make-ready in the communication space is not complete by the date specified in Rule 10.5, then a new attacher may conduct the make-ready in place of the utility and existing attachers, and, as specified in Rule 11, hire a contractor to complete the make-ready such communications space make-ready. Under no circumstances shall any attacher, or any contractor hired by an attacher, complete make-ready above the communications space without the express written consent of the electric utility.

With respect to make-ready work above the communications space, the remedy for failure to complete such work within a reasonable time period should be filing a complaint with the Commission.

E. Section 10.10.2 Should Be Revised to Ensure that One-Touch Make-Ready is Performed in a Safe and Reasonable Manner.

Regarding Section 10.10.2, NESC engineering and clearance determinations are required before a contractor can conclude that communications space make-ready work is "simple." To provide maximum flexibility to allow communications companies to hire contractors, any contractor used by the new attacher should include a professional engineer stamp with all survey results, certifying the make-ready work is "simple." In addition, more notice rather than three days should be provided to allow utilities to participate in OTMR self-help surveys. Additional days need to be added to the One Touch Make Ready ("OTMR") application review process, such as 30 days' notice of OTMR construction instead of 15 days' notice. The additional days should be provided to allow utilities to monitor any OTMR make-ready construction work.

Additionally, in order to avoid the pervasive, unsightly, and highly objectionable "double wood" condition, in which an existing pole remains in place for extended periods of time right next to a replacement pole because existing communications attachers will not move their facilities, the Commission should simply enable pole owners to transfer all communications company cables, at the expense of the communications company, in a manner consistent with the communications space make ready self-help remedy. Alternatively, a timeline of perhaps 6

months should be written into the rule to provide that after a new pole is in place, other attachers have 6 months to transfer their facilities to the new pole. (See new Section 10.10.6).

VII. THE COMMISSION SHOULD DELETE REFERENCES TO SELF-HELP ABOVE THE COMMUNICATIONS SPACE IN SECTION 11 (CONTRACTORS FOR SURVEY AND MAKE-READY).

As set forth in part VI.D above, the Commission should not allow communications companies to perform work in the electric supply space. Not only is this a bad idea, but it is also inconsistent with W. Va. Code Section 31G-4-3 which provides: "Notwithstanding any provision of this code to the contrary, the provisions of this article shall not apply to: (1) Facilities located above the 'Communications Worker Safety Zone' as such term is defined in the National Electric Safety Code; or (2) Any electric supply facilities wherever located." For this reason, the Commission should also delete references to self-help above the communications space within proposed Section 11.1. This deletion can be accomplished through the following revisions to Section 11.1:

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 Rules 11.3 through 11.3.5 and the utility may not unreasonably withhold its consent.

VIII. THE COMMISSION SHOULD DELETE SECTION 12 (ILEC COMPLAINTS) IN IT ENTIRETY BECAUSE THE COMMISSION ALREADY REGULATES JOINT USE AGREEMENTS BETWEEN ELECTRIC UTILITIES AND ILECS.

Section 12 is based upon FCC Rule 1.1413, which is currently the subject of an appeal in the Ninth Circuit Court of Appeals (by a coalition of electric utilities that includes Appalachian Power Company and Wheeling Power Company's affiliate, American Electric Power Service Corporation) and a Petition for Reconsideration (by a coalition of electric utilities that includes

FirstEnergy). *See Am. Elec. Power Serv. Corp. v. FCC*, Docket Nos. 1872689, 19-70490 (9th Cir. 2019); Petition for Reconsideration of the Coalition of Concerned Utilities, WC Docket No. 17-84, WT Docket No. 17-79 (Oct. 15, 2018).

A. The Commission Should Not Adopt Proposed Section 12 because It Conflicts with the Commission's Existing Jurisdiction Over Joint Use Agreements.

Incumbent local exchange carriers ("ILECs") and electric utilities share space on each other's poles in their overlapping service areas in order to avoid the cost and public nuisance of redundant pole lines. The rates, terms, and conditions governing those relationships are set forth in joint use agreements. The Companies have a number of joint use agreements and joint pole ownership agreements, some of which have been in place for many decades.

The Commission already has authority to regulate joint use agreements between electric utilities and ILECs pursuant to W. Va. Code Sections 24-2-3, 24-2-6, 24-2-7, 24-2-12. The Commission has previously exercised that jurisdiction on several occasions. *See, e.g., Appalachian Power Company and Wheeling Power Company v. Frontier West Virginia Inc.*, Case No. 12-0284-E-T-C; *Verizon West Virginia Inc. v. Appalachian Power Company and Wheeling Power Company*, Case No. 07-1279-E-C. Even the FCC has recognized the scope of the Commission's jurisdiction over joint use relationships and has stayed an FCC complaint in favor of the Commission's jurisdiction. *See Frontier West Virginia Inc. v. Appalachian Power Company and Wheeling Power Company*, March 25, 2013 FCC Enforcement Bureau Letter Order, File No. EB-12-MD-004.

Although the Companies' joint use agreements have existed (and been subject to Commission oversight) for many decades, there have only been only a handful of disputes that have been taken to the Commission for resolution. The absence of a significant number of such disputes indicates that the existing regulatory and contractual approach has worked well. In the

rare situation where a dispute does arise between these two types of public utilities, the Commission has the authority to resolve those disputes pursuant to W. Va. Code Sections 24-2-3, 24-2-6, 24-2-7, 24-2-12.

Further, the Companies are not aware of any instance in which the Commission—which has exercised jurisdiction over joint use agreements for decades—has determined that a rate contained within a joint use agreement was unjust or unreasonable. The presumption in Section 12 would be tantamount to the Commission presuming that existing joint use agreements over which it has had jurisdiction for decades are presumed to be unjust and unreasonable. There is simply no factual predicate upon which to make such a presumption. In fact, the existing factual predicate—the Commission’s long-standing authority over such agreements to ensure they are just and reasonable—directly contradicts the proposed presumption.

Further, the proposed presumption would, in essence, presume that electric ratepayers should bear a higher portion of the cost of jointly used infrastructure. The FCC has no jurisdiction over electric utility rates and has shown time and again its apathy (if not eagerness) towards shifting costs to electric ratepayers. However, this Commission does have jurisdiction over both ILECs and electric utilities and has an obligation to consider the justness of imposing costs fairly borne by ILECs upon electric utility ratepayers.

B. The Commission Should Not Adopt Section 12 Because it Would Create a Presumption that is Inconsistent with the Facts, as ILECs Enjoy Numerous Advantages Under Joint Use Agreements That Are Not Available to Their Competitors.

With respect to existing ILEC attachments made pursuant to joint use agreements, the Commission’s proposed presumption is contrary to the facts—and thus unreasonable. As stated by the United States Supreme Court in *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 787 (1979), “[i]t is, of course, settled law that a presumption adopted and applied by [a regulatory agency]

must rest on a sound factual connection between the proved and inferred facts.” *See also Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 804-05 (1945) (“Like a statutory presumption or one established by regulation, the validity, perhaps in a varying degree, depends upon the rationality between what is proved and what is inferred.”).

The presumption in proposed Section 12 that ILECs are “similarly situated” to telecommunications carriers and cable television providers does not bear a “sound factual connection” to the facts here. ILECs place a greater burden on poles than their competitors. While entities that make pole attachments pursuant to pole license agreements are presumed to occupy one foot of space, the minimum number of feet of space reserved for ILECs in most joint use agreements ranges from 2 to 3 feet for standard 40-foot poles. And, in fact, ILECs generally occupy at least this amount of space, if not more. In addition to often having more than one attachment per pole, the ILECs’ heavier, bundled lines, unlike a single fiber lashed to a steel messenger, have significantly greater mid-span sag and place significantly greater loading on poles. As a result, an ILEC’s attachment must be made higher on the pole to satisfy minimum grade clearance at mid-span, which in turn “occupies” a greater amount of space.

Even the FCC has expressly recognized distinctions between ILECs and other entities that make attachments to electric utility poles:

- “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. 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.” 2018 Order at 7768, ¶ 124.
- “Given that incumbent LECs often can be differently situated from other attachers, both due to the terms of existing joint use agreements and because

of their continuing pole ownership, we conclude that it would not be appropriate to treat them identically to telecommunications carrier or cable operator attachers in all circumstances.” 2011 Order at 5328, ¶ 203.

- “Having found that section 224(b) enables the Commission to ensure that pole attachments by incumbent LECs are accorded just and reasonable rates, terms and conditions, we recognize the need to exercise that authority in a manner that accounts for the potential differences between incumbent LECs and telecommunications carrier or cable operator attachers... incumbent LECs also own many poles and historically have obtained access to other utilities’ poles within their incumbent LEC service territory through ‘joint use’ or other agreements. We therefore decline at this time to adopt comprehensive rules governing incumbent LECs’ pole attachments, finding it more appropriate to proceed on a case-by-case basis.” 2011 Order at 5333-34, ¶ 214.
- “. . . some commenters contend that joint use agreements give incumbent LECs advantages that offset any increased rates they might pay for pole access in certain circumstances. . . . As examples of incumbent LEC advantages, these parties cite: ‘Paying significantly lower make-ready costs; No advance approval to make attachments; No post-attachment inspection costs; Rights-of-way often obtained by electric company; Guaranteed space on the pole; Preferential location on pole; No relocation and rearrangement costs; and Numerous additional rights such as approving and denying pole access, collecting attachment rents and input on where new poles are placed.’ Comcast Reply at 25. Electric utilities also contend that existing joint use arrangements—in contrast to cable or telecommunications carrier pole lease agreements—reflect a decades-old contractual responsibility of incumbent LECs to share in infrastructure costs and also account for the fact that incumbent LECs still own many poles today. . . . A failure to weigh, and account for, the different rights and responsibilities in joint use agreement could lead to marketplace distortions. We therefore reject arguments that rates for pole attachments by incumbent LECs should always be identical to those of telecommunications carriers or cable operators. . . . As discussed below, incumbent LECs have the opportunity to demonstrate that they are comparably situated to telecommunications carriers or cable operators in a particular instance.” 2011 Order at 5334-36, ¶ 216 n. 654 (emphasis added).
- “As discussed above, the historical joint use agreements between incumbent LECs and other utilities implicate rights and responsibilities that differ from those in typical pole lease agreements between utilities and telecommunications carriers or cable operators.” 2011 Order at 5336, ¶ 217.

The FCC has also noted in the context of complaint proceedings that joint use agreements typically provide ILECs with a number of advantages not afforded to other types of attaching entities. See *In the Matter of Verizon Virginia, LLC v. Virginia Electric and Power Company*, 32 FCC Rcd. 3750, 3751 (May 1, 2017) (citing 2011 Order at 5335, ¶ 216 n.654); *Verizon Florida LLC v. Florida Power and Light Co.*, 30 FCC Rcd. 1140, 1148, ¶ 21 (Feb. 11, 2015) (“In the *Pole Attachment Order*, the Commission repeatedly noted that joint use agreements are not analogous to lease agreements between competitive LECs and electric utilities because...incumbent LECs receive unique benefits under joint use agreements that are not available to competitive LECs”).

Though the FCC, in 2018, subsequently adopted a presumption similar to the presumption in Section 12.2, it did so based upon the alleged repeated “disputes” between ILECs and electric utilities (a circumstance not present here). 2018 Order at ¶ 129. Further, the Companies believe that the FCC’s new presumption is unlawful, anyway, and have challenged this portion of the FCC’s 2018 order. See *Am. Elec. Power Service Corp. et al v. FCC*, Docket Nos. 18-72689(L), Joint Opening Brief for Petitioners, 19-70490 (9th Cir. June 24, 2019); see also *Petition for Reconsideration of the Coalition of Concerned Utilities*, WC Docket No. 17-84, WT Docket No. 17-79 (Oct. 15, 2018). Whether the FCC’s presumption is ultimately adjudicated as unlawful or not, it is still bad policy that ignores the facts. The Commission should not follow suit.

C. Placing the Burden of Proof on Electric Utilities in ILEC Rate Complaints Would Be Unjust and Unreasonable.

Section 12 would also place the burden on an electric utility to disprove the faulty presumption contained therein by clear and convincing evidence. There are at least two flaws with this misplaced burden of proof. First, this rule would place the burden of proof on the

party seeking to uphold the voluntary, and heretofore presumptively reasonable, joint use agreement between the parties, rather than on the party seeking to “get out” of the express terms of the contract. This is exactly backwards, especially in light of the fact that the Commission has long exercised jurisdiction over such agreements (thus affording them a presumption of validity in West Virginia). Second, the proposed rule purports to require an electric utility to meet its misplaced burden of proving an incorrect presumption by “clear and convincing evidence” standard. The clear and convincing evidence standard is a higher burden of proof than the “preponderance of the evidence” standard that ordinarily governs civil litigation. *Sharon B.W. v. George B.W.*, 507 S.E.2d 401, 404 (W. Va. 1998) (“The standard of proof in civil cases is *preponderance* of evidence.”) (emphasis in original).

D. If the Commission Retains Section 12.2, It Should Revise the Effective Date Thereof.

If the Commission chooses to retain proposed Section 12.2, the Commission should revise that rule to remove the erroneous reference to October 4, 2018 as the “effective date of 47 C.F.R. 1.413(b) [sic].” The “effective date” of FCC Rule § 1.1413(b) was March 11, 2019. *See* 84 Fed. Reg. 2460 (Feb. 7, 2019). Regardless, the Commission should replace the phrase “contracts entered into or renewed after October 4, 2019 (effective date of 47 C.F.R. § 1.413(b)) [sic]” with “contracts entered into or renewed after the effective date of this rule.” It would be unjust and unreasonable to apply Section 12.2 retroactively to agreements entered into or renewed after March 11, 2019. Instead, Section 12.2 should be applied to agreements entered into or renewed after the effective date of Section 12.2.

IX. THE COMMISSION SHOULD REVISE THE TITLE OF SECTION 13 TO CLARIFY THAT THE REVIEW PERIOD CONTAINED THEREIN ONLY APPLIES TO POLE ACCESS COMPLAINTS.

Section 13.1 proposes to adopt the FCC's rule governing the "review period" applicable to "pole access complaints." See 47 C.F.R. § 1.1414(a). Section 13.1 does not adopt the FCC's "review period" for "other pole attachment complaints." See 47 C.F.R. § 1.1414(b). As a consequence, the Commission's well-established rules of practice and procedure, West Virginia Code Rules §§ 150-1-1 *et seq.*, govern all "other pole attachment complaints," such as those challenging the rates, terms and conditions of pole attachment agreements. The Companies agree with this approach. By applying its own procedural rules to all "other pole attachment complaints," the Commission can leverage its institutional knowledge in administering the most prevalent types of pole attachment complaints. The Companies believe that the Commission's approach will create significant efficiencies. Accordingly, to further clarify that Section 13.1's "review period" only applies to "pole access complaints," the Companies propose revising the title of Section 13.1 as follows:

§150-38-13. Review period for pole access ~~attachment~~ complaints.

X. THE COMMISSION SHOULD ADOPT A MODIFIED VERSION OF SECTION 14 THAT (1) PROHIBITS OVERLASHING INTO EXISTING VIOLATIONS, (2) CONFIRMS THAT OVERLASHING MAY BE DENIED FOR CAPACITY, SAFETY, RELIABILITY AND ENGINEERING REASONS, AND (3) CONFIRMS THAT OVERLASHERS ARE RESPONSIBLE FOR THE COST OF EVALUATING THE PROPOSED OVERLASHING.

A. The Commission Should Not Sanction Overlapping into Preexisting Violations.

Section 14.2 provides:

Preexisting violations. A utility may not prevent an attacher from overlapping because another attacher has not fixed a preexisting violation. A utility may not require an existing attacher that overlaps its existing wires on a pole to fix preexisting violations caused by another existing attacher.

The Commission should strike the first sentence of Section 14.2 because it conflicts with Section 3.1, which allows a utility to deny access "where there is insufficient capacity or for reasons of

safety, reliability, and generally applicable engineering purposes.” A preexisting violation may pose—in fact often poses—a capacity, safety, reliability or engineering issue that must be resolved prior to overlashing. Overlashing into an existing violation is a dangerous practice for at least three reasons: (1) it can endanger the safety of the communications worker performing the overlashing (for example, causing the communications worker to enter into the power space); (2) it can endanger the safety of the public by compounding existing violations (for example, low hanging wires over a roadway); and (3) it can threaten the reliability of the electric infrastructure by compounding an existing problem (for example, further overloading an already-overloaded pole).

With respect to the second sentence of Section 14.2, which states that “[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,” the Companies do not disagree with that concept as stated. Specifically, the Companies agree that the new attacher to the pole should not be responsible for the cost of remedying existing violations caused by other attaching entities. But there is more to it. This text, in combination with the preceding sentence stating that utilities cannot prevent an overlasher from attaching based on a third party’s preexisting violation, seems to put the onus on the electric utility to push forward with correcting the violation and hope to recover the cost later. There are at least two problems with this approach. First, by allowing make-ready to proceed before the cost-causer is identified, the draft rule would deprive the existing attacher of its contractual right to be notified of the violation and pursue a less-costly remedy, such as removal of the attachment. Second, if the violation is corrected before the attacher is notified, there is no “evidence” to back-up the assignment of cost causation. This becomes particularly important when the corrective action is a pole change-out (which is often a

situation where the existing violator will simply choose another aerial route or an underground solution). Further, such an approach would shift a tremendous cost, risk and burden onto electric utilities and their ratepayers.

The most effective way of addressing delays in correcting existing violations is to adopt a rule that requires existing attachers to correct violations identified by a utility within 15 days of notice to the existing attacher of same, and providing that where the existing attacher fails to do so, the new attacher can proceed with correcting the violation at the existing attacher's sole expense (and regardless of whether the existing attacher might have chosen a lower cost alternative such as removal of the existing attachers' attachment). The Companies thus propose the following modifications to proposed Section 14.2:

14.2 Preexisting violations.

14.2.1 A utility may not prevent an attacher from overlashing because another attacher has not fixed a preexisting violation, **except where the utility reasonably determines that the proposed overlashing should be denied for capacity, safety, reliability, or generally applicable engineering purposes.** 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.

14.2.2 **Existing attaching entities must correct violations identified by a utility within 15 days of notice to the existing attaching entity. Where the existing attaching entity fails to correct the violation, an overlashing entity can perform such work (or cause such work to be performed) at the existing attaching entity's sole risk and expense.**

B. The Companies Support Section 14.2 to the Extent that It Expressly Allows Pole Owners to Require Up to 15 Days' Advance Notice of Overlashing.

Section 14.3 provides that "A utility may require no more than 15 days advance notice of planned overlashing." The Companies support the proposed rule insofar as it would expressly allow electric utilities to require advance notice of overlashing. Such advance notice of

overlashing is essential to ensure the safety and reliability of electric utilities' infrastructure, personnel, and the public at large. Advance notice of overlashing is the only way an electric utility can (1) determine whether the proposed overlashing meets the electric utility's engineering standards for loading and clearance or (2) exercise its right under Section 3.1 to "deny a cable television system or any telecommunications carrier access to its poles...on a nondiscriminatory basis where there is insufficient capacity or for reasons of safety, reliability and generally applicable engineering purposes." Overlashing presents engineering and safety concerns similar to any other new burden on a pole line. It is critical, as with a new attachment, that electric utilities know about proposed overlashing in advance so that they have a reasonable opportunity to engineer the new load. This is particularly true as overlashing becomes more common and as the fiber count of a typical overlash increases. As stated by the FCC in adopting the overlashing rule upon which draft Section 14.3 is based:

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. Such pole overloading could "hamper the installation or maintenance of electric facilities, or other on-going wireline or wireless facility installations." We find these concerns to be valid and supported by the record. 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.... Providing the utility with advance notice of overlashing will allow it to better monitor and ensure the safety, integrity, and reliability of its poles both before and after the overlash is completed without overburdening overlashers or requiring multiple trips to the pole.

2018 Order at 7762-65, ¶¶ 116, 118 (emphasis added).

The Commission's proposal to support advance notice conforms with the decisions of the vast majority of state commissions to address this issue within the past five years.

Arkansas. In 2016, the Arkansas Public Service Commission adopted new pole attachment rules which provide that “[r]equests to a Pole Owner for a Pole Attachment or Overlashing permit shall be in writing.” See 126-03 Ark. Code R. § 2.02(a). Arkansas Public Service Commission Pole Attachment Rules, Rule 2.02(a). Further, Rule 2.02(b) of the Arkansas Pole Attachment Rules provides, “[a]n Attaching Entity wishing to overlash facilities shall submit a written request to the Pole Owner identifying the size and type of facilities to be overlashed, the size and type of facilities to be added, the poles over which such facilities will be overlashed, and when such facilities will be overlashed. . . .” *Id.* at § 2.02(b). And Rule 2.02(f) of the Arkansas rules provides:

The Pole Owner shall approve, deny, or conditionally approve with Make-Ready Work provisions, the request for a Pole Attachment or Overlashing in writing as soon as practicable, but in no event later than:

- (1) 45 days after receipt of a complete permit request, for requests including no more than 300 poles or 20 manholes; or
- (2) 60 days after receipt of a complete permit request, for requests greater than the preceding limits but less than 3,000 poles and 100 manholes.

Id. at § 2.02(f) (emphasis added). Attaching entities sought reconsideration of this rule, arguing that a “permit for fiber optic overlashing is unnecessary,” but the Arkansas PSC rejected the request, holding:

The Commission finds that the TelCos have raised no new issues which support a revision to Rule 2.01 on overlashing. The evidence continues to support the need for a permit for overlashing because of safety and reliability concerns.

In the Matter of a Rulemaking Proceeding to Consider Changes to the Arkansas Public Service Commission's Pole Attachment Rules, Docket No. 15-019-R; Order No. 7, 2016 Ark. PUC LEXIS 360, *10 (Oct. 12, 2016) (emphasis added).

Washington. In 2015, the Washington Utilities and Transportation Commission (“WUTC”) adopted a rule requiring that attachers provide 15 days’ advance notice of overloading, along with specific information in the advance notice of overloading:

The occupant must provide the owner with written notice fifteen business days prior to undertaking the overloading. The notice must identify no more than one hundred affected poles and describe the additional communications wires or cables to be overloaded so that the owner can determine any impact of the overloading on the poles or other occupants’ attachments. The notice period does not begin until the owner receives a complete written notice that includes the following information:

- (i) The size, weight per foot, and number of wires or cables to be overloaded; and
- (ii) Maps of the proposed overload route, including pole numbers if available.

See Washington Admin. Code § 480-54-030(11)(a). Under the WUTC’s rule, the advance notice specifically allows the pole owner “to inspect the proposed route and provide a written response and explanation if the owner prohibits the noticed overloading.” *In the Matter of Adopting Chapter 480-54 WAC Relating to Attachment to Transmission Facilities*, Docket U-140621, General Order S-582, Order Adopting Rules Permanently, 2015 Wash. UTC LEXIS 824, *15 (Oct. 21, 2015).

Louisiana. In 2014, the Louisiana Public Service Commission (“LPSC”) adopted an order (1) requiring advance notice of overloading, and (2) requiring a pole owner to notify the attaching entity within 15 days if the request is denied. See Louisiana Public Service Commission, General Order, Docket No. R-26968, 2014 La. PUC LEXIS 263, *37-38 (Rule 7(a) - (c)) (Sept. 4, 2014). The LPSC overloading rule provides, in most pertinent part:

- a. Any Attacher wishing to overload facilities must provide a Pole Owner with reasonable notice of its intent to overload facilities by filing a written request with the Pole Owner identifying what existing and proposed facilities are to be attached and/or overloaded, all entities served by the overload, all design information to perform pole loading analysis, where

such facilities will be attached and/or overlashed, and when such facilities will be attached and/or overlashed. . . .

- b. A Pole Owner shall conduct any pre-construction inspection reasonably necessary within a reasonable time of receipt of the Attacher's written request to overlash and provide the Attacher with a written estimate of the Make-Ready Costs, if any, associated with the overlash.
- c. Where a Pole Owner does not wish to permit the attachment or overlashing of facilities because it has determined that a requested overlash cannot be performed in compliance with applicable engineering, construction and safety standards, the Pole Owner must identify, in writing, the reasons for the denial within 15 days of receipt of the Attacher's written request. . . .

Id.

- C. **Allowing an Attaching Entity to Overlash Despite the Fact that an Overlash Would Create a Capacity, Safety, Reliability, or Engineering Issue Conflicts with Proposed Section 3.1 and Is Dangerous and Unreasonable.**

While proposed Section 14.2 would allow a utility to require advance notice of overlashing—presumably so that a utility can evaluate whether the proposed overlash would create a capacity, safety, reliability or engineering issue—the proposed rule does *not* expressly allow a utility to deny access if such an issue is identified. Rather, the draft rule glosses-over this important step and purports to move directly to requiring a utility to provide specific documentation of the issue to the party seeking to overlash:

It after receiving advance notice, the utility determines that an overlash would 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....

Section 14.2 (emphasis added). Though the Commission likely does not intend to undermine a utility's right to deny access for reasons of insufficient capacity or safety, reliability or engineering concerns, the Commission should modify the above-referenced language to avoid

any ambiguity and to avoid potential conflict with Section 3.1, which expressly allows a utility to deny access “where there is insufficient capacity or for reasons of safety, reliability, and generally applicable engineering purposes.”

D. The Commission Should Not Adopt the Portion of Section 14.2 Preventing a Public Utility from Recovering Its Costs of Performing an Engineering Review of a Proposed Overlash.

Section 14.2 states that an electric utility “may not charge a fee to the party seeking to overlash for the utility’s review of the proposed overlash.” Though this provision does not expressly prohibit an electric utility from recovering the incremental costs incurred in connection with the engineering review of the proposed overlash, the Companies are concerned that attaching entities would attempt to use this language to shift these costs to electric ratepayers.

A rule that even arguably undermines a utility’s ability to recover pole attachment costs from the entity that caused those costs would run afoul of longstanding cost causation precedent and shift those costs to electric utilities and their ratepayers. *See, e.g., Carlton F. Collins, 904 Old Oakvale Road, Princeton, Mercer County, Complainant, v. Citizens Telecommunications Company of West Virginia, doing business as Frontier Communications of West Virginia, a corporation, Defendant*, 2002 W. Va. PUC LEXIS 2694, at *13 (Jul. 1, 2002) (“A major tenet of ratemaking has long been that the cost causer should bear the cost incurred.”); 2011 Order at 5302, ¶ 143 n. 426 (“These capital costs would not have been incurred ‘but for’ the pole attachment demand and the attacher—the cost causer—pays for these costs.”). Furthermore, such a rule would conflict with Section 5.2, which states that “a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments....” Other reverse preemption states, such as Arkansas, explicitly allow pole owners to recover the costs of reviewing proposed overlashes:

The Pole Owner shall identify and account for the incremental engineering costs associated with a request for a Pole Attachment or Overlapping permit and the cost of estimating Make-Ready Work. A Pole Owner may charge an Attaching Entity incremental administrative costs associated with a request for a Pole Attachment or Overlapping permit and the cost of estimating Make-Ready Work, provided that the Pole Owner identifies and accounts for such incremental administrative costs. The Attaching Entity shall pay to the Pole Owner any incremental engineering costs or incremental administrative costs incurred and charged by the Pole Owner in connection with a request for a Pole Attachment or Overlapping permit, regardless of whether the Attaching Entity's request is rejected or withdrawn by the Attaching Entity.

126-03 Ark. Code R. § 202(c). When an engineering analysis is necessitated by a proposed overlap, the overlasher is the “cost causer,” and the cost of that analysis should be borne by the overlasher.

XI. THE COMMISSION SHOULD DECLINE TO ADOPT THE FCC'S FORMAL COMPLAINT RULES, BUT IF THE COMMISSION NEVERTHELESS ADOPTS THOSE RULES, CERTAIN CHANGES ARE NECESSARY.

A. The Commission Should Decline to Adopt the FCC's Formal Complaint Rules.

The Commission should not adopt Sections 15 through 29 incorporating the FCC's formal complaint rules. As previously stated by Staff, “adoption of a separate set of procedural rules would be inconsistent with W. Va. Code § 24-1-7 which provides that the Commission Procedural Rules are applicable to all matters coming before it.” Order at 3. The Commissions' existing rules already provide more than adequate procedures for complaint proceedings, and there is no reason why they cannot be applied to pole attachment complaint proceedings. For example, the Commission already has detailed rules regarding the filing of complaints and answers, (W. Va. Code R. §§ 150-1-6, 150-1-7) and discovery requests (*id.* at § 150-1-13.6), that render proposed Sections 16, 18, and 22—which are based on the FCC's rule—at best, wholly unnecessary, and at worst, in direct conflict with preexisting rules. It would reduce confusion among participants to use one set of procedural rules rather than two different sets. The

Commission's current procedural rules have been in effect for decades and satisfied the test of time.

Further, adopting a separate set of formal complaint rules for pole attachment complaints would be the exact opposite of the approach the FCC has taken. When the FCC adopted its formal complaint rules, it stated:

Three different sets of procedural rules, which the Commission adopted at different times, apply to formal complaints that the Enforcement Bureau now handles under its delegated authority. In 1978, the Commission adopted procedural rules for pole attachment complaints governed by Section 224 of the Communications Act of 1934, as amended (Act)..On September 13, 2017, the Commission adopted a Notice of Proposed Rulemaking seeking comment on streamlining and consolidating the procedural rules governing formal complaints filed under Section 208 of the Act; pole attachment complaints filed under Section 224 of the Act; and formal complaints filed under Sections 255, 716, and 718 of the Act concerning access by persons with disabilities to communications equipment and services.

See In the Matter of Amendment of Procedural Rules Governing Formal Complaint Proceedings Delegated to Enforcement Bureau, EB Docket No. 17-245, Report and Order, 33 FCC Red. 7178, 7178-79 at ¶ 2-3 (Jul. 18, 2018) ("Complaint Rules Order"). The FCC thus took separate complaint rules applicable to different types of complaint proceedings and consolidated them into one set of complaint rules. The adoption by this Commission of a separate set of complaint rules for pole attachment proceedings than for its other complaint proceedings would thus be contrary to the spirit of the FCC's formal complaint rules.

B. If the Commission Nevertheless Adopts the FCC's Formal Complaint Rules, Certain Changes Are Necessary.

1. The Commission Should Strike Proposed Rule 150-38-17 regarding Damages.

If the Commission does choose to adopt the FCC's formal complaint rules, it should make a number of changes to the proposed rules. First, Section 17 regarding damages should be stricken. As previously stated by Staff:

...the enactment of W. Va. Code § 31G-4-4(b) created an indirect conflict with W.Va. Code § 24-2-7 that prohibits the Commission from awarding damages.

Staff recommended that the Commission adopt those provisions of the FCC Procedural Rules that do not conflict with applicable statutes or the Commission Procedural Rules. Specifically, the Commission should not adopt provisions that provide for the imposition of fees and allow claims for damages - §§1.722(f), 1.723, and 1.734....

Order at 3.

In addition, the damages provision contained within the FCC's formal complaint rules, FCC Rule 1.723, is not applicable to pole attachment complaint proceedings. In order to understand why this is, it is necessary to examine the history of the FCC's formal complaint rules. Those rules, including FCC Rule 1.723, were originally applicable to Section 208 complaints, and did not apply to pole attachment complaint proceedings. *See Complaint Rules Order*, 33 FCC Rcd. at 7178-79, ¶ 2. Only recently did the FCC adopt revisions to its formal complaint rules that made those rules applicable to pole attachment complaints. *See generally, id.* Because the revised formal complaint procedures are now applicable to pole attachment complaint proceedings, in addition to Section 208 complaints, FCC Rule 1.723 appears on its face to apply to pole attachment complaint proceedings. However, that is not the case. As recently as 2011, the FCC has declined to adopt rules allowing for the imposition of damages in pole attachment complaint proceedings. *See* 2011 Order at 5288-89, ¶¶ 107-109 ("we decline at this time to amend rule 1.1410 to allow compensatory damages."). In the FCC's subsequent rulemaking revising its formal complaint procedures and applying them to pole attachment complaints, the FCC did not address FCC Rule 1.723 regarding damages and its applicability to

pole attachment complaints at all. If the FCC intended to reverse course regarding the imposition of damages in pole attachment complaints, it would have, as required, explained its reasoning for doing so in the order adopting the formal complaint rules. *See generally*, Complaint Rules Order; *see also Lone Mountain Processing, Inc. v. Secretary of Labor*, 709 F.3d 1161, 1164 (D.C. Cir. 2013) (“[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored. Failing to supply such analysis renders the agency’s action arbitrary and capricious.”).

2. The Commission Should Revise Proposed Rule 150-38-22 To Improve Upon the Discovery Process.

In addition, should the Commission adopt the FCC’s formal complaint rules, the Commission should improve upon them by revising Section 22 to specify that the propounding of interrogatories shall occur *after* the filing of the complaint, answer, and reply. 47 C.F.R. § 1.730(a), upon which Section 22 is based, provides that:

- (a) A complainant may file with the Commission and serve on a defendant, concurrently with its complaint, up to 10 written interrogatories. A defendant may file with the Commission and serve on a complainant, concurrently with its answer, up to 10 written interrogatories.

47 C.F.R. § 1.730(a). In practice, this rule has proven to be unworkable because it stacks the discovery deadlines on top of the pleading deadlines. The Commission should improve upon the FCC’s rules by requiring that any interrogatories will be served within 10 days following the close of the pleading cycle. This also provides a discovery process that is more closely aligned with the Commission’s traditional adjudicatory procedures.

CONCLUSION

The West Virginia Legislature has given the Commission the authority to regulate pole attachments. The Commission should regulate pole attachments as it regulates all other assets

under its supervision—by providing due process to stakeholders and tailoring its rules and policies to fit West Virginia rather than by wholesale adoption of the FCC’s regulatory scheme. The Companies believe the Commission has the authority to adopt the rules it concludes are appropriate for West Virginia and can do so without violating the Legislature’s direction and intent in W. Va. Code Section 31G-4-4.

WHEREFORE, the Companies respectfully request that the Commission carefully consider the Comments presented by the Companies as part of this proposed rulemaking.

Dated this 7th day of November, 2019.

Respectfully submitted,

APPALACHIAN POWER COMPANY
WHEELING POWER COMPANY
MONONGAHELA POWER COMPANY
THE POTOMAC EDISON COMPANY

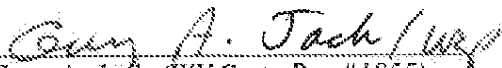
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ATTACHMENT A

TITLE 150
LEGISLATIVE RULE
PUBLIC SERVICE COMMISSION

SERIES 38
RULES FOR THE GOVERNMENT OF POLE ATTACHMENTS

§150-38-1. General.

1.1. Scope. -- These rules govern the regulation of pole attachments subject to the jurisdiction of the Public Service Commission pursuant to W. Va. Code §31G-4-4, and subject to regulation under 47 U.S.C. §224, commonly referred to as the Pole Attachment Act and the regulations promulgated thereunder at 47 C.F.R. §§1.1401-1.1415.

1.2. Authority. -- W. Va. Code §§24-1-1, 24-1-7, 24-2-1, 24-2-2, 31G-4-4.

1.3. Filing Date. --

1.4. Effective Date.

1.5. Intent. -- The Commission has the authority to consider, and will consider, the interests of the subscribers of the services offered by means of pole attachments as well as the interests of the consumers of the utility services. These rules, commonly referred to as the Pole Attachment Rules, adopt the rates, terms, conditions and complaint procedures for access to and use of utility poles, ducts, conduits and rights-of-way provided in 47 U.S.C. §224 and 47 CFR §§1.1401-1.1425, inclusive of future changes as those regulations may be amended, for the regulation of pole attachments in West Virginia as provided by W. Va. Code §31G-4-4.

1.6. Application of rules. -- This Series applies to all persons, entities, poles, ducts, conduits and rights-of-way subject to 47 U.S.C. §224 and 47 C.F.R. §§1.1401-1.1415 as those regulations may be amended.

§150-38-2. Definitions.

2.1. The term "utility" means any person that is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any communications through wires or cables. Such term does not include any railroad, any person that is cooperatively organized, or any person owned by the Federal Government or the State.

2.2. The term "pole attachment" means any attachment by a cable television system, ~~or provider of telecommunications carrier service, or an entity whose sole purpose is to provide broadband service,~~ to a pole, duct, conduit, or right-of-way owned or controlled by a utility.

2.3. With respect to poles, the term "usable space" means the space on a utility pole above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment, and which includes space occupied by the utility, ~~but does not include the communication worker safety zone.~~ With respect to conduit, the term usable space means capacity within a conduit system which is available, or which could, with reasonable effort and expense, be made available, for the purpose of installing wires, cable and associated equipment for telecommunications or cable services, and which includes capacity occupied by the utility.

2.4. The term "complaint" means a filing by a cable television system operator, a cable television system association, a utility, an association of utilities, a telecommunications carrier, or an association of telecommunications carriers alleging that it has been denied access to a utility pole, duct, conduit, or right-of-way in violation of these rules and/or that a rate, term, or condition for a pole attachment is not

just and reasonable. It also means a filing by an incumbent local exchange carrier (as defined in 47 U.S.C. §251(h)) or an association of incumbent local exchange carriers alleging that a rate, term, or condition for a pole attachment is not just and reasonable.

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

2.6. The term "defendant" means a cable television system operator, a utility, or a telecommunications carrier against whom a complaint is filed.

2.7. The term "State" means the State of West Virginia, or any political subdivision, agency, or instrumentality thereof.

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

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

2.10. The term "conduit system" means a collection of one or more conduits together with their supporting infrastructure.

2.11. The term "duct" means a single enclosed raceway for conductors, cable and/or wire.

2.12. With respect to poles, the term "unusable space" means the space on a utility pole below the usable space, including the amount required to set the depth of the pole, and the communication worker safety zone.

2.13. The term "attaching entity" includes cable system operators, telecommunications carriers, entities whose sole purpose is to provide broadband service, incumbent and other local exchange carriers, utilities, governmental entities and other entities with a physical attachment to the pole, duct, conduit or right of way. It does not include governmental entities with only seasonal attachments to the pole.

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

2.15. 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.

2.16. 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.

2.17. 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.

2.18. The term "communications space" means the lower usable space on a utility pole, which typically is reserved for low-voltage communications equipment.

2.19. The term "Commission" means the Public Service Commission of West Virginia.

2.20. The term "carrying charge rate" shall include capital costs including income taxes, depreciation, taxes other than income taxes, administrative and general expense, a rate of return, and an operation and maintenance expense factor.

§150-38-3. Duty to provide access; modifications; notice of removal, increase or modification; petition for temporary stay; and cable operator notice.

3.1. A utility shall provide a cable television system ~~or~~, any telecommunications carrier, or an entity whose sole purpose is to provide broadband service with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it, provided however that any attacher must secure and obtain the written authorization from the landowner for the placement of attacher's facilities on real property prior to being granted access to the utility's facilities. Notwithstanding this obligation, a utility may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity or for reasons of safety, reliability and generally applicable engineering purposes.

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

3.3. A utility shall provide a cable television system or telecommunications carrier no less than 60 days written notice prior to:

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

3.3.2. Any increase in pole attachment rates; or

3.3.3. Any modification of facilities by the utility, other than make-ready noticed pursuant to Rule 1 0.5, routine maintenance, or modification in response to emergencies.

3.3.4. A cable television system operator or telecommunications carrier may file a "Petition for Temporary Stay" of the action contained in a notice received pursuant to Rule 3.3 within 15 days of receipt of such notice. Such submission shall not be considered unless it includes, in concise terms, the relief sought, the reasons for such relief, including a showing of irreparable harm and likely cessation of cable television service or telecommunication service, a copy of the notice, and certification of service as required by Rule 4.2. The utility may file an answer within 7 days of the date the Petition for Temporary

Stay was filed. No further filings under this section will be considered unless authorized by the Commission.

3.3.5. Cable operators must notify pole owners upon offering telecommunications services.

§150-38-4. Pole attachment complaint proceedings.

4.1. Pole attachment complaint proceedings shall be governed by ~~Rules 15 through 29 of this Series~~ West Virginia Code of State Rules §§ 150-1-1 to 150-1-26.

4.2. The complaint shall be accompanied by a certification of service on the named defendant, and each of the Federal, State, and local governmental agencies that regulate any aspect of the services provided by the complainant or defendant.

4.3. The complaint shall include a statement that the utility is not owned by any railroad, any person who is cooperatively organized or any person owned by the Federal Government or the State.

4.4. The complaint shall be accompanied by a copy of the pole attachment agreement, if any, between the cable television system operator or telecommunications carrier and the utility. If there is no present pole attachment agreement, the complaint shall contain:

4.4.1. A statement that the utility uses or controls poles, ducts, or conduits used or designated, in whole or in part, for wire communication; and

4.4.2. A statement that the cable television system operator or telecommunications carrier currently has attachments on the poles, ducts, conduits, or rights-of-way.

4.5. The complaint shall state with specificity the pole attachment rate, term or condition which is claimed to be unjust or unreasonable and provide all data and information supporting such claim. Data and information supporting the complaint (including all information necessary for the Commission to apply the rate formulas in Rule 5.4 should be based upon historical or original cost methodology, insofar as possible. Data should be derived from ARMIS, FERC 1, Annual Report to the Commission or other reports filed with state or federal regulatory agencies (identify source). The complainant shall also specify any other information and argument relied upon to attempt to establish that a rate, term, or condition is not just and reasonable.

4.6. A utility must supply a cable television system operator or telecommunications carrier the information required in Rule 4.5, as applicable, along with the supporting pages from its ARMIS, FERC Form 1, Annual Report to the Commission, or other report to a regulatory body, and calculations made in connection with these figures, within 30 days of the request by the cable television system operator or telecommunications carrier.

4.7. If any of the information and data required in Rules 4.5 and 4.6 is not provided to the cable television system operator or telecommunications carrier by the utility upon reasonable request, the cable television system operator or telecommunications carrier shall include a statement indicating the steps taken to obtain the information from the utility, including the dates of all requests. No complaint filed by a cable television system operator or telecommunications carrier shall be dismissed where the utility has failed to provide the information required under Rules 4.5 and 4.6 after such reasonable request.

§150-38-5. Commission consideration of the complaint.

5.1. The complainant shall have the burden of establishing a prima facie case that the rate, term, or condition is not just and reasonable or that the denial of access violates 47 U.S.C. §224(f). If, however, a

utility argues that the proposed rate is lower than its incremental costs, the utility has the burden of establishing that such rate ~~does not allow for the recovery of the additional costs of providing pole attachments is below the statutory minimum just and reasonable rate based primarily on cost.~~ In a case involving a denial of access, the utility shall have the burden of proving that the denial was lawful, once a prima facie case is established by the complainant.

~~5.2.~~ The Commission shall determine whether the rate, term or condition complained of is just and reasonable. For the purposes of this paragraph, a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way. The Commission shall ~~deduct~~ exclude from actual capital costs those reimbursements received by the utility from cable operators and telecommunications carrier for non-recurring costs contributions or advances in aid of construction received by the utility and will exclude from operation and maintenance expenses and taxes any reimbursements received from cable operators and telecommunications carriers.

~~5.3.~~ The Commission shall deny the complaint if it determines that the complainant has not established a prima facie case, or that the rate, term or condition is just and reasonable, or that the denial of access was lawful.

~~5.4.~~ The Commission will apply the following formulas for determining a maximum just and reasonable rate:

~~5.4.1.~~ Formula A shown on Attachment A shall apply to attachments to poles, ~~by cable operators providing cable services. This formula shall also apply to attachments to poles by any telecommunications carrier (to the extent such carrier is not a party to a pole attachment agreement) or cable operator providing telecommunications services until February 8, 2001.~~

~~5.4.2.~~ With respect to attachments to poles by any telecommunications carrier or cable operator providing telecommunications services, the maximum just and reasonable rate shall be the higher of the rate yielded by Rules ~~5.4.2.a or 5.4.2.b.~~

~~5.4.2.a.~~ Formula B shown on Attachment B applies to the extent that it yields a rate higher than that yielded by the applicable formula in Rule ~~5.4.2.b.~~

~~5.4.2.b.~~ Formula C shown on Attachment C applies to the extent that it yields a rate higher than that yielded by the applicable formula in Rule ~~5.4.2.a.~~

~~5.4.2.~~ Formula D shown on Attachment D shall apply to attachments to conduit ~~by cable operators and telecommunications carriers.~~

§150-38-6. Remedies.

~~6.1.~~ If the Commission determines that the rate, term, or condition complained of is not just and reasonable, it may prescribe a just and reasonable rate, term, or condition and may:

~~6.1.1.~~ Terminate the unjust and/or unreasonable rate, term, or condition;

~~6.1.2.~~ Substitute in the pole attachment agreement the just and reasonable rate, term, or condition established by the Commission; and/or

~~6.1.3.~~ Order a refund, or payment, if appropriate. The refund or payment will normally be the difference between the amount paid under the unjust and/or unreasonable rate, term, or condition and the amount that would have been paid under the rate, term, or condition established by the Commission, plus interest, consistent with the applicable statute of limitations.

~~6.2.~~ If the Commission determines that access to a pole, duct, conduit, or right-of-way has been unlawfully denied or delayed, it may order that access be permitted within a specified time frame and in accordance with specified rates, terms, and conditions.

§150-38-7. Imputation of rates; modification costs.

~~7.1.~~ A utility that engages in the provision of telecommunications services or cable services shall impute to its costs of providing such services (and charge any affiliate, subsidiary, or associate company engaged in the provision of such services) an equal amount to the pole attachment rate for which such company would be liable under this section.

~~7.2.~~ The costs of modifying a facility shall be borne by all parties that obtain access to the facility as a result of the modification and by all parties that directly benefit from the modification. Each party described in the preceding sentence shall share proportionately in the cost of the modification. A party with a preexisting attachment to the modified facility shall be deemed to directly benefit from a modification if, after receiving notification of such modification, as provided in these rules, it adds to or modifies its attachment. Notwithstanding the foregoing, a party with a preexisting attachment to a pole, conduit, duct or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment if such rearrangement or replacement is necessitated solely as a result of an additional attachment or the modification of an existing attachment sought by another party. If a party makes an attachment to the facility after the completion of the modification, such party shall share proportionately in the cost of the modification if such modification rendered possible the added attachment.

~~§150-38-8. Allocation of Unusable Space Costs.~~

~~8.1.~~ With respect to the applicable formula referenced in Rule 5.4.3, a utility shall apportion the cost of providing unusable space on a pole so that such apportionment equals two-thirds (2/3) of the costs of providing unusable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities.

~~8.2.~~ All attaching entities attached to the pole shall be counted for purposes of apportioning the cost of unusable space.

~~8.3.~~ Utilities may use the following rebuttable presumptive averages when calculating the number of attaching entities with respect to the applicable formula referenced in Rule 5.4.3. For non-urbanized service areas (under 50,000 population), a presumptive average number of attaching entities of three. For urbanized service areas (50,000 or higher population), a presumptive average number of attaching entities of five. If any part of the utility's service area within the state has a designation of urbanized (50,000 or higher population) by the Bureau of Census, United States Department of Commerce, then all of that service area shall be designated as urbanized for purposes of determining the presumptive average number of attaching entities.

~~8.4.~~ A utility may establish its own presumptive average number of attaching entities for its urbanized and non-urbanized service area as follows:

~~8.4.1.~~ Each utility shall, upon request, provide all attaching entities and all entities seeking access the methodology and information upon which the utility's presumptive average number of

~~attachers is based.~~

~~§4.2. Each utility is required to exercise good faith in establishing and updating its presumptive average number of attachers.~~

~~§4.3. The presumptive average number of attachers may be challenged by an attaching entity by submitting information demonstrating why the utility's presumptive average is incorrect. The attaching entity should also submit what it believes should be the presumptive average and the methodology used. Where a complete inspection is impractical, a statistically sound survey may be submitted.~~

~~§4.4. Upon successful challenge of the existing presumptive average number of attachers, the resulting data determined shall be used by the utility as the presumptive number of attachers within the rate formula.~~

§150-38-9. Use of presumptions in calculating the space factor.

9.1. With respect to the formulas referenced in Rules 5.4. ~~12.a and 5.4.2.b~~, the space occupied by an attachment is presumed to be one foot. The amount of usable space is presumed to be ~~13.5~~ 10.5 feet. The amount of unusable space is presumed to be ~~27~~ 27 feet. The pole height is presumed to be 37.5 feet. These presumptions may be rebutted by either party.

§150-38-10. Timeline for access to utility poles.

10.1. Definitions.

10.1.1. 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.

10.1.2. 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.

10.1.3. The term "existing attacher" means any entity with equipment on a utility pole.

10.2. All time limits in this section are to be calculated according to Rule 7.5 of the Commission Rules of Practice and Procedure, 150 C.S.R. 1.7.5.

10.3. Application review and survey--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.

10.3.1. 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.

10.3.2. 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.

10.3.3. Application review on the merits. A utility shall respond to the new attacher either by granting access or, consistent with Rule 3.2 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 Rule 10.7). 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.

10.3.4. Survey.

10.3.4.a. ~~At the utility's option,~~ 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 Rule 10.7).

10.3.4.b. 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 ~~3-1~~ 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.

10.3.4.c. Where a new attacher has conducted a survey pursuant to Rule 10.10.3, ~~the attacher shall provide any known information on other attachers on any given pole or pole line. a utility. The new attacher should~~ ~~an elect to satisfy its survey obligations in this paragraph~~ notifying affected attachers of its intent to use the survey conducted by the new attacher pursuant to Rule 10.10.3 and ~~the new attacher should by providing~~ a copy of the survey to the affected attachers within the time period set forth in Rule 10.3.4.a. A utility relying on a survey conducted pursuant to Rule 10.10.3 to satisfy all of its obligations under Rule 10.3.4.a shall have 15 days to make such a notification to affected attachers rather than a 45-day survey period.

10.4. 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 Rule 10.3, or in the case where a new attacher has performed a survey, within 14 days of receipt by the utility of such survey. ~~The new attacher shall be responsible for collecting make-ready estimates from existing attachers.~~ Where ~~an a pole-by-pole~~ estimate 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 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.

10.4.1 A utility may withdraw an outstanding estimate of charges to perform make-ready work beginning 14 days after the estimate is presented.

10.4.2. 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.

10.4.3. 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 estimate 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 estimated charges, including any projected material, labor, and other related costs that form the basis of its estimate.

10.4.4. 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 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.

10.5. Make-ready. Upon receipt of payment specified in Rule 10.4.2, a utility shall notify immediately and in writing all known entities with existing attachments that may be affected by the make-ready.

10.5.1. For attachments in the communications space, the notice shall:

10.5.1.a. Specify where and what make-ready will be performed.

10.5.1.b. 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 Rule 10.7).

10.5.1.c. State that any entity with an existing attachment may modify the attachment consistent with the specified make-ready before the date set for completion.

10.5.1.d. State that if make-ready is not completed by the completion date set by the utility in Rule 10.5.1.b, the new attacher may complete the make-ready specified pursuant to Rule 10.5.1.a.

10.5.1.e. State the name, telephone number, and email address of a person to contact for more information about the make-ready procedure.

10.5.2. For attachments above the communications space, the notice shall:

10.5.2.a. Specify where and what make-ready will be performed.

10.5.2.b. 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 Rule 10.7).

10.5.2.c. State that any entity with an existing attachment may modify the attachment consistent with the specified make-ready before the date set for completion.

10.5.2.d. State that the utility may assert its right to 15 additional days to complete make-

10.5.2.e. State that if make-ready is not completed by the completion date set by the utility in Rule 10.5.2.b (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 Rule 10.5.2.a.

10.5.2.f. State the name, telephone number, and email address of a person to contact for more information about the make-ready procedure.

10.5.3. Once a new attacher utility provides the notices described in this section, it then must provide ~~the new attacher with~~ a copy of the notices and the existing attacher's contact information and address where ~~the utility~~ it 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 Rule 10.5.1.b for communications space attachments or Rule 10.5.2.b for attachments above the communications space.

10.6. A utility shall complete its make-ready in the communications space by the same dates set for existing attachers in Rule 10.5.1.b or its make-ready above the communications space by the same dates for existing attachers in Rule 10.5.2.b (or if the utility has asserted its 15-day right of control, 15 days later).

10.7. For the purposes of compliance with the time periods in this section:

10.7.1. A utility shall apply the timeline described in Rules 10.3 through 10.5 to all requests for attachment up to the lesser of 300 poles or 0.5 percent of the utility's poles in West Virginia.

10.7.2. A utility may add 15 days to the survey period described in Rule 10.3 to larger orders up to the lesser of 3000 poles or 5 percent of the utility's poles in West Virginia.

10.7.3. A utility may add 45 days to the make-ready periods described in Rule 10.5 to larger orders up to the lesser of 3000 poles or 5 percent of the utility's poles in West Virginia.

10.7.4. 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 West Virginia.

10.7.5. 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.

10.8. Deviation from the time limits specified in this section.

10.8.1. 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.

10.8.2. 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.

10.8.3. 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 Rule 10.5.1 is sent by the utility (or up to 105 days in the case of larger orders described in Rule 10.7). 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.

10.9. Self-help remedy.

10.9.1. Surveys. If a utility fails to complete a survey as specified in Rule 10.3.4.a, then a new attacher may conduct the survey in place of the utility and, as specified in Rule 11, hire a contractor to complete a survey.

10.9.1.a. 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.

10.9.1.b. 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.

10.9.2. Make-ready. If make-ready in the communication space is not complete by the date specified in Rule 10.5, then a new attacher may conduct the make-ready in place of the utility and existing attachers, and, as specified in Rule 11, hire a contractor to complete ~~the make-ready such communications space make-ready work. Under no circumstances shall any attacher, or any contractor hired by an attacher, complete make-ready work above the communications space without the express written consent of the electric utility pole owner.~~

10.9.2.a. 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.

10.9.2.b. 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:

10.9.2.b.1. Complete any necessary remedial work and bill the new attacher for the reasonable costs related to fixing the damage; or

10.9.2.b.2. Require the new attacher to fix the damage at its expense immediately following notice from the utility or existing attacher.

10.9.2.c. 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.

10.9.3. Pole replacements. Self-help shall not be available for pole replacements.

10.10. One-touch make-ready option. For attachments involving simple make-ready, new attachers may elect to proceed with the process described in this section in lieu of the attachment process described in Rules 10.3 through 10.6 and Rule 10.9.

10.10.1. Attachment application.

10.10.1.a. 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.

10.10.1.b. 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.

10.10.1.b.1. 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.

10.10.1.b.2. 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.

10.10.2. 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 Rule 10.7). Any contractor used by the new attacher should include a professional engineer stamp with all survey results, certifying the make-ready work is "simple."

10.10.2.a. 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.

10.10.2.b. Within the 15-day application review period (or within 30 days in the case of larger orders as described in Rule 10.7), 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.

10.10.3. 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 Rule 11.2.

10.10.3.a. 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.

10.10.4. 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 Rule 11.2.

10.10.4.a. 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.

10.10.4.b. 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:

10.10.4.b.1. Complete any necessary remedial work and bill the new attacher for the reasonable costs related to fixing the damage; or

10.10.4.b.2. Require the new attacher to fix the damage at its expense immediately following notice from the utility or existing attacher.

10.10.4.c. 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 Rules 10.4 through 10.9 and the utility shall provide the notice required by Rule 10.5 as soon as reasonably practicable.

10.10.5. 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.

10.10.6. In order to avoid the unsightly double wood conditions in which an existing pole remains in place for extended periods right next to a replacement pole because of delay in attachers moving their facilities, pole owners are authorized, at the cost to the attachers, to transfer the attachments and cables

of the attachers to the new pole in a manner consistent with communications space "complex" make-ready self help remedy.

§150-38-11. Contractors for survey and make-ready.

11.1. 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 Rules 11.3 through 11.3.5 and the utility may not unreasonably withhold its consent.

11.2. 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 Rules 11.3 through 11.3.5 and the utility may not unreasonably withhold its consent.

11.2.1. 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 Rule 11.3. 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 Rule 11.3 when providing notices required by Rules 10.9.1.b, 10.9.2.a, 10.10.3.a, and 10.10.4.

11.2.2. 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 Rule 11.3 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 Rules 10.9.1.b, 10.9.2.a, 10.10.3.a, and 10.10.4 and in its objection must identify at least one available qualified contractor.

11.3. 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 Rule 11.2.1, meet the following minimum requirements:

11.3.1. 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;

11.3.2. The contractor has acknowledged that it knows how to read and follow licensed engineered pole designs for make-ready, if required by the utility;

11.3.3. 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;

11.3.4. 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

11.3.5. 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.

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

§150-38-12. Complaints by incumbent local exchange carriers.

~~12.1~~ A complaint by an incumbent local exchange carrier (as defined in 47 U.S.C. §251(b)) 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 these rules.

~~12.2~~ In complaint proceedings challenging utility pole attachment rates, terms, and conditions for pole attachment contracts entered into or renewed after October 4, 2018 (effective date of 47 C.F.R.

~~§1.413(b)), 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 Rule 5.4.2. A utility can rebut either or both of the two presumptions in this section 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.~~

§150-38-13. Review period for pole attachment access complaints.

13.1. Pole access complaints. Except in extraordinary circumstances, final action on a complaint where a cable television system operator or provider of telecommunications service claims that it has been denied access to a pole, duct, conduit, or right-of-way owned or controlled by a utility should be expected no later than 180 days from the date the complaint is filed with the Commission. The Commission shall have the discretion to pause the 180-day review period in situations where actions outside the Commission's control are responsible for delaying review of a pole access complaint.

§150-38-14. Overlashing.

14.1. Prior approval. A utility shall not require prior approval for:

14.1.1. An existing attacher that overlashes its existing wires on a pole; or

14.1.2. For third party overlashing of an existing attachment that is conducted with the permission of an existing attacher.

14.2. Preexisting violations. A utility may not prevent an attacher from overlashing because another existing attacher has not fixed a preexisting violation, except where the utility reasonably determines that the proposed overlashing should be denied for capacity, safety, reliability, or generally applicable engineering purposes. 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.

14.2.1 Existing attaching entities must correct violations identified by a utility within 15 days of notice to the existing attaching entity. Where the existing attaching entity fails to correct the violation, an overlying entity can perform such work (or cause such work to be performed) at the existing attaching entity's sole risk and expense.

14.3 Advance notice. A utility may require no more than 15 days advance notice of planned overlying. If a utility requires advance notice for overlying, 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 overlash would 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. A utility may not charge a fee to the party seeking to overlash for the utility's review of the proposed overlash.

14.4. Overlayers' responsibility. A party that engages in overlying 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 overlying or overlying work causes safety or engineering standard violations, then the overlying party is responsible at its expense for any necessary repairs.

14.4.1. The utility shall be permitted to charge and be paid by the overlying party for engineering evaluations performed by the utility. The utility retains the right to deny access to the facilities at any point in time for reasons of safety, reliability, insufficient capacity or generally applicable engineering purposes.

14.5 Post-overlying review. An overlying 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 overlying 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 overlying party and provide adequate documentation of the damage or code violations. The utility may either complete any necessary remedial work and bill the overlying party for the reasonable costs related to fixing the damage or code violations or require the overlying party to fix the damage or code violations at its expense within 14 days following notice from the utility.

~~§150-38-15. Formal Complaint Procedure—General pleading requirements.~~

~~15.1 The following procedural rules, Rules 15 through 39, apply to the formal complaint proceedings brought under the Pole Attachment Rules. Pole attachment formal complaint proceedings are generally resolved on a written record consisting of a complaint, answer, reply, and joint statement of stipulated facts, disputed facts and key legal issues, along with all associated evidence in the record. The Commission may also require or permit other written submissions such as briefs, proposed findings of fact and conclusions of law, or other supplemental documents or pleadings.~~

~~15.2 Pleadings must be clear, concise, and direct. All matters concerning a claim, defense or requested remedy, including damages, should be pleaded fully and with specificity.~~

~~15.3 Pleadings must contain facts which, if true, are sufficient to constitute a violation of the Pole Attachment Act or a Commission rule or order, or a defense to an alleged violation.~~

~~15.4. Averred facts, claims, or defenses shall be made in numbered paragraphs and must be supported by relevant evidence. The contents of each paragraph shall be limited as far as practicable to a statement of a single set of circumstances. Each claim founded on a separate transaction or occurrence and each affirmative defense shall be separately stated to facilitate the clear presentation of the matters set forth. Assertions based on information and belief are prohibited unless made in good faith and accompanied by a declaration or affidavit explaining the basis for the party's belief and why the party could not reasonably ascertain the facts from any other source.~~

~~15.5. Legal arguments must be supported by appropriate statutory, judicial, or administrative authority.~~

~~15.6. Opposing authorities must be distinguished.~~

~~15.7. Copies must be provided of all non-Commission authorities relied upon which are not routinely available in national reporting systems, such as unpublished decisions or slip opinions of courts or administrative agencies. In addition, copies of state authorities relied upon shall be provided.~~

~~15.8. Parties are responsible for the continuing accuracy and completeness of all information and supporting authority furnished in a pending complaint proceeding. Information submitted, as well as relevant legal authorities, must be current and updated as necessary and in a timely manner before a decision is rendered on the merits of the complaint.~~

~~15.9. Specific reference shall be made to any tariff or contract provision relied on in support of a claim or defense. Copies of relevant tariffs, contracts, or relevant portions that are referred to or relied upon in a complaint, answer, or other pleading shall be appended to such pleading.~~

~~15.10. Pleadings shall identify the name, address, telephone number, and email address for either the filing party's attorney or, where a party is not represented by an attorney, the filing party. Pleadings may be signed by a party's attorney and shall contain the attorney's West Virginia Bar identification number.~~

~~15.11. All attachments shall be Bates stamped or otherwise numbered sequentially. Parties shall cite to the sequential page numbers in their pleadings.~~

~~15.12. Each pleading or other submission must contain a written verification that the signatory has read the submission and, to the best of his or her knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of the proceeding. If any pleading or other submission is signed in violation of this provision, the Commission may upon motion or upon its own initiative impose appropriate sanctions.~~

~~15.13. Parties may petition the Commission for a waiver of any of Rules 15 through 39. Such waiver may be granted for good cause shown.~~

~~15.14. A complaint may, on request of the filing party, be dismissed without prejudice as a matter of right prior to the adoption date of any final action taken by the Commission with respect to the complaint. A request for the return of an initiating document will be regarded as a request for dismissal.~~

~~15.15. Amendments or supplements to complaints to add new claims or requests for relief are~~

prohibited.

~~15.16. Failure to prosecute a complaint will be cause for dismissal.~~

~~15.17. Any document purporting to be a formal complaint which does not state a cause of action under the Pole Attachment Act, 47 U.S.C. §224, or a Commission rule or order, will be dismissed. In such case, any amendment or supplement to such document will be considered a new filing which must be made within any applicable statutory limitations of actions.~~

~~15.18. Any other pleading that does not conform with the requirements of these rules may be deemed defective. In such case the Commission may strike the pleading or request that specified defects be corrected and that proper pleadings be filed with the Commission and served on all parties within a prescribed time as a condition to being made a part of the record in the proceeding.~~

~~15.19. Pleadings shall be construed so as to do justice.~~

~~15.20. Any party that fails to respond to official correspondence, a request for additional information, or an order or directive from the Commission may be subject to appropriate sanctions.~~

~~§150-38-16. Format and content of complaints.~~

~~A formal complaint shall contain:~~

~~16.1. The name of each complainant and defendant;~~

~~16.2. The occupation, address and telephone number of each complainant and, to the extent known, each defendant;~~

~~16.3. The name, address, telephone number, email address and West Virginia Bar identification number of complainant's attorney, if represented by counsel;~~

~~16.4. Citation to the section of the Pole Attachment Act or Commission rule or order alleged to have been violated; each such alleged violation shall be stated in a separate count;~~

~~16.5. Legal analysis relevant to the claims and arguments set forth therein;~~

~~16.6. The relief sought, including recovery of damages and the amount of damages claimed, if known;~~

~~16.7. Certification that the complainant has, in good faith, discussed or attempted to discuss the possibility of settlement with each defendant prior to the filing of the formal complaint. In disputes between businesses, associations, or other organizations, the certification shall include a statement that the complainant has engaged or attempted to engage in executive level discussions concerning the possibility of settlement. Executive level discussions are discussions among representatives of the parties who have sufficient authority to make binding decisions on behalf of the entity they represent regarding the subject matter of the discussions. Such certification shall include a statement that, prior to the filing of the complaint, the complainant notified each defendant in writing of the allegations that form the basis of the complaint and invited a response within a reasonable period of time. A refusal by a defendant to engage in discussions contemplated by this rule may constitute an unreasonable practice. The certification shall also include a brief summary of all additional steps taken to resolve the dispute prior to the filing of the formal complaint.~~

~~16.8. A statement explaining whether a separate action has been filed with the Commission, any court, or other government agency that is based on the same claim or some set of facts, in whole or in part, or whether the complaint seeks prospective relief identical to the relief proposed or at issue in a notice and comment rulemaking proceeding that is concurrently before the Commission;~~

~~16.9. An information designation containing:~~

~~16.9.1. The name and, if known, the address and telephone number of each individual likely to have information relevant to the proceeding, along with the subjects of that information, excluding individuals otherwise identified in the complaint or exhibits thereto, and individuals employed by another party; and~~

~~16.9.2. A copy, or a description by category and location, of all relevant documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control, excluding documents submitted with the complaint.~~

~~§150-38-17. Damages.~~

~~17.1. If a complainant in a formal complaint proceeding wishes to recover damages, the complaint must contain a clear and unequivocal request for damages.~~

~~17.2. In all cases in which recovery of damages is sought, the complaint must include either:~~

~~17.2.1. A computation of each and every category of damages for which recovery is sought, along with an identification of all relevant documents and materials or such other evidence to be used by the complainant to prove the amount of such damages; or~~

~~17.2.2. If any information not in the possession of the complainant is necessary to develop a detailed computation of damages, an explanation of:~~

~~17.2.2.a. Why such information is unavailable to the complaining party;~~

~~17.2.2.b. The factual basis the complainant has for believing that such evidence of damages exists; and~~

~~17.2.2.c. A detailed outline of the methodology that would be used to create a computation of damages with such evidence.~~

~~17.3. If a complainant wishes a determination of damages to be made in a proceeding that is separate from and subsequent to the proceeding in which the determinations of liability and prospective relief are made, the complainant must:~~

~~17.3.1. Comply with the requirements of Rule 17.1, and~~

~~17.3.2. State clearly and unequivocally that the complainant wishes a determination of damages to be made in a proceeding that is separate from and subsequent to the proceeding in which the determinations of liability and prospective relief will be made.~~

~~17.4. If the Commission decides that a determination of damages would best be made in a proceeding that is separate from and subsequent to the proceeding in which the determinations of liability and prospective relief are made, the Commission may at any time bifurcate the case and order that the initial proceeding will determine only liability and prospective relief, and that a~~

~~separate, subsequent proceeding initiated in accordance with Rule 17.5 will determine damages.~~

~~17.5. If a complainant exercises its right under Rule 17.3, or the Commission invokes its authority under Rule 17.4, the complainant may initiate a separate proceeding to obtain a determination of damages by filing a supplemental complaint within sixty days after a decision that contains a finding of liability on the merits of the original complaint. Supplemental complaints filed pursuant to this section need not comply with the requirements in Rules 15.3 or 15.4, 15.7, 15.8, 15.10 and 15.11. The supplemental complaint shall be deemed, for statutory limitations purposes, to relate back to the date of the original complaint.~~

~~17.6. The Commission may, in its discretion, order the defendant either to post a bond for, or deposit into an interest bearing escrow account, a sum equal to the amount of damages which the Commission finds, upon preliminary investigation, is likely to be ordered after the issue of damages is fully litigated, or some lesser sum which may be appropriate, provided the Commission finds that the grant of this relief is favored on balance upon consideration of the following factors:~~

~~17.6.1. The complainant's potential irreparable injury in the absence of such deposit;~~

~~17.6.2. The extent to which damages can be accurately calculated;~~

~~17.6.3. The balance of the hardships between the complainant and the defendant; and~~

~~17.6.4. Whether public interest considerations favor the posting of the bond or ordering of the~~

~~deposit.~~

~~17.7. The Commission may, in its discretion, end adjudication of damages by adopting a damages computation method or formula. In such cases, the parties shall negotiate in good faith to reach an agreement on the exact amount of damages pursuant to the Commission mandated method or formula. Within 30 days of the release date of the damages order, parties shall submit jointly to the Commission either:~~

~~17.7.1. A statement detailing the parties' agreement as to the amount of damages;~~

~~17.7.2. A statement that the parties are continuing to negotiate in good faith and a request that the parties be given an extension of time to continue negotiations; or~~

~~17.7.3. A statement detailing the bases for the continuing dispute and the reasons why no agreement can be reached.~~

~~17.8. In any proceeding to which no statutory deadline applies, the Commission may, in its discretion, suspend ongoing damages proceedings to provide the parties with time to pursue settlement negotiations or mediation under Rule 20.~~

~~§150-38-18. Answers.~~

~~18.1. Any defendant upon which a copy of a formal complaint is served shall answer such complaint in the manner prescribed under this section within 30 calendar days of service of the formal complaint by the complainant, unless otherwise directed by the Commission.~~

~~18.2. The answer shall advise the complainant and the Commission fully and completely of the nature of any defense, and shall respond specifically to all material allegations of the complaint. Every effort shall be made to narrow the issues in the answer. The defendant shall state concisely its defense~~

~~to each claim asserted, admit or deny the averments on which the complainant relies, and state in detail the basis for admitting or denying such averment. General denials are prohibited. Denials based on information and belief are prohibited unless made in good faith and accompanied by a declaration or affidavit explaining the basis for the defendant's belief and why the defendant could not reasonably ascertain the facts from the complainant or any other source. If the defendant is without knowledge or information sufficient to form a belief as to the truth of an averment, the defendant shall so state and this has the effect of a denial. When a defendant intends in good faith to deny only part of an averment, the defendant shall specify so much of it as is true and shall deny only the remainder. The defendant may deny the allegations of the complaint as specific denials of either designated averments or paragraphs.~~

~~18.2. The answer shall include legal analysis relevant to the claims and arguments set forth therein.~~

~~18.4. Averments in a complaint or supplemental complaint filed pursuant to Rule 17.5 are deemed to be admitted when not denied in the answer.~~

~~18.5. Affirmative defenses to allegations in the complaint shall be specifically captioned as such and presented separately from any denials made in accordance with Rule 18.2.~~

~~18.6. The answer shall include an information designation containing:~~

~~18.6.1. The name and, if known, the address and telephone number of each individual likely to have information relevant to the proceeding, along with the subjects of that information, excluding individuals otherwise identified in the complaint, answer, or exhibits thereto, and individuals employed by another party; and~~

~~18.6.2. A copy, or a description by category and location, of all relevant documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control, excluding documents submitted with the complaint or answer.~~

~~18.7. Failure to file an answer may be deemed an admission of the material facts alleged in the complaint. Any defendant that fails to file and serve an answer within the time and in the manner prescribed by this part may be deemed in default and an order may be entered against such defendant in accordance with the allegations contained in the complaint.~~

~~§150-38-19. Cross-complaints and counterclaims.~~

~~19.1. Cross-complaints seeking any relief within the jurisdiction of the Commission against any party (complainant or defendant) to that proceeding are prohibited. Any claim that might otherwise meet the requirements of a cross-complaint may be filed as a separate complaint in accordance with these rules. For purposes of this subpart, the term "cross-complaint" shall include counter claims.~~

~~§150-38-20. Replies.~~

~~20.1. A complainant shall file and serve a reply within 10 calendar days of service of the answer, unless otherwise directed by the Commission. The reply shall contain statements of relevant, material facts and legal arguments that respond to the factual allegations and legal arguments made by the defendant. Other allegations or arguments will not be considered by the Commission.~~

~~20.2. Failure to reply will not be deemed an admission of any allegations contained in the responsive pleading, except with respect to any affirmative defense set forth therein. Failure to reply to an affirmative defense shall be deemed an admission of such affirmative defense and of any facts~~

supporting such affirmative defense that are not specifically contradicted in the complaint.

~~20.3. The reply shall include legal analysis relevant to the claims and arguments set forth therein.~~

~~20.4. The reply shall include an information designation containing:~~

~~20.4.1. The name and, if known, the address and telephone number of each individual likely to have information relevant to the proceeding and addressed in the reply, along with the subjects of that information, excluding individuals otherwise identified in the complaint, answer, reply, or exhibits thereto, and individuals employed by another party; and~~

~~20.4.2. A copy, or a description by category and location, of all relevant documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control that are addressed in the reply, excluding documents submitted with the complaint or answer.~~

~~§150-38-31. Motions.~~

~~21.1. A request for a Commission order shall be by written motion, stating with particularity the grounds and authority therefor, including any supporting legal analysis, and setting forth the relief sought.~~

~~21.2. Motions to compel discovery must contain a certification by the moving party that a good faith attempt to resolve the dispute was made prior to filing the motion.~~

~~21.3. Motions seeking an order that the allegations in the complaint be made more definite and certain are prohibited.~~

~~21.4. Motions to dismiss all or part of a complaint are permitted. The filing of a motion to dismiss does not suspend any other filing deadlines under the Commission's rules, unless the Commission issues an order suspending such deadlines.~~

~~21.5~~ Oppositions to motions shall be filed and served within 5 business days after the motion is served. Oppositions shall be limited to the specific issues and allegations contained in the motion; when a motion is incorporated in an answer to a complaint, the opposition to such motion shall not address any issues presented in the answer that are not also specifically raised in the motion. Failure to oppose any motion may constitute grounds for granting the motion.

~~21.6~~ No reply may be filed to an opposition to a motion, except as authorized by the Commission.

~~§150-38-22~~ Discovery.

~~22.1~~ A complainant may file with the Commission and serve on a defendant, concurrently with its complaint, up to 10 written interrogatories. A defendant may file with the Commission and serve on a complainant, concurrently with its answer, up to 10 written interrogatories. A complainant may file with the Commission and serve on a defendant, concurrently with its reply, up to five additional written interrogatories. Subparts of any interrogatory will be counted as separate interrogatories for purposes of compliance with this limit. Interrogatories filed and served pursuant to this procedure may be used to seek discovery of any non-privileged matter that is relevant to the material facts in dispute in the pending proceeding. This procedure may not be employed for the purpose of delay, harassment, or obtaining information that is beyond the scope of permissible inquiry related to the material facts in dispute in the proceeding.

~~22.2~~ Interrogatories filed and served pursuant to Rule 22.1 shall contain an explanation of why the information sought in each interrogatory is both necessary to the resolution of the dispute and not available from any other source.

~~22.3~~ Unless otherwise directed by the Commission, within 7 calendar days, a responding party shall file with the Commission and serve on the propounding party any opposition and objections to interrogatories. The grounds for objecting to an interrogatory must be stated with specificity. Unless otherwise directed by the Commission, any interrogatories to which no opposition or objection is raised shall be answered within 20 calendar days.

~~22.4~~ The Commission shall determine the scope of, and schedule for answering, any disputed interrogatories based upon the justification for the interrogatories properly filed and served pursuant to Rule 22.1, and any objections or oppositions thereto, properly filed and served pursuant to Rule 22.3.

~~22.5~~ Interrogatories shall be answered separately and fully in writing under oath or affirmation by the party served, or if such party is a public or private corporation or partnership or association, by any officer or agent who shall furnish such information as is available to the party. The answers shall be signed by the person making them, and the attorney who objects must sign any objections. The answers shall be filed with the Commission and served on the propounding party.

~~22.6~~ The Commission, in its discretion, may allow additional discovery, including, but not limited to, document production and/or depositions, and it may modify the scope, means and scheduling of discovery in light of the needs of a particular case and the requirements of applicable statutory deadlines.

~~22.7~~ The Commission may, in its discretion, require parties to provide documents to the Commission in a scanned or other electronic format that:

~~22.7.1~~ Indexes the documents by useful identifying information; and

~~22.7.2~~ Allows staff to annotate the index so as to make the format an efficient means of

reviewing the documents.

~~22.8~~ A propounding party asserting that a responding party has provided an inadequate or insufficient response to a discovery request may file a motion to compel within 10 days of the service of such response, or as otherwise directed by the Commission, pursuant to the requirements of Rule 21.

~~§150-38-23. Confidentiality of information produced or exchanged.~~

~~23.1~~ Any information produced in the course of a formal complaint proceeding may be designated as confidential by either party to the proceeding or a third party if the party believes in good faith that the materials fall within an exemption to disclosure contained in the West Virginia Freedom of Information Act (FOIA), W.Va. Code §29B-1-1 et seq. Any party asserting confidentiality for such materials must:

~~23.1.1~~ File with the Executive Secretary's Office an unredacted hard copy version of the materials that contains the confidential information and clearly marks each page, including cover page, for which a confidential designation is claimed with a bold header stating "Confidential Version". In addition, all information for which confidential treatment is requested must be identified with the use of bold double square brackets ({{ }}) at the beginning and end of the material that is redacted in the Public Version. The party claiming confidentiality should restrict its designations to encompass only the specific information that it asserts is confidential. If a confidential designation is challenged, the party claiming confidentiality shall have the burden of demonstrating, by a preponderance of the evidence, that the materials designated as confidential fall under the standards for nondisclosure enunciated in the FOIA and that the designation is narrowly tailored to encompass only confidential information.

~~23.1.2~~ File with the Executive Secretary's Office, a public version of the materials that redacts any confidential information and clearly marks each page, including the cover page, of the redacted public version with a bold header stating "Public Version." The redaction may be actual blacked-out sections, or, blank sections beginning and ending with bold double square brackets and the phrase "redacted material" within the brackets. The redaction shall cover the entire length of redacted text. The redacted document shall be machine-readable whenever technically possible. Where the document to be filed electronically contains metadata that is confidential or protected from disclosure by a legal privilege (including, for example, the attorney-client privilege), the filer may remove such metadata from the document before filing it electronically.

~~23.1.3~~ The unredacted version must be filed on the same day as the redacted version.

~~23.2~~ An attorney of record for a party or a party that receives unredacted materials marked as confidential may disclose such materials solely to the following persons, only for use in prosecuting or defending a party to the complaint action, and only to the extent necessary to assist in the prosecution or defense of the case:

~~23.2.1~~ Support personnel for counsel of record representing the parties in the complaint action;

~~23.2.2~~ Officers or employees of the receiving party who are directly involved in the prosecution or defense of the case;

~~23.2.3~~ Consultants or expert witnesses retained by the parties; and

~~23.2.4. Court reporters and stenographers in accordance with the terms and conditions of this section.~~

~~23.3. The individuals identified in Rule 23.2 shall not disclose information designated as confidential to any person who is not authorized under this section to receive such information, and shall not use the information in any activity or function other than the prosecution or defense in the case before the Commission. Each such individual who is provided access to the information shall sign a declaration or affidavit stating that the individual has personally reviewed the Commission's rules and understands the limitations they impose on the signing party.~~

~~23.4. Parties may make copies of materials marked confidential solely for use by the Commission or persons designated in Rule 23.2. Each party shall maintain a log recording the number of copies made of all confidential material and the persons to whom the copies have been provided.~~

~~23.5. The Commission may issue a protective order with further restrictions as appropriate.~~

~~23.6. Upon termination of a formal complaint proceeding, including all appeals and petitions, the parties, not including Commission Staff, shall ensure that all originals and reproductions of any confidential materials, along with the log recording persons who received copies of such materials, shall be provided to the producing party. In addition, upon final termination of the proceeding, any notes or other work product derived in whole or in part from the confidential materials of an opposing or third party shall be destroyed. Commission Staff shall return confidential materials to the Executive Secretary or acknowledge to the Executive Secretary that the materials have been shredded. The Executive Secretary shall maintain copies of the materials marked as confidential in closed envelopes or folders until otherwise directed by the Commission.~~

~~§150-38-24. Other required written submissions.~~

~~23.1. The Commission may, in its discretion, require the parties to file briefs summarizing the facts and issues presented in the pleadings and other record evidence and presenting relevant legal authority and analysis. The Commission may limit the scope of any briefs to certain subjects or issues. Unless otherwise directed by the Commission, all briefs shall include all legal and factual claims and defenses previously set forth in the complaint, answer, or any other pleading submitted in the proceeding.~~

~~24.1. Claims and defenses previously made but not reflected in the briefs will be deemed abandoned.~~

~~24.3. The Commission may require the parties to submit any additional information it deems appropriate for a full, fair, and expeditious resolution of the proceeding.~~

~~§150-38-25. Status conference.~~

~~25.1. In any complaint proceeding, the Commission may, in its discretion, direct the attorneys and/or the parties to appear before it for a status conference. A status conference may include discussion of:~~

~~25.1.1. Simplification or narrowing of the issues;~~

~~25.1.2. The necessity for or desirability of additional pleadings or evidentiary submissions;~~

~~25.1.3. Obtaining admissions of fact or stipulations between the parties as to any or all of the matters in controversy;~~

~~25.1.4. Settlement of all or some of the matters in controversy by agreement of the parties;~~

~~25.1.5. Whether discovery is necessary and, if so, the scope, type, and schedule for such discovery;~~

~~25.1.5. The schedule for the remainder of the case and the dates for any further status conferences; and~~

~~25.1.7. Such other matters that may aid in the disposition of the complaint.~~

~~25.2. Parties shall meet and confer prior to the initial status conference to discuss:~~

~~25.2.1. Settlement prospects;~~

~~25.2.2. Discovery;~~

~~25.2.3. Issues in dispute;~~

~~25.2.4. Schedules for pleadings;~~

~~25.2.5. Joint statement of stipulated facts, disputed facts, and key legal issues;~~

~~25.2.6. Parties shall submit a joint statement of all proposals agreed to and disputes remaining as a result of such meeting to the Commission on a date specified by the Commission.~~

~~25.3. In addition to the initial status conference referenced in Rule 25.1, any party may also request that a conference be held at any time after the complaint has been filed.~~

~~§150-38-26. Separate filings against multiple defendants--Service.~~

~~26.1. Complaints may not be brought against multiple defendants unless they are commonly owned or controlled, are alleged to have acted in concert, are alleged to be jointly liable to complainant, or the complaint concerns common questions of law or fact. Complaints may, however, be consolidated by the Commission for disposition.~~

~~26.2. The complainant shall serve the complaint by electronic, overnight, or hand delivery on either the named defendant or one of the named defendant's registered agents for service of process on the same date that the complaint is filed with the Commission.~~

~~26.3. Upon receipt of the complaint by the Commission, the Commission shall promptly send, by email if available or overnight delivery, to each defendant named in the complaint, notice of the filing of the complaint. The Commission shall issue an order setting a procedural schedule.~~

~~26.4. All pleadings and briefs filed in any formal complaint proceeding, as well as all letters, documents, or other written submissions, shall be served by the filing party on the attorney of record for each party to the proceeding, or, where a party is not represented by an attorney, each party to the proceeding either by hand delivery, overnight delivery, or email, together with a certificate of service. Service is deemed effective as follows:~~

~~26.4.1. Service by hand delivery that is delivered to the office of the recipient by 5:30 p.m., local time of the recipient, on a business day will be deemed served that day. Service by hand delivery that is delivered to the office of the recipient after 5:30 p.m., local time of the recipient, on a business day will be deemed served on the following business day.~~

~~26.4.2. Service by overnight delivery will be deemed served the business day following the day it is accepted for overnight delivery by a reputable overnight delivery service or~~

~~26.4.2~~ Service by email that is fully transmitted to the office of the recipient by 5:30 p.m., local time of the recipient, on a business day will be deemed served that day. Service by email that is fully transmitted to the office of the recipient after 5:30 p.m., local time of the recipient, on a business day will be deemed served on the following business day.

~~26.5~~ Supplemental complaints filed pursuant to Rule 17 shall conform to the requirements set forth in this section.

~~§150-38-37. Conduct of proceedings.~~

~~27.1~~ The Commission may issue such orders and conduct its proceedings as will best conduce to the proper dispatch of business and the ends of justice.

~~27.2~~ The Commission may decide each complaint upon the filings and information before it, may request additional information from the parties, and may require one or more informal meetings with the parties to clarify the issues or to consider settlement of the dispute.

~~§150-38-28. Accelerated Docket Proceedings.~~

~~28.1~~ Parties to a pole attachment complaint proceeding against a cable television system operator, a utility, or a telecommunications carrier, may request expedited treatment. Proceedings receiving expedited treatment are subject to shorter pleading deadlines and other modifications to the procedural rules that govern pole attachment formal complaint proceedings.

~~28.2~~ A complainant may file a motion for expedited treatment at the time a complaint is filed.

~~28.3~~ Within five days of receiving service of a pole attachment complaint against a cable television system operator, a utility, or a telecommunications carrier, a defendant may file a motion for expedited treatment.

~~28.4~~ The Commission will allow responses to motions for expedited treatment, which must be filed within 5 business days of the filing of the motion unless otherwise ordered by the Commission. The Commission may issue an order, without hearing or further pleadings, granting or denying a motion for expedited treatment. The Commission will attempt, but is not required, to issue such order within fifteen days of filing of the motion.

~~28.5~~ In appropriate cases, the Commission may require that the parties participate in pre-filing settlement negotiations or mediation under Rule 29.

~~28.6~~ If the parties do not resolve their dispute and the matter is granted expedited treatment, the Commission will establish a procedural schedule.

~~28.7~~ If it appears at any time that expedited treatment is no longer appropriate, the Commission may revise the expedited procedural schedule either on its own motion or at the request of any party.

~~28.9~~ Commission review of an ALJ recommended decision shall comply with the filing and service requirements of Rule 19 of the Commission Rules of Practice and Procedure, 150 C.S.R. 1.19.

~~§150-38-29. Mediation.~~

~~29.1~~ The Commission encourages parties to attempt to settle or narrow their disputes. Commission staff is available to conduct mediations. The Commission will determine whether a matter is appropriate

for mediation. Participation in mediation is generally voluntary, but may be required as a condition for expedited treatment.

~~20.2~~ Parties may request mediation of a dispute at any time as long as a proceeding is pending before the Commission.

~~20.3~~ Parties may request mediation by filing a written request for mediation, or including a mediation request in any pleading in a formal complaint proceeding. Any party requesting mediation must verify that it has attempted to contact all other parties to determine whether they are amenable to mediation, and shall state the response of each party, if any.

~~20.4~~ The Commission mediator will schedule the mediation in consultation with the parties. The Commission mediator may request written statements and other information from the parties to assist in the mediation.

~~20.5~~ In any proceeding to which no statutory deadline applies, the Commission may, in its discretion, hold a case in abeyance pending mediation.

~~20.6~~ The parties and Commission mediator shall keep confidential all written and oral communications prepared or made for purposes of the mediation, including mediation submissions, offers of compromise, and the Commission mediator and party comments made during the course of the mediation (Mediation Communications). Neither the Commission mediator nor the parties may use, disclose or seek to disclose Mediation Communications in any proceeding before the Commission (including an arbitration or a formal complaint proceeding involving the instant dispute) or before any other tribunal, unless compelled to do so by law. Documents and information that are otherwise discoverable do not become Mediation Communications merely because they are disclosed or discussed during the mediation. Unless otherwise directed by the Commission, the existence of the mediation will not be treated as confidential.

Any party or the Commission mediator may terminate a mediation by notifying other participants of their decision to terminate. The Commission mediator shall promptly confirm in writing that the mediation has ended. The confidentiality rules in Rule 20.6 shall continue to apply to any Mediation Communications. Further, unless otherwise directed, any Commission ruling requiring that the existence of the mediation be treated as confidential will continue to apply after the mediation has ended.

Public Service Commission of West Virginia

201 Brooks Street, P.O. Box 812
Charleston, West Virginia 25323



Phone: (304) 340-0300
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November 14, 2019

Connie Graley, Executive Secretary
Public Service Commission
Post Office Box 812
Charleston, West Virginia 25323

09:37 AM NOV 14 2019 EXEC SEC DIV

GENERAL ORDER NO. 261

In the Matter of Adopting and Implementing
Rules Governing Pole Attachments and
Assumption of Commission Jurisdiction Over
Pole Attachments, 150 C.S.R. 38

Dear Ms. Graley:

Enclosed for filing in the above-referenced proceeding, please find an original and twelve copies of *Staff Reply Comments*. A copy has been provided to those individuals shown on the attached *Certificate of Service*.

Sincerely,

A handwritten signature in black ink, appearing to read "L. Bouvette".

Linda S. Bouvette, Staff Attorney
West Virginia State Bar I.D. No. 5926

Chris Howard, Staff Attorney
West Virginia State Bar I.D. 8688

LSB/vm
Enclosure
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PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

GENERAL ORDER NO. 261

In the Matter of Adopting and Implementing
Rules Governing Pole Attachments and
Assumption of Commission Jurisdiction Over
Pole Attachments, 150 C.S.R. 38

STAFF REPLY COMMENTS

On November 8, 2019, the West Virginia Cable Telecommunications Association, CITA-The Wireless Association, Lumos Networks, LLC dba Segra and Lumos Networks of West Virginia, Inc., Appalachian Power Company, Wheeling Power Company, Monongahela Power Company and The Potomac Edison Company (jointly "Power Companies"), Frontier West Virginia Inc. and Citizens Telecommunications Company of West Virginia, D/B/A Frontier Communications of West Virginia, CenturyLink and Staff filed Initial Comments in the above-styled case on the Commission's Proposed "Rules Governing Pole Attachments and Assumption of Commission Jurisdiction over Pole Attachments".

The Initial Comments are summarized as follows:

West Virginia Cable Telecommunications Association – commended the Commission on its adoption of the FCC Pole Attachment Rules, including its reconciliation of certain conflicting provisions with the Commission's existing rules (dispute resolution and damages). The Association recommended that the Commission make one modification to Proposed Rule 4.1, to conform to FCC Pole Attachment Rule 1.1406(a) if the "utility argues

that the proposed rate is below the utility's incremental costs." (Initial Comments, p. 2.) FCC Pole Attachment Rule 1.1406(a) requires the utility to show that the rate "is below the statutory minimum just and reasonable rate..." which is defined in Section 224(d)(1) of the Pole Attachment Act. The Association suggests language to cure the defect.

The Association also points out in a footnote that the Commission's exclusion of FCC Rule 1.406(e) is appropriate because "LECs do not have the option to use GAAP accounting for these purposes in West Virginia."

CITA-The Wireless Association – CITA had no substantive comment on the Commission's proposed Pole Attachment Rules but stated the Commission's adoption of the FCC Pole Attachment Rules would "help streamline pole attachment deployment and promote efficiency in the process."

Lumos Networks, LLC dba Segra and Lumos Networks of West Virginia, Inc. – Segra was complimentary of the Commission's wholesale adoption of the FCC Pole Attachment Rules but felt the Commission should utilize its existing procedural rules rather than adopt the FCC procedural rules for pole attachment complaints. Segra also recommended an addition to the proposed rules that would allow for "adoption of prospective updates of the FCC Pole Attachment Rules but would include a provision preserving the Commission's ability "to expeditiously address any unique issues or circumstances that may require West Virginia-specific changes to the FCC existing regulatory framework." (Initial Comments, p. 3.)

Frontier West Virginia Inc. and Citizens Telecommunications Company of West Virginia, D/B/A Frontier Communications of West Virginia - Frontier stated that the proposed Rules will fully implement W.Va. Code §31-G-4-4. It had no further comments.

CenturyLink – CenturyLink supports the Commission’s adoption of the FCC Pole Attachment Rules because they “achieve that critical balance of ensuring ease of access to poles without burdensome process for pole owners” and are “consistent with the legislative intent of SB 3.” (Initial Comments, p. 2.)

Appalachian Power Company, Wheeling Power Company, Monongahela Power Company and The Potomac Edison Company (jointly “Power Companies”) – The Power Companies summarized their comments in eight (8) bullet points:

1. The Commission is not bound to adopt the FCC rules that are unique to the FCC.
2. The FCC rules are a function of federal statutory requirements to which the Commission is not constrained.
3. The communication worker safety zone should be excluded from “usable space.”
4. The Commission should delete Section 5.4.2. (the telecom rate formula.)
5. The Commission should exclude the FCC’s self-help remedy for work in the electric power supply space.
6. The Commission should not adopt the FCC ILEC complaint rule.
7. The Commission should not adopt the FCC formal complaint procedures.
8. The Legislature’s intent was not for the Commission to adopt the FCC rules in their entirety.

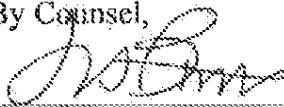
Overall, the parties appear to be pleased with the proposed Pole Attachment Rules because they provide continuity and uniformity in pole attachment regulation and encourage broadband development in West Virginia.

Staff recommends that the Commission not adopt the change proposed by the West Virginia Telecommunications Association regarding the rate. The Commission should ensure that the utility covers its incremental costs so that ratepayers are not subsidizing the telecommunications industry. Staff recommends that the Commission adopt the suggestion made by Segra to include language that the Commission may opt out of automatic adoption of FCC rule changes. Staff would not recommend adoption of any of the changes proposed by the Power Companies.

Respectfully submitted this the 14th day of November, 2019.

STAFF OF THE PUBLIC SERVICE
COMMISSION OF WEST VIRGINIA

By Counsel,



LINDA S. BOUVETTE, Staff Attorney
West Virginia State Bar I.D. 5926

CHRIS HOWARD, Staff Attorney
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PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

GENERAL ORDER NO. 261

In the Matter of Adopting and Implementing
Rules Governing Pole Attachments and
Assumption of Commission Jurisdiction Over
Pole Attachments, 150 C.S.R. 38

CERTIFICATE OF SERVICE

I, Linda S. Bouvette, Counsel for the Public Service Commission of West Virginia, do hereby certify that a copy of the foregoing "*Staff Reply Comments*" has been served upon the following parties of record by First Class, United States Mail, postage prepaid this 14th day of November, 2019.

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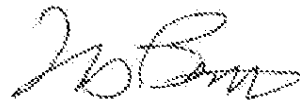
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LEWIS GLASSER

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12:39 PM NOV 14 2019 EXEC SEC DIV

November 14, 2019

Hand Delivery

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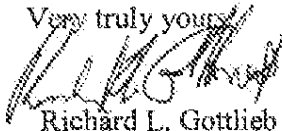
CASE NO. ~~19-0351-T-GT~~ 80261
**General Investigation into Adopting and
Implementing Rules Governing Pole Attachments and
Assumption of Commission Jurisdiction over Pole Attachments**

Dear Ms. Graley:

Enclosed please find for filing in the above-referenced matter the original and twelve (12) copies of the *REPLY COMMENTS OF THE WEST VIRGINIA CABLE TELECOMMUNICATIONS ASSOCIATION*.

Thank you for your attention in this matter.

Very truly yours,



Richard L. Gottlieb

RLG/dc

Enc.

cc: All counsel of record

LEWIS GLASSER PLLC

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**PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON**

)	
General Investigation into adopting and)	
Implementing Rules Governing Pole)	Case No. 19-0551-T-GI
Attachments and Assumption of Commission)	
Jurisdiction over Pole Attachments)	
)	

**REPLY COMMENTS OF THE WEST VIRGINIA CABLE
TELECOMMUNICATIONS ASSOCIATION**

The West Virginia Cable Telecommunications Association (“WVCTA”) respectfully submits its reply comments in response to the Public Service Commission’s (“Commission”) Notice of Proposed Rulemaking (“Notice”) issued on October 11, 2019 in the captioned proceeding.

As explained in its initial comments, and as agreed by virtually all other parties in this proceeding, the Commission’s proposed pole attachment rules appropriately fulfill the lawful mandate of the West Virginia legislature as set forth in West Virginia Code §31G-4-4. Section 31G-4-4(b) could not be more clear in its direction to the Commission:

(b) The commission shall adopt the rates, terms, and conditions of access to and use of poles, ducts, conduits, and rights-of-way as provided in 47 U.S.C. §224 and 47 C.F.R. §§1.1401 - 1.1415, inclusive, of the dispute resolution process incorporated by reference in those regulations and any subsequent modifications or additions to the provisions of the United States Code or Code of Federal Regulations provisions referenced herein. (Emphasis added).

Notwithstanding this unambiguous statutory directive, some commenters, most notably the AEP Companies and the FirstEnergy Companies (collectively the “Electric Companies”),¹ urge the Commission to violate its statutory obligations by modifying the proposed rules in numerous respects that are inconsistent with the federal Pole Attachment Act and the relevant FCC rules.

The legislature adopted SB3 (containing West Virginia Code §31G-4-4) by near unanimous vote (98-1 in the House and 34-0 in the Senate) in order to promote broadband deployment and competition by requiring the adoption of the specific FCC rules that the Energy Companies now seek to undermine. The recently updated FCC rules are the product of a comprehensive rulemaking proceeding to streamline and improve pole attachment rules in order to facilitate the same important interests sought by West Virginia.² Notably, the Energy Companies (and various other electric utilities) made many of the same objections to the FCC’s pole attachment rules during the FCC’s comprehensive proceeding that they make in this proceeding. After careful consideration, the FCC modified its rules where it deemed appropriate and rejected other (pole owner and attacher) proposals after due consideration. Thus, the FCC’s rules (that the legislature has directed the Commission to adopt) reflect a careful balancing of interests in the context of establishing effective rules that will promote deployment and competition.³

¹ See Initial Comments, Appalachian Power Company, Wheeling Power Company (the AEP Companies), Monongahela Power Company and The Potomac Edison Company (the FirstEnergy Companies), filed Nov 7, 2019.

² *In re Accelerating Wireline/Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment* Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705 (2018).

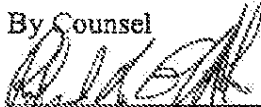
³ The Energy Companies propose a number of modifications to the proposed rules that deviate sharply from FCC rules and policies (as well as those in most other certified states). For example, the proposal to require that the Communications Worker Safety Zone (“CWSZ”) be treated as part of the “unusable” pole space for purposes of calculating pole attachment rates has been repeatedly rejected by the FCC and sustained on appeal because the utilities actually do use the space. See, e.g., *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, Mem. Op. and Second Report and Order, 72 F.C.C. 2d 59, 70-71 ¶ 24 (1979), *aff’d*, *Monongahela Power Co. v. FCC*, 655 F.2d 1254 (D.C. Cir. 1981); *Petition to Adopt Rules Concerning Usable Space On Utility Poles*, 1984 FCC LEXIS 2284, at *11 (1984); *2000 Pole Order*, 15 FCC at 6467-69 ¶¶ 20-24 (2000); *2001 Pole Order*, 16 FCC Rcd at 12130 ¶ 51 (2001). The Electric Companies’ proposed CWSZ modification is inconsistent with the Commission’s statutory obligation to adopt the FCC’s rules and would substantially increase the cost of

Consistent with its statutory obligations, and in the interest of promoting deployment and competition, the Commission should firmly and promptly reject the Energy Companies' proposed rule changes and approve the proposed rules consistent with the modification addressed by the WVCTA in its Initial Comments. To the extent that the Energy Companies (and other commenters) take issue with the Commission's statutorily required mandate in any respect, the proper forum for redress is at the legislature. If the Commission nonetheless believes that it has the statutory authority to adopt any rules proposed by the Energy Companies that go beyond the FCC's rules and/or are inconsistent with the FCC's rules, the WVCTA respectfully requests that the Commission provide parties additional time to provide comment.

Respectfully Submitted,

West Virginia Cable Telecommunications Association

By Counsel



Richard L. Gottlieb (WV Bar #1447)

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pole attachments thereby creating a significant new obstacle to deployment and competition in West Virginia. Another example is the Energy Companies' proposal to require attachers to obtain written consent from private landowners for easements before being allowed to access poles. This proposal conflicts with the FCC's rules and Section 224, which only allows electric companies to deny pole access "where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes." 47 U.S.C §224(i)(2); 47 C.F.R. §1.1403(a). Consequently, the Energy Companies' proposal is contrary to W. Va. Code §31G-4-4(b). In this regard, cable systems generally have access to private easements under the federal Cable Act (47 U.S.C. §541(a)(2)) and to public and private easements under West Virginia law. W.Va. Code §§ 24D-1-9(a) (right to use easements), 24D-1-9(i)(4) (covering any "public or private easement for electric, gas, telephone or other utility transmission"). These statutory rights are entirely consistent with West Virginia's common law of easements that allow utilities to "take advantage of technological improvements." *Kell v. Appalachian Power Co.*, 289 S.E.2d 450, 453, 456 (Va. 1982). See also *C/R TV, Inc. v. Shannondale*, 27 F.3d 104 (4th Cir. 1994).

**PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON**

CASE NO. 19-0551-T-GI

**General Investigation into Adopting and
Implementing Rules Governing Pole Attachments and
Assumption of Commission Jurisdiction over Pole Attachments**

CERTIFICATE OF SERVICE

I, Richard L. Gottlieb, Counsel for the West Virginia Cable Telecommunications Association (WVCTA), does hereby certify that a copy of the foregoing *REPLY COMMENTS OF THE WEST VIRGINIA CABLE TELECOMMUNICATIONS ASSOCIATION* has been served upon the following parties of record by First Class, United States Mail; postage prepaid, this 14th day of November, 2019.

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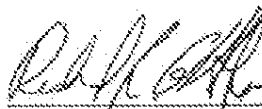
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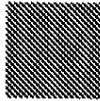
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November 14, 2019

VIA HAND DELIVERY

Connie Graley
Executive Secretary
Public Service Commission
201 Brooks Street
Charleston, WV 25301

03:10 PM NOV 14 2019 EXEC SEC DIV

Re: General Order No. 261
In the Matter of Adopting and Implementing
Rules Governing Pole Attachments and
Assumption of Commission Jurisdiction Over
Pole Attachments.

Dear Ms. Graley:

On behalf of CTIA, enclosed are an original and twelve (12) copies of the **Reply Comments of CTIA**.

Sincerely,

David B. Hanna
WV State Bar # 8813
dhanna@hannalawpllc.com

DBH/dh

Enclosures

cc: C. Howard, Esq.
L. Bouvette, Esq.
Cert. of Service

Before the
PUBLIC SERVICE COMMISSION OF WEST VIRGINIA

In the Matter of Adopting and Implementing)
Rules Governing Pole Attachments and) General Order No. 261
Assumption of Commission Jurisdiction)
Over Pole Attachments)
)

REPLY COMMENTS OF CTIA

CTIA respectfully submits its reply comments in response to the Public Service Commission of West Virginia’s (“Commission’s”) Commission Order (“Order”) entered October 11th, 2019 in the above-captioned docket, and the proposed rules on pole attachments therein (“Proposed Rules”), as well as the comments initially submitted in response to that Order.

As CTIA noted in the Commission’s prior proceeding on this issue (Case No. 19-0551-T-GI), not only is adoption of the Federal Communications Commission’s (“FCC’s”) pole attachment rules and precedent an effective and efficient way for the Commission to promote broadband deployment,¹ such an approach complies with the explicit direction in Senate Bill 3 for the Commission “to adopt the FCC rules in their entirety.”² Accordingly, CTIA was encouraged to see that the Commission’s Proposed Rules largely mirrored the FCC’s.³ Further, nearly all commenters in this proceeding supported the substantive adoption of the FCC’s rules, with the singular exception of Appalachian Power Company *et al.* (“the Electric Utilities”).⁴

¹ Initial Comments of CTIA, Case No. 19-0551-T-GI (July 15, 2019) at 3.

² Reply Comments of CTIA, Case No. 19-0551-T-GI (July 25, 2019) at 1.

³ See Initial Comments of CTIA, General Order No. 261 (Nov. 7, 2019).

⁴ See Initial Comments of Segra, General Order No. 261 (Nov. 7, 2019) (“Segra Comments”) at 1 (“Overall, Segra believes the Commission has done an excellent job in adopting rules based primarily upon the Federal Communications Commission existing pole attachment rules”); Initial Comments of West Virginia Cable Telecommunications Association, General Order No. 261 (Nov. 7, 2019) at 2 (“The WVCTA commends the Commission on the Proposed Rules, which substantially accomplish the objectives of West Virginia law while reconciling various provisions of the FCC’s rules with certain pre-existing rules of the Commission”); Initial Comments of Frontier West Virginia Inc. *et al.*, General Order No. 261 (Nov. 7, 2019) at 1 (“Frontier believes that the proposed rules would fully implement Section 4’s requirement that the Commission “adopt the rates, terms, and

The Electric Utilities ask the Commission to reject wholesale a number of provisions of the FCC's rules, including the definition of "usable space," the telecommunications rate formula, the FCC's self-help remedy for work in the electric power supply space, the FCC's ILEC complaint rule, and the FCC's complaint procedures.⁵ The overarching theme of the Electric Utilities' comments is laid out in their executive summary: "The [Electric Utilities] do not believe that the West Virginia legislature empowered the Commission to regulate pole attachments solely to follow the FCC's regulations lock-step."⁶ Their suggestions misrepresent the clear directive of the Legislature, represent an attempt to re-litigate the FCC's precedent on pole attachments, and ignore the record established in the previous proceeding on this same issue. Accordingly, they should largely be dismissed.

In its Order responding to Senate Bill 3, the Commission makes plain that the bill "does not authorize the Commission to adopt its own rules... or to adopt only those sections of the FCC formal complaint rules that are consistent with State law."⁷ That interpretation itself is enough to dismiss much of the Electric Utilities' approach, which can be summed up in their comments: "The Companies believe the Commission has the authority to adopt the rules *it* concludes are appropriate for West Virginia [. . .]."⁸

conditions of access to and use of poles, ducts, conduits, and rights-of-way as provided in 47 U.S.C. §224 and 47 C.F.R. §§1.1401 - 1.1415, inclusive, of the dispute resolution process incorporated by reference in those regulations"); Letter from CenturyLink to Secretary Graley re: General Order No. 261 (Nov. 7, 2019) at 1 ("The West Virginia Pole Attachment Rules incorporate a measured and flexible approach that mirror changes recently made at the FCC to drive out delays and streamline the process for pole attachments.")

⁵ See generally Joint Initial Comments of Appalachian Power Company *et al.*, General Order No. 261 (Nov. 7, 2019) ("Electric Utilities' Comments").

⁶ *Id.* at i. The Electric Utilities also pose the rhetorical question that if the Legislature's intent was to empower the Commission "solely to follow the FCC's regulations lock-step," then "why empower the Commission to regulate pole attachments at all?" See *id.* at ii. CTIA has already clearly answered this question in the previous proceeding: the Legislature is broadly empowered by statute to establish restrictions on the Commission. See Reply Comments of CTIA, Case No. 19-0551-T-GI (July 25, 2019) at 3.

⁷ Commission Order, Case No. 19-0551-T-GI (June 4, 2019) at 3.

⁸ Electric Utilities' Comments at 44 (emphasis added).

This represents an absurd stance: that even though Senate Bill 3 plainly stated that the Commission must “adopt the rates, terms and conditions of access to and use of poles, ducts, conduits, and rights-of-way as provided in 47 U. S. Code §224 and 47 C.F.R. §§ 1.1401 - 1.1415...” and the “dispute resolution process incorporated by reference in those regulations,”⁹ what the Legislature actually *meant* by that was the Commission should reject the FCC’s rules and the substantive, evidentiary conclusions the FCC reached when it adopted said rules. The Commission should reject this nonsensical and unsupported approach, which is merely an attempt to take “another bite of the apple” in areas where the Electric Utilities simply do not like the FCC’s well-considered and court-tested rules. The Electric Utilities also disregard that Senate Bill 3 grants the Commission the significant new authority to take jurisdiction over pole attachment complaints, where before such authority lay with the FCC.¹⁰

CTIA also disagrees with several of the Electric Utilities’ finite suggestions. For example, the Electric Utilities ask the Commission to revise the definition of “Usable Space” in Proposed Rules Section 2.3 to exclude the Communication Worker Safety Zone.¹¹ They argue that “the communications attachments are the cost-causers of this space and therefore should bear at least a pro rata share of this cost.”¹² What the Electric Utilities fail to mention is that this same argument has been put forward at the FCC and explicitly rejected on at least three occasions over the last five decades.¹³ Further, the Electric Utilities misleadingly emphasize the part of National Electric Safety Code (“NESC”) Rule 235C4 that says “no supply or

⁹ See Staff Initial Comments, Case No. 19-0551-T-GI (July 15, 2019) at 2.

¹⁰ Indeed, two months ago the neighboring Pennsylvania Public Utility Commission took the same approach -- taking jurisdiction over pole attachment complaints and adopting the FCC’s pole attachment rules -- even without explicit legislative instruction to do so. See Penn. Pub. Util. Comm’n, *Final Rulemaking Order*, Docket No. L-2018-3002672 (Sep. 3, 2019), available at <http://www.puc.state.pa.us/pucdocs/1634454.docx>.

¹¹ See Electric Utilities’ Comments at 5-8.

¹² *Id.* at 6.

¹³ See, e.g., 72 FCC 2d 59, 69-70 (1977); FCC, 77 FCC 2d 187 (1980); 15 FCC Red 6453 at para. 22 (2000).

communication facility shall be located in the communication worker safety zone,” but not the significant exceptions in the NESC made directly before that phrase.¹⁴ As the FCC noted when rejecting this argument, one major exception to this rule that the Electric Utilities neglect to describe is that “so long as their crews make the installation, the electric utilities are not limited by the NESC in what equipment or cables *they* may attach in the safety space.”¹⁵ The Electric Utilities further obfuscate this issue by stating that “electric utilities do not need or use this space for the provision of electric service.”¹⁶ But even beyond their footnoted admissions that utilities install streetlights within this space,¹⁷ their statement belies the fact that electric utilities can and do use this space for their own purposes, as the FCC pointed out.¹⁸

Accordingly, the FCC has repeatedly rejected as anti-competitive electric utilities’ attempts to charge attachers for pole space to which *only* pole owners can attach. The Electric Utilities’ attempts to proffer such arguments here merely demonstrate a sound rationale for the Legislature to ask the Commission to broadly adopt the FCC’s rules: to save the Commission the time and resources needed to consider arguments that the federal expert agency has already considered and dismissed multiple times. Furthermore, this represents an attempt by the Electric Utilities to propose an alternate rate methodology, and Senate Bill 3 is overt and clear that the Commission *must* adopt the FCC’s “rates, terms, and conditions of access to and use of” pole attachments.¹⁹

Other provisions suggested by the Electric Utilities would only further delay deployment by adding unnecessary hurdles to the FCC rules the Commission has been explicitly commanded

¹⁴ See NESC §235C4 at p. 139 (“Except as allowed by Rules 238C, 238D, and 239, no supply or communication facility shall be located in the communication worker safety zone.”) (emphasis added).

¹⁵ 15 FCC Rcd 6453 at para. 22 (2000) (emphasis added).

¹⁶ Electric Utilities’ Comments at 6.

¹⁷ See *id.* at fn. 2.

¹⁸ 15 FCC Rcd 6453 at para. 22.

¹⁹ W.Va. Code §31-G-4-4.

to adopt. For example, the Electric Utilities ask the Commission to add a provision requiring all attachers to “secure and obtain the written authorization from the landowner for the placement of attacher’s facilities on real property prior to being granted access to the utility’s facilities.”²⁰ But as the Electric Utilities illustrate when they state “the right of way and easement agreements that the Companies have secured from West Virginia landowners provide for the electric utility to be able to place its facilities on poles,”²¹ access to private property is a contractual issue outside the purview of the Commission. If land access is unavailable to an attacher due to contractual issues, that issue clearly must be worked out prior to attachment. Therefore, all adding a Commission rule on the issue would accomplish is to add a hurdle for attachers by requiring separate written authorization for all attachments even when such authorization is not, or could not be, required.²²

The Electric Utilities make plain their desire to re-litigate the FCC’s rules when they ask the Commission to place make-ready responsibilities that the FCC has assigned to the pole owners on attachers instead, at one point nakedly buttressing their argument with the claim that “the FCC got this rule wrong, and the Commission should not follow in the FCC’s footsteps.”²³ For one, the Electric Utilities are wrong on the substance. As the electric utility should know all the attachers on one of its poles and a new attacher likely does not, it makes logical sense for the FCC to require the electric utility to gather the estimates required from existing attachers on a pole. But regardless of whether the FCC was “right” or “wrong,” the simple fact is that Senate Bill 3 instructs the Commission to adopt the FCC’s rules, so the Commission should dismiss this and similar requests from the Electric Utilities out-of-hand.

²⁰ Electric Utilities’ Comments at 10.

²¹ *Id.*

²² For example, no such authorization could legally be required for poles on land owned by the Electric Utilities, as the Electric Utilities’ denial of such authorization would constitute a facial violation of the Communications Act (47 U.S.C. §224 (f)) by constructively denying nondiscriminatory pole access to attachers.

²³ Electric Utilities’ Comments at 19.

These examples are not meant to be all-inclusive of the ways in which the Electric Utilities are attempting to use the Commission as a forum to re-hash arguments that failed at the FCC. Instead, they illustrate that the Electric Utilities' claims and edits have little to do with the Commission's interpretation of the Legislature's clear instructions, and are instead a request that the Commission ignore its responsibilities and promulgate rules more favorable to the utilities, which already have monopoly power over utility poles in the rights-of-way, skewing competition even further.

That being said, CTIA does not object to correction of the Proposed Rules in areas where attempts to harmonize conflicts or conform to the Commission's rules and procedures have brought them further away from the FCC's pole attachment rules than necessary. For example, CTIA has no objection to the Commission using the term "telecommunications carrier" in the two instances where the Proposed Rules currently use the undefined term "provider of telecommunications service," as noted by the Electric Utilities.²⁴ The Electric Utilities also note areas in Attachment D to the Proposed Rules where the Commission seems to have deviated from the FCC's formulae for rates.²⁵ On review, it appears similar errors may appear in other attachments. The Commission should review the Proposed Rules and attachments and correct such errors to better reflect the Legislature's intent that the Commission adopt the FCC's rules, and particularly its rate methodologies.

Additionally, both the Electric Utilities and Segra expressed issues with sections 15 through 29 of the Proposed Rules, which govern the specifics of complaint procedures.²⁶ While the Proposed Rules do contain a waiver clause for any procedural issues on good cause shown

²⁴ See Electric Utilities' Comments at 2-3.

²⁵ See Electric Utilities' Comments at 16.

²⁶ See Segra Comments at 3-7; Electric Utilities' Comments at 40-43.

(Section 15.13), the Commission should review the procedures in the Proposed Rules with an eye towards, as Segra stated, “adoption of only those provisions of the FCC’s pole attachment regulations that actually apply to the specific process for setting rates, terms and conditions of pole attachments in West Virginia, and not the purely procedural rules applicable only to the FCC’s rather unique complaint processing procedures.”²⁷

Finally, CTIA agrees with Segra that the Commission should establish a process to rapidly consider and adopt future FCC rule changes on the subject if and when they occur. Such a process would, as Segra noted, “allow both attachers and pole owners in West Virginia to immediately take advantage of any regulatory developments as soon as such are codified by the FCC, while preserving the ability of the Commission to expeditiously address any unique issues or circumstances that may require West Virginia-specific changes to the FCC’s existing regulatory framework.”²⁸

CTIA looks forward to continuing to working with the Commission to achieve the goal of making infrastructure deployment more efficient in West Virginia, and supports prompt adoption of the Proposed Rules in this proceeding consistent with the comments above.

CTIA
By Counsel



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November 14, 2019

²⁷ Segra Comments at 7.
²⁸ Segra Comments at 3.

CERTIFICATE OF SERVICE

I, David B. Hanna, counsel for CTIA hereby certify that copies of the foregoing **Reply Comments of CTIA**, have been served upon the following, by first class United States mail, postage prepaid, this 14th day of November 2010:

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03:17 PM NOV 14 2019 EXEC SEC DIV

November 14, 2019

BY HAND DELIVERY

Connie Graley, Executive Secretary
Public Service Commission of West Virginia
201 Brooks Street
Charleston, WV 25301

Re: GENERAL ORDER NO. 261
In the matter of Adopting and Implementing Rules
Governing Pole Attachments and Assumption of
Commission Jurisdiction over Pole Attachments

Dear Ms. Graley:

I am filing on behalf of Appalachian Power Company, Wheeling Power Company, Monongahela Power Company, and The Potomac Edison Company the enclosed Joint Reply Comments of the AEP Companies and the FirstEnergy Companies in the above-referenced matter.

Very truly yours,

William C. Porth
(W.Va. State Bar #2943)

Counsel for
Appalachian Power Company and
Wheeling Power Company

WCP:sr
Enclosure
cc: Service List

PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

GENERAL ORDER NO. 261

In the Matter of Adopting and Implementing
Rules Governing Pole Attachments and
Assumption of Commission Jurisdiction Over
Pole Attachments

JOINT REPLY COMMENTS OF APPALACHIAN POWER COMPANY, WHEELING
POWER COMPANY, MONONGAHELA POWER COMPANY,
AND THE POTOMAC EDISON COMPANY

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Date: November 14, 2019

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PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

GENERAL ORDER NO 261

In the Matter of Adopting and Implementing
Rules Governing Pole Attachments and
Assumption of Commission Jurisdiction over
Pole Attachments

JOINT REPLY COMMENTS OF APPALACHIAN POWER COMPANY, WHEELING
POWER COMPANY, MONONGAHELA POWER COMPANY,
AND THE POTOMAC EDISON COMPANY

COME NOW Appalachian Power Company (“APCo”), Wheeling Power Company (“WPCo”) (“collectively, the “AEP Companies”), Monongahela Power Company (“Mon Power”), and The Potomac Edison Company (“PE”) (collectively the “FirstEnergy Companies”) (all four companies collectively, the “Companies”) and together respectfully submit their reply comments on the proposed rules governing pole attachment procedures.¹

**I. THE COMMISSION’S PROPOSED RULES ARE INSUFFICIENTLY
INDEPENDENT OF THE FCC’S REGULATIONS THAT FAVOR
COMMUNICATIONS INTERESTS.**

The paucity of substantive revisions proposed by the communications commenters to the Commission’s proposed rules should give the Commission pause, as should the fact that the very few substantive revisions the communications commenters have suggested seek to align the proposed rules even closer to the FCC’s rules. Understandably, the FCC’s expertise is focused on the communications industry. The FCC’s expertise does not include electric distribution safety and reliability, and the FCC’s ratemaking and cost-recovery principles do not fairly

¹ In the Matter of Adopting and Implementing Rules Governing Pole Attachments and Assumption of Commission Jurisdiction Over Pole Attachments, General Order No. 261, Case No. 19-0551-T-G1, Commission Order (Oct. 11, 2019); In the Matter of Adopting and Implementing Rules Governing Pole Attachments and Assumption of Commission Jurisdiction Over Pole Attachments, General Order No. 261, Amended Commission Order (Oct. 15, 2019).

consider the interests of West Virginia electric ratepayers. The rules adopted by the Commission should vigilantly avoid incorporation of the pro-communication industry slant of the FCC rules.

The purpose of West Virginia Code Section 31G-4-4 was to allow the Commission to assume jurisdiction over pole attachments. Unlike the FCC, the Commission does have expertise in the areas of electric distribution safety, reliability, ratemaking and cost recovery. Consequently, the Commission can and should provide a more balanced approach to pole attachment issues than the FCC. The Companies urge the Commission to embrace the approach of other reverse preemption states, such as Arkansas and Louisiana, and adopt its own pole attachment regulations that are tailored to serve West Virginia's specific needs, and reject wholesale adoption of the FCC's pole attachment rules. The fact that all of the communications commenters have so readily endorsed the Commission's proposed rules suggests that those rules may tilt unnecessarily in favor of the interests of those communications companies. The fact that electric utilities unanimously endorse changes to preserve the safety and reliability of electric distribution service demonstrates a legitimate concern that should be considered by the Commission.

II. THE COMMISSION SHOULD APPLY ITS OWN PROCEDURAL RULES TO COMPLAINT PROCEEDINGS.

In its initial comments, Segra counsels against the adoption of the FCC's procedural rules and, instead, recommends that the Commission "simply utilize its current procedural rules for the processing of informal and formal complaints until such time as the Commission gains more real world experience in the handling of pole attachment complaints." Segra Cmts. at 4. As set forth in their initial comments, the Companies agree with Segra on this point. Companies Cmts. at 40-41. The Commission, by leveraging its institutional knowledge of the existing procedural framework, can more efficiently administer pole attachment complaint proceedings. By contrast,

the adoption of a specific set of procedural rules applicable only to pole attachment complaints would be moving in the opposite direction of the FCC, which recently abandoned its specific pole attachment complaint procedure rules in favor of the generally applicable complaint procedure rules set forth in 47 C.F.R. §§ 1.720 *et seq.* *Id.* at 41. For these reasons, the Companies join Segra in urging the Commission simply to apply its existing, generally applicable procedural rules, West Virginia Code R. §§ 150-1-1 *et seq.*, to pole attachment complaint proceedings.

III. THE COMMISSION SHOULD REVISE SECTION 5.1 TO MORE CLEARLY DELINEATE THE “LOWER BOUND” OF ITS RATEMAKING AUTHORITY.

In its initial comments, West Virginia Cable Telecommunications Association (“WVCTA”) notes that Section 5.1 “largely tracks” but “materially deviates” from FCC Rule 1.1406(a). WVCTA Cmts. at 2. WVCTA contends that by deviating from FCC Rule 1.1406(a)’s “statutory minimum” language, Section 5.1 “introduces ambiguity” and raises questions as to whether the Commission intended to incorporate the FCC’s “incremental costs” standard. *See id.* at 3. To resolve these ambiguities, WVCTA proposed the following revisions to Section 5.1

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

The Companies agree with WVCTA and raised identical concerns in their initial comments. *See* Companies Cmts. at 10-12. Further, the Companies’ proposed revisions to Section 5.1 are nearly identical to those proposed by WVCTA. *Id.* at 12. Accordingly, the Companies join WVCTA

and recommend that the Commission revise Section 5.1 to more clearly articulate the “lower bound” of the Commission’s ratemaking authority.

IV. TO THE EXTENT THE COMMISSION ADOPTS THE FCC’S POLE ATTACHMENT RULES, THE COMMISSION SHOULD BE PREPARED TO RESCIND OR MODIFY SUCH RULES IN THE EVENT THEY ARE OVERTURNED ON RECONSIDERATION OR APPEAL.

The FCC’s recently adopted rules, upon which the Commission’s proposed rules are based, raise significant issues regarding safety and reliability, as well as fairness in ratemaking and cost-recovery. *See generally, Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, FCC 18-111, WC Docket No. 17-84, WT Docket No. 17-79, 33 FCC Rcd. 7705 (Aug. 3, 2018) (the “2018 Order”). The FirstEnergy Companies submitted extensive Comments and Reply Comments during the FCC rulemaking as part of the Coalition of Concerned Utilities,² and on October 15, 2018, the FirstEnergy Companies also petitioned for reconsideration of the FCC’s 2018 Order as part of the same Coalition. Similarly, the AEP Companies submitted extensive Comments and Reply Comments during the FCC rulemaking process along with a group referenced as the “Electric Utilities”³ in the 2018 Order. Certain members of that group, including the AEP Companies, have challenged certain aspects of the FCC’s new rules in the United States Court of Appeals for the Ninth Circuit.⁴

The petition for reconsideration and the appeal challenge, *inter alia*, the following rules from the FCC’s 2018 Order:

² The Coalition of Concerned Utilities is comprised of Arizona Public Service, Consumers Energy, Eversource, Exelon Corporation, FirstEnergy Corp., Hawaiian Electric, Kansas City Power & Light, Northwestern Energy, Portland General Electric, Puget Sound Energy, South Carolina Electric & Gas, and the AES Corporation.

³ The Electric Utilities group included Ameren Corporation, American Electric Power Service Corporation, Duke Energy Corporation, Entergy Corporation, Oncor Electric Delivery Company LLC, Southern Company, Tampa Electric Company and Westar Energy, Inc.

⁴ *American Electric Power Service Corp., et al. v. FCC*, In the United States Court of Appeals for the Ninth Circuit, Docket No. 19-70490.

- FCC Rule 1.1411(i)(2) provides that if an electric utility fails to meet the FCC's power supply space make-ready construction deadlines, an attachor may hire utility-approved contractors to perform make-ready work in the electric supply space, creating significant safety concerns. The Commission is proposing to adopt this rule as Section 10.9.2.
- FCC Rule 1.1415 allows a communications company to overlash an existing communication cable without submitting an engineering analysis to the pole owner. The FCC Rule also does not allow an electric utility to recover the cost of performing a loading analysis of a proposed overlash, thus shifting that cost to electric ratepayers. More alarming still, the FCC Rule allows overlashing on poles with preexisting NESC violations (or other safety and reliability violations). The Commission is proposing to adopt this rule as Section 14.
- FCC Rule 1.1413 alters the manner in which incumbent local exchange carriers ("ILECs) are treated under the pole attachment rules. This new FCC rule includes presumptions that ILECs are "similarly situated" to CATVs and competitive local exchange carriers ("CLECs") and that ILECs are entitled to the same annual attachment rate as CATVs and CLECs. The FCC rule also requires an electric utility to disprove these presumptions by "clear and convincing evidence." A virtually identical provision is included in Section 12 of the Commission's proposed rules, notwithstanding the fact that the Commission possesses and is already

exercising jurisdiction over the joint-use relationship between ILECs and electric utilities.

The Companies' specific concerns with the FCC's new rules are consistent with the Companies' overall concern that the FCC's emphasis on broadband deployment de-emphasizes electric safety and reliability, as well as fairness in cost recovery. If the Companies are successful in reversing any of the above-referenced FCC rules on reconsideration or appeal, the Companies recommend that the Commission rescind or modify any of its corresponding rules at that time.

V. THE COMMISSION SHOULD REJECT SEGRA'S PROPOSED RULE TO ADOPT AND INCORPORATE ANY FUTURE FCC RULES AND AMENDMENTS INTO WEST VIRGINIA'S POLE ATTACHMENT RULES.

Segra recommends "that the Commission include a proposed rule that provides for adoption of prospective updates of the FCC's pole attachment rules unless the Commission either initiates an action on its own motion or via a petition filed by an attacher, pole owner, or other interested party to initiate a rulemaking..." Segra Crmts. at 2-3. There is no need, and no justification, for the Commission to take action now to deprive itself of its ability to make future assessments of, and decisions respecting, future unknowable actions by the FCC. To do so, as Segra advocates, would undermine the intent of the West Virginia legislature. The West Virginia Legislature would not have passed West Virginia Code Section 31G-4-4 if it wanted West Virginia's pole attachment rules to be dictated—now and in the future—by the FCC. Segra's proposed rule would effectively nullify West Virginia Code Section 31G-4-4. No reasonable construction of West Virginia Code Section 31G-4-4 supports Segra's proposed rule. *See, e.g., Click v. Click*, 127 S.E. 194, 198 (W.Va. 1925) ("It is always presumed, in regard to a statute, that no absurd or unreasonable result was intended by the legislature.") (citation omitted).

In addition to conflicting with clear legislative intent, Segra's proposed rule would also violate West Virginia's Administrative Procedures Act, West Virginia Code Sections 29A-1-1 *et seq.* Though exempt from some provisions of the Administrative Procedures Act, *see* West Virginia Code Section 29A-1-3, the Commission is still required to comply with the Act's provisions governing rulemaking. W.Va. Code § 24-1-7 ("The commission shall prescribe such rules and regulations as may be necessary to carry out the provisions of this chapter... Provided, [t]hat no such rule or regulation shall be effective unless promulgated pursuant to the provisions of [Sections 29A-3-1 through 29A-3-10]..."). The rulemaking provisions of West Virginia's

Administrative Procedures Act require, *inter alia*, that the Commission adhere to formal notice and comment rulemaking procedures whenever it “proposes to promulgate a rule other than an emergency rule...” W.Va. Code § 29A-3-5. By providing for the automatic adoption of future FCC rules and substantive amendments into West Virginia’s pole attachment rules, Segra’s proposed rule would violate West Virginia’s Administrative Procedures Act. Accordingly, incorporating Segra’s proposed rule would not only be inadvisable—it would be unlawful.

CONCLUSION

The West Virginia Legislature has given the Commission authority to regulate pole attachments. The Commission should regulate pole attachments as it regulates all other assets under its supervision—by providing due process to stakeholders and tailoring its rules and policies to fit West Virginia. It should avoid wholesale adoption of the federal regulatory scheme. The Commission has the authority to adopt the rules it concludes are appropriate for West Virginia and can do so without violating the Legislature’s direction and intent in West Virginia Code Section 31G-4-4.

WHEREFORE, the Companies respectfully request that the Commission carefully consider the Initial Comments and Reply Comments presented by the Companies as part of this proposed rulemaking.

Dated this 14th day of November, 2019.

Respectfully submitted,

APPALACHIAN POWER COMPANY
WHEELING POWER COMPANY
MONONGAHELA POWER COMPANY
THE POTOMAC EDISON COMPANY

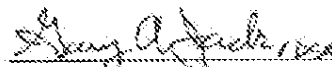
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PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

GENERAL ORDER NO. 261

In the matter of Adopting and Implementing Rules
Governing Pole Attachments and Assumption of
Commission Jurisdiction over Pole Attachments

CERTIFICATE OF SERVICE

I, William C. Porth, counsel for Appalachian Power Company and Wheeling Power Company, do hereby certify that true copies of the foregoing comments were served by hand delivery or U.S. mail on this 14th day of November, 2019, addressed to the following:

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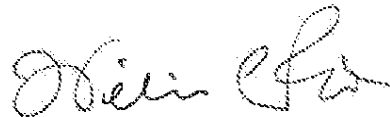
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03:48 PM NOV 14 2019 EXEC SEC DIV

November 14, 2019

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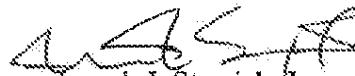
**Re: GENERAL ORDER NO. 261
In the Matter of Adopting and Implementing
Rules Governing Pole Attachments and
Assumption of Commission Jurisdiction Over
Pole Attachments**

Dear Ms. Graley:

Please find enclosed for filing in the original plus 12 copies of the **Reply Comments of Frontier West Virginia Inc. and Citizens Telecommunications Company of West Virginia, D/B/A Frontier Communications of West Virginia** in the above-referenced matter.

Thank you for your attention to this matter.

Sincerely,


Joseph J. Starsick, Jr.
(State Bar No. 3576)

JJSjr/sc
Enclosure

cc: Service List

**PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON**

GENERAL ORDER NO. 261

**In the Matter of Adopting and Implementing
Rules Governing Pole Attachments and
Assumption of Commission Jurisdiction Over
Pole Attachments**

**REPLY COMMENTS OF FRONTIER WEST VIRGINIA INC. AND CITIZENS
TELECOMMUNICATIONS COMPANY OF WEST VIRGINIA, D/B/A FRONTIER
COMMUNICATIONS OF WEST VIRGINIA**

I. Introduction

Frontier West Virginia Inc. and Citizens Telecommunications Company of West Virginia, d/b/a Frontier Communications of West Virginia (collectively, "Frontier") again state their appreciation for the opportunity to comment on the Commission's proposed regulations implementing West Virginia Code § 31G-4-4 ("Section 4"). All of the initial comments agree generally that the Commission's proposed rules effectuate Section 4's requirement that the Commission "shall adopt the rates, terms, and conditions of access to and use of poles, ducts, conduits, and rights-of-way as provided in 47 U.S.C. §224 and 47 C.F.R. §§1.1401 – 1.1415, inclusive, of the dispute resolution process incorporated by reference in those regulations."¹ And some commentators have offered various tweaks to help ensure that the Commission's proposed rules properly align with the FCC's regulations implementing the PAA.²

Only the initial comments filed by the State's investor-owned Power Companies suggest that the Commission can and should deviate from several of the FCC's substantive PAA

¹ West Virginia Code § 31G-4-4(b). 47 U.S.C. § 224 is the federal Pole Attachment Act ("PAA"), and the FCC's regulations implementing the PAA are set forth at 47 C.F.R. §§1.1401 – 1.1415.

² See *Initial Comments of West Virginia Cable Telecommunications Association*, pp. 2-3; *Staff's Initial Comments*, pp. 2-3. The West Virginia Cable Telecommunications Association is also referred to as the "WVCTA".

regulations.³ The Power Companies' position lacks merit. Instead, Section 4 sets forth the Commission's jurisdiction over pole attachment and requires it to adopt the FCC's substantive PAA regulations. Accordingly, the Commission cannot revise its proposed rules as the Power Companies have proposed.

II. Discussion

A. The Commission's Proposed Rules Properly Adopt the FCC's PAA Regulations

In its Initial Comments, Frontier expressed its belief that the Commission's proposed rules would properly implement Section 4's requirement that the Commission adopt the rates, terms, and conditions of pole attachments as set forth in the PAA and the FCC's regulations implementing that statute.⁴ All commentators generally agree on this point. However, both the Staff and WVCTA have suggested various revisions to more fully align the Commission's proposed rules with the FCC's PAA regulations.⁵ For example, WVCTA recommends that the Commission revise Rule 4.1 on the utility's burden when arguing that a proposed rate is below the utility's incremental costs so that the rule properly mirrors the FCC's corresponding rule at 47 C.F.R. § 1.1406(a).⁶ Frontier agrees with the revisions the Staff and WVCTA have proposed and recommends that the Commission implement them in its final rules.

³ *Joint Initial Comments of Appalachian Power Company, Wheeling Power Company, Monongahela Power Company, and the Potomac Edison Company* ("Power Companies' Joint Initial Comments"), pp. 5-6. Appalachian Power Company, Wheeling Power Company, Monongahela Power Company and the Potomac Edison Company are collectively referred to as the "Power Companies."

⁴ *Initial Comments of Frontier West Virginia Inc. and Citizens Telecommunications Company of West Virginia*, p. 1.

⁵ See *Initial Comments of West Virginia Cable Telecommunications Association*, pp. 2-3; *Staff's Initial Comments*, pp. 2-3.

⁶ *Initial Comments of West Virginia Cable Telecommunications Association*, pp. 2-3.

B. The Commission May Not Deviate from the FCC's Substantive PAA Rules

Only the Power Companies argue that the Commission can and should deviate from the FCC's substantive PAA regulations. In doing so, they claim, in relevant part, that the Commission: (1) should revise the definition of "pole attachment" to exclude the term "provider of telecommunications service" and to include broadband only providers⁷; (2) alter the definitions of "usable space"⁸ and "unusable space"⁹ to change how they account for the separation between electric and communications facilities; (3) delete the telecom rate formula;¹⁰ (4) revise numerous provisions associated with make-ready work;¹¹ and (5) delete the rule governing complaints by incumbent local exchange carriers ("ILECs").¹² As the Power Companies admit in each instance, their proposals would create substantive differences between the Commission's pole attachment rules and the FCC's PAA regulations.¹³

However, "[t]he Public Service Commission has no jurisdiction and no power or authority except as conferred on it by statute."¹⁴ And Section 4 provides, in relevant part, that the

⁷ *Power Companies' Joint Initial Comments*, pp. 1-5 (recommending that the Commission revise the definition of "pole attachment" while acknowledging that the current proposed "definition is identical to the FCC's definition of the same term").

⁸ *Id.*, pp. 5-8 (recommending that the Commission revise the definition of "usable space" to exclude the required separation space even "[t]hrough excluding the [separation] zone would admittedly be a slight departure from the FCC's rules"). In making this argument, the Power Companies acknowledge that they utilize this separation space for street lights. *Id.*, p. 6, n. 2. And their tariffs establish that they each generate revenue from those lights. Appalachian Power Company, P.S.C. W.VA. TARIFF No. 15, Original Sheet Nos. 17-1 – 17-4, 18-1 – 18-4; Wheeling Power Company, P.S.C. W.V.A. TARIFF No. 20, Original Sheet Nos. 17-1 – 17-4, 18-1 – 18-4; Potomac Edison Company, P.S.C. W.VA. TARIFF No. 3, Original Sheet Nos. 14-1 – 14-2, 15-1 – 15-3, 16-1 – 16-7, 17-1 – 17-2; Monongahela Power Company, P.S.C. W.VA. TARIFF No. 22, Original Sheet Nos. 14-1 – 14-2, 15-1 – 15-3, 16-1 – 16-7, 17-1 – 17-2. Critically, the FCC has included this separation space as usable space and allocated it to the electric companies because they utilize the space for revenue generating street lights. *Amendment of Rules and Policies Governing Pole Attachments*, Report and Order, CS Docket No. 97-98, FCC 00-116, ¶ 22 (April 3, 2000) (internal citation omitted).

⁹ *Id.*, p. 8.

¹⁰ *Id.*, pp. 13-16 (recommending that the Commission delete the telecom rate formula while acknowledging that the formula is required under 47 U.S.C. § 224(e)(2)).

¹¹ *Id.*, pp. 18-25 (claiming, in part, that its proposed revisions are justified because "[t]he FCC got this rule wrong").

¹² *Id.*, pp. 25-31 (arguing that the Commission should delete the ILEC complaint provisions in Section 12 even while acknowledging that "Section 12 is based upon FCC Rule 1.1413").

¹³ See n. 7-12 *supra*.

¹⁴ *Wilhite v. Public Serv. Commission*, 149 S.E.2d 273, 281 (W.Va. 1966).

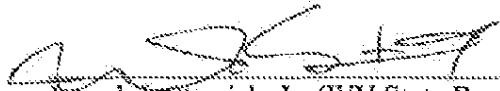
Commission "*shall adopt* the rates, terms, and conditions of access to and use of poles, ducts, conduits, and rights-of-way as provided in 47 U.S.C. §224 and 47 C.F.R. §§1.1401 – 1.1415."¹⁵ Thus, the Power Companies' proposed revisions are simply not allowed under the express language of Section 4 and must be rejected.

III. Conclusion

As set forth above and in Frontier's Initial Comments, the Commission's proposed rules generally effectuate Section 4's requirement that it adopt the FCC's substantive PAA regulations. The proposed revisions of the Staff and WVCTA would help further ensure that the rules fully comply with Section 4.

Respectfully submitted,

FRONTIER WEST VIRGINIA INC. AND CITIZENS
TELECOMMUNICATIONS COMPANY OF WEST
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¹⁵ W. Va. Code § 31G-4-4(b) (emphasis added).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Reply Comments of the Frontier West Virginia Inc. and Citizens Telecommunications Company of West Virginia, d/b/a Frontier Communications of West Virginia* were served upon the parties of record this 14th day of November, 2019, via first-class U.S. mail, postage prepaid.

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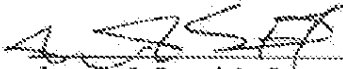
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SEGRA™

November 14, 2019

VIA HAND DELIVERY

Connie Graley
Executive Secretary
Public Service Commission of West Virginia
P.O. Box 812
Charleston, WV 25323

Re: General Order No. 261
In the matter of Adopting and Implementing
Rules Governing Pole Attachments and Assumption
of Commission Jurisdiction Over Pole Attachments

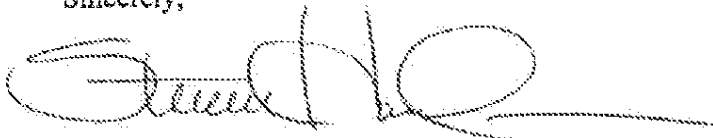
Dear Ms. Graley:

Enclosed for filing please find an original and twelve (12) copies of the "Reply Comments of Segra" in the above-captioned proceeding.

A copy of Segra's comments were today served upon all Parties filing initial comments in this proceeding.

If you have any questions regarding this filing, please feel free to contact me at your earliest convenience.

Sincerely,



STEVEN HAMULA (SB# 4580)
Associate General Counsel
Lumos Networks LLC dba Segra and
Lumos Networks of West Virginia Inc. dba Segra

SH/s
Enclosure

THE PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

GENERAL ORDER NO. 261

In the matter of Adopting and Implementing
Rules Governing Pole Attachments and Assumption
of Commission Jurisdiction Over Pole Attachments

REPLY COMMENTS OF SEGRA

I. Introduction

Lumos Networks, LLC dba Segra and Lumos Networks of West Virginia Inc. dba Segra (collectively "Segra"), by counsel, respectfully files these reply comments on the proposed Rules For the Government of Pole Attachments ("Pole Attachment Rules") issued pursuant to the Commission Order of October 24, 2019 in the above-captioned proceeding. After having had the opportunity to review the initial comments filed by the other parties in this proceeding, Segra remains convinced that its initial comments and suggested modifications to the proposed Pole Attachment Rules are still appropriate and should be adopted by the Commission.

The initial comments of the other parties to this proceeding presented a mixed bag overall. The majority of the recommendations contained in the other parties' initial comments were reasonable and consistent with the Commission's charge in this proceeding. Indeed, Segra even found common ground with the joint initial comments filed by the West Virginia power companies ("WVPCs")¹ relative to Commission's proposed adoption of the FCC's general complaint processing rules. With respect to the WVPCs' recommendations regarding the abandonment and/or re-litigation of the FCC's current One-Touch Make-Ready ("OTMR") rules, however, Segra must unfortunately part company. Accordingly, Segra will briefly comment upon those

¹The West Virginia power companies consist of Appalachian Power Company, Wheeling Power Company, Monongahela Power Company, and The Potomac Edison Power Company.

initial comments of the WVPCs and a few of the other parties for the benefit of the Commission in this proceeding.

Commission Staff

In its initial comments, the Staff noted in its comment #2 that the Commission left out of the proposed Pole Attachment Rules any reference 47 C.F.R. § 1.1406(e) allowing certain ILECs to opt out of using ARMIS data in favor of GAAP data to set attachment rates. The Staff recommended that the Commission clarify whether this omission was intentional.² In addition, in its comment #3, Staff recommended that the Commission should clarify in 150 C.S.R. §38-2, that the definitions contained therein were applicable only to the Pole Attachment Rules in order to avoid confusion over the definition of "utility", which is defined differently in West Virginia Code §24-1-2 and §24-2-1, respectively.³

With respect to Staff comment #2, Segra is of the opinion that whether done intentionally or inadvertently, "allowing certain ILECs to opt out of using ARMIS data in favor of GAAP accounting data," is both inconsistent and ambiguous. Segra would prefer that 47 C.F.R. § 1.1406(e) remain out of the Commission's proposed Pole Attachment Rules. However, if the Commission chooses to insert some form of 47 C.F.R. § 1.1406(e) back into its proposed rules, Segra would recommend that said rule be modified so as to mandate the use of ARMIS data for purposes of computing rates relative to attachment to poles, ducts, conduits, and rights-of-way in West Virginia.

With respect to Staff comment #3, Segra would agree with the Staff's recommendation that the Commission further clarify and limit the application of the definition of "utility" contained in proposed rule §150-38-2-1 to the Pole Attachment Rules. This will avoid any unwarranted

² Commission Staff's Initial Comments at p. 2.

³ Id.

confusion brought about by any conflicting references to the term “public utility” as defined and utilized in West Virginia Code §24-1-2 and §24-2-1, respectively.

West Virginia Cable Telecommunications Association

While the West Virginia Cable Telecommunications Association (WVCTA”) is generally complimentary and supportive of the Commission’s proposed Pole Attachment Rules, WVCTA does request that the Commission make one minor modification to proposed rule §150-38-2-5.1⁴ as it relates to a utility’s burden if it argues that a proposed rate is below the utility’s incremental costs. In pertinent part, FCC rule 1.1406(a) states “*If, however, a utility argues that the proposed rate is lower than its incremental costs, the utility has the burden of establishing that such rate is below the statutory minimum just and reasonable rate.*” In the Commission’s proposed rule §150-38-2-5.1, however, the pertinent part of the proposed rules states “*If, however, a utility argues that the proposed rate is lower than its incremental costs, the utility has the burden of establishing that such rate is below a just and reasonable rate based primarily on cost.*”

According to WVCTA, the Commission’s proposed rule’s reference to “*based primarily on cost*” introduces ambiguity into the concept set out in the Pole Attachment Act and FCC’s rules. By deviating from the language in Section 224 that is referenced by the FCC’s rules, WVCTA argues that there could be debates about whether some standard other than the FCC’s (and Pole Attachment Act’s) concept of incremental cost should be applied in West Virginia. WVCTA further asserts that this ambiguity in what constitutes incremental cost for purposes of pole attachment rates will undermine the West Virginia legislature’s statutory directive to follow the

⁴ Although WVCTA identifies the Commission’s proposed rule as being 4.1, Segra believes WVCTA actually intends to be commenting on §150-38-2-5.1.

FCC's pole attachment rate rules in order to promote uniformity in the regulation of pole attachments.⁵

Accordingly, the WVCTA recommends that the Commission modify proposed rule §150-38-2-5.1 so that it reads in pertinent part as follows: "*If, however, a utility argues that the proposed rate is lower than its incremental costs, the utility has the burden of establishing that such rate is below the additional costs of providing pole attachments.*" WVCTA argues that this modification will make the Commission's proposed rule consistent with Section 224(d)(1) of the Pole Attachment Act, which specifies that the "statutory minimum" rate for pole attachments is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing additional pole attachments.⁶

After having had the opportunity to review and consider WVCTA's recommended modification to proposed rule §150-38-2-5.1 as noted hereinabove, Segra believes it to be reasonable and would therefore recommend that it be adopted by the Commission. As noted by WVCTA, Segra is of the opinion the deviation from the FCC's rule currently contained in proposed rule §150-38-2-5.1 is material and thus should be corrected so as to reflect that the FCC's statutory minimum, incremental cost standard is based entirely on "the additional costs of providing pole attachments."⁷

West Virginia Power Companies

In its reply comments in Case No. 19-0551-T-GI, Segra cautioned the Commission to avoid allowing the WVPCs to manipulate the focus of that general investigation proceeding solely for the purpose of obtaining yet another opportunity to advocate for purely parochial positions that

⁵ WVCTA Initial Comments at pp. 2-3.

⁶ Id.

⁷ Id.

had already been thoroughly considered and rejected by the FCC.⁸ Although the WVPCs were unsuccessful in their efforts to bend the Commission to their wishes during the prior General Investigation proceeding, as their initial comments herein indicate, the WVPCs have regrouped and have once again advanced lengthy arguments intended solely to neuter the prior work done by the FCC as part of the development of its current pole attachment regulations, and in so doing, to effectively water down the Commission's proposed Pole Attachment Rules.

Therefore, with the exception of the WVPCs' recommendation that the Commission decline to adopt the FCC's formal complaint rules, Segra respectfully opposes those recommendations put forth by the WVPCs -- especially those contained in Articles VI, VII and X in their initial comments -- that the Commission deviate from the current FCC rules in order to re-litigate issues that have already been the subject of extensive consideration by the FCC. Among other things, the WVPCs take issue with (i) making utility notification of the field inspection portion of the engineering survey permissive instead of mandatory; (ii) shifting the burden from the utility to the attacher relative to the gathering of costs of third party make-ready; (iii) delete requirement for pole by pole estimates; (iv) suggesting that make-notices be sent by the attacher rather than the utility; (v) limiting the self-help remedy only to the communications space on pole; (vi) require that one-touch make be performed in a safe and reasonable manner; and (vii) various issues related to overlashing.⁹

The Commission should reject these attempts to revisit the FCC's rules for purposes of watering down the Pole Attachment Rules under consideration in the instant proceeding. In fact, in its 2018 Wireline Infrastructure Order¹⁰, the FCC made clear that it listened to and carefully

⁸ See, Case No. 19-0551-T-GI, Segra Reply Comments at pp. 1-2.

⁹ WVPC Initial Comments at pp. 18-25 and pp. 32-40.

¹⁰ *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Third Report and Order and*

considered the arguments of the electric utilities and adjusted its rules accordingly. Simply stated, there is no benefit to be gained by letting the WVPCs reargue these matters again in the instant proceeding in order to make it more difficult for attachers to successfully operate in West Virginia.¹¹

Similarly, the make-ready completion process, and the provisions contained within the FCC's current pole attachment regulations allowing for the utilization of contractors to perform one-touch and/or self-help make-ready work in certain circumstances are not issues of first impression, and the FCC did not ignore them. The FCC considered the same arguments being made here again by the WVPCs in the 2018 Wireline Infrastructure Order, wherein the FCC emphasized the importance of expediting the expansion of broadband coverage by significantly revising its rules and regulations governing the pole attachment "make-ready" process, including the establishment of an OTMR process. The OTMR process considerably shortens the multi-step method for processing pole attachments that the FCC had previously adopted in 2011.

Nevertheless, the FCC appropriately inserted safeguards into its rules specifically to address electric utilities' concerns about safety and equipment integrity for self-help work performed in the electric space. According to the FCC, "[w]e recognize the valid concerns of utilities regarding the importance of safety and equipment integrity, particularly in the electric space, and we take several steps to address these important issues."¹² The FCC set appropriate guidelines, including a 90-day period (135 for larger requests) for the electric utility to complete

Declaratory Ruling, WC Docket No. 17-84 and WT Docket No. 17-79, released August 3, 2018.
<https://docs.fcc.gov/public/attachments/FCC-18-111A1.pdf> ("2018 Wireline Infrastructure Order").

¹¹ For a more detailed discussion of the FCC's rationale in this regard, a summary of the FCC's 2018 Wireline Infrastructure Order as published in the Federal Register on September 14, 2018 is attached hereto as Exhibit A.

¹² 2018 Wireline Infrastructure Order at ¶ 99.

work before the “self-help” remedy is triggered, and other safeguards relating to contractor qualifications and the like that specifically address utilities’ safety and reliability concerns.¹³

In addition, the FCC noted that “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,” and further that “utilities may prevent self-help from being invoked by completing make-ready on time.”¹⁴

Similarly, the WVPCs object to the FCC’s findings that utilities cannot require prior approval for “overlapping.” However, the FCC correctly pointed out that it was only “codify[ing] our longstanding policy that utilities may not require an attacher to obtain its approval for overlapping,” and its holdings were already “[c]onsistent with [FCC] precedent.”¹⁵ To address the WVPCs’ concerns, however, the FCC added a new requirement that “allows utilities to establish reasonable advance notice requirements.”¹⁶ The FCC also considered and rejected the electric utilities’ arguments for utility pre-approval, finding that “[p]re-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 overlap being completed or after completion.”¹⁷

¹³ Id.

¹⁴ Id.

¹⁵ 2018 Wireline Infrastructure Order at ¶ 115.

¹⁶ Id.

¹⁷ Id. at ¶ 117.

In seeking the Commission's reconsideration of various overlashing issues in the context of the instant proceeding, the WVPCs conveniently fail to mention the significant benefits of the FCC's current rules on overlashing. Specifically, in its 2018 Wireline Infrastructure Order, the FCC found that "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," and that by adding the reasonable advance notice safeguard, "we seek to promote faster, less expensive broadband deployment while addressing important safety concerns relating to overlashing."¹⁶ In short, the FCC has already reasonably considered and appropriately addressed the WVPC's concerns on overlashing. Truth be told, the WVPCs have raised no concern so unique to West Virginia that it requires a radical departure from the FCC's prior findings and regulations relative to overlashing.

The WVPCs also noted that some of the rule changes accompanying the FCC's 2018 Wireline Infrastructure Order are currently on appeal or subject to petitions for reconsideration, implying that the Commission should not adopt these rules until they are settled and all appeals exhausted. The Commission should likewise reject these arguments and maintain its adoption of the FCC rules as presently effective -- despite the fact that legal appeals may be pending. As the Commission is not doubt aware, federal court proceedings can often take years to complete, and a very high burden would need to be met for a federal court of competent jurisdiction to stay rules pending an appeal. Accordingly, any FCC rules still at the center of such legal challenges will likely remain effective until these legal challenges play out.

Conversely, if the Commission ultimately adopts the FCC's rules subject to legal challenge at a later point in time, the potentially lengthy time lag that would have transpired could well set

¹⁶ 2018 Wireline Infrastructure Order at ¶ 117.

back broadband investment and deployment in West Virginia to a point at which it may never fully recover. Simply put, West Virginia cannot afford to lose time at this crucial juncture in the deployment of next generation broadband facilities by needlessly deviating from the current FCC regulations based merely upon partisan speculation that the legal challenges to these regulations might one day be successful.

Furthermore, if any changes to the existing FCC rules result from a successful legal appeal, the automatic adoption recommendation Segra has proffered in its initial comments will ensure that those changes become effective in West Virginia at the same time that they take effect at the federal level. The Commission should thus adopt the current FCC pole attachment rules in their entirety as part of the current rulemaking proceeding -- excepting only those portions either not procedurally applicable to the Commission, unnecessary, or clearly at odds with the Commission's statutory requirements. Any future changes to the Commission's Pole Attachment Rules, whether effectuated via subsequent action taken by either the FCC or a federal court, should be automatically adopted and immediately implemented by the Commission.

With regard to consideration of the Commission's proposed pole attachment complaint processing rules, however, the WVPC's are correct in recommending that the Commission not adopt proposed rules §150-38-15 through §150-38-29, which purport to incorporate the FCC's formal complaint rules. As previously stated by the Staff and noted by the Commission in its Commission Order of October 11, 2019, "adoption of a separate set of procedural rules would be inconsistent with West Virginia Code § 24-1-7, which provides that the Commission Procedural Rules are applicable to all matters coming before it." The Staff's analysis in this regard is right on the mark.

Indeed, as the WVPCs correctly pointed out, the Commissions' existing rules of practice and procedure already provide more than adequate procedures for the handling of complaint proceedings, and there is no reason why they cannot be applied to pole attachment complaint proceedings.¹⁹ As the WVPC further pointed out, the Commission already has detailed rules regarding the filing of complaints, answers, and discovery requests that render proposed Sections §150-38-16, §150-38-18, and §150-38-22, which are based on the FCC's rules, at best, wholly unnecessary, and at worst, in direct conflict with preexisting practice and procedure rules.²⁰

In its initial comments, Segra provided other examples of procedural requirements contained within the FCC's rules that are unnecessary and arguably in conflict with the Commission's existing rules of practice and procedure. These include the proposed requirement in §150-38-15.15 prohibiting the filing of amendments or supplements to complaints in order to add new claims or requests for relief; the proposed requirement in §150-38-16.7 mandating the conduct and conclusion of executive-level discussions between parties prior to the actual filing of a complaint; the entirety of §150-38-17 et seq. requiring the consideration of claims for the recovery of damages; and §150-38-18.1 allowing any defendant to a pole attachment complaint proceeding thirty (30) calendar days for the filing of its answer following service of the complaint.²¹

The Commission's goal in this proceeding should be, among other things, to provide a convenient forum for the efficient and expedient resolution of pole attachment complaints. In this regard, the Commission's current rules of practice and procedure are more than adequate to accomplish that goal. Segra thus agrees with the WVPCs that it would reduce confusion among

¹⁹ WVPC Initial Comments at p. 40.

²⁰ Id.

²¹ Segra's Initial Comments at p. 6.

participants to use one set of procedural rules rather than two different sets. Accordingly, the Commission should decline to adopt the FCC's formal complaint rules as proposed in §150-38-15 through §150-38-29.

Conclusion

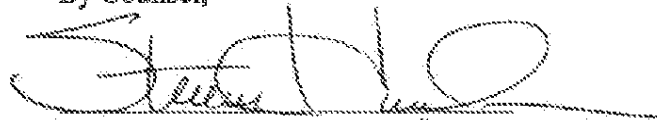
During its participation in this pole attachment rulemaking proceeding, Segra has consistently urged the Commission to maintain uniformity to the extent reasonably practicable by adopting the FCC existing pole attachment rules -- excepting those portions of said rules either not procedurally applicable to the Commission, unnecessary, or clearly at odds with the Commission's statutory requirements -- together with the automatic adoption of future changes once approved by the FCC. Segra firmly believes that proceeding in this manner will create a consistent, predictable, and stable regulatory environment in West Virginia that will in turn be conducive for future broadband investment and innovation.

WHEREFORE, for all of the foregoing reasons, Lumos Networks LLC dba Segra and Lumos Networks of West Virginia Inc. dba Segra respectfully request that the Commission adopt and modify the proposed Rules for the Government of Pole Attachments consistent with these reply comments.

Respectfully submitted this 14th day of November, 2019.

Lumos Networks LLC dba Segra and
Lumos Networks of West Virginia Inc. dba Segra

By Counsel,



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EXHIBIT A

Summary of the FCC's 2018 Wireline Infrastructure Order as published in the Federal Register
on September 14, 2018

**FEDERAL COMMUNICATIONS
COMMISSION**

47 CFR Part 1

[WC Docket No. 17-84, WT Docket No. 17-79, FCC 18-111]

**Accelerating Wireline and Wireless
Broadband Deployment by Removing
Barriers to Infrastructure Investment**

AGENCY: Federal Communications
Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) adopts a new framework for the vast majority of pole attachments governed by federal law by instituting a "one-touch make-ready" regime, in which a new attacher may elect to perform all simple work to prepare a pole for new wireline attachments in the communications space. This new framework includes safeguards to promote coordination among parties and ensures that new attachers perform the work safely and reliably. The Commission retains the current multi-party pole attachment process for attachments that are complex or above the communications space of a pole, but makes significant modifications to speed deployment, promote accurate billing, expand the use of self-help for new attachers when attachment deadlines are missed, and reduce the likelihood of coordination failures that lead to unwarranted delays. The Commission also improves its pole attachment rules by codifying and redefining Commission precedent that requires utilities to allow attachers to "overlash" existing wires, thus maximizing the usable space on the pole; eliminating outdated disparities between the pole attachment rates that incumbent carriers must pay compared to other similarly-situated cable and telecommunications attachers; and clarifying that the Commission will preempt, on an expedited case-by-case basis, state and local laws that inhibit the rebuilding or restoration of broadband infrastructure after a disaster.

DATES: Effective October 15, 2018, except for Sections III.A–E of the *Third Report and Order*, which will be effective on the later of February 3, 2019 or 30 days after the announcement in the *Federal Register* of OMB approval of information collection requirements modified in this *Third Report and Order*. OMB approval is necessary for the information collection requirements in 47 CFR 1.1411(c)(1) and (3), (d) introductory text, (d)(3), (e)(3), (h)(2) and (3), (i)(1) and (2), (j)(1) through (5),

1.1412(a) and (b), 1.1413(b), and 1.1415(b). The Commission will publish a document in the *Federal Register* announcing the effective date for the rules requiring OMB approval.

FOR FURTHER INFORMATION CONTACT:

Wireline Competition Bureau, Competition Policy Division, Michael Ray, at (202) 418-0357, michael.ray@fcc.gov. For additional information concerning the Paperwork Reduction Act information collection requirements contained in this document, send an email to PRA@fcc.gov or contact Nicole Ongele at (202) 418-2991.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Third Report and Order* in WC Docket No. 17-84, WT Docket No. 17-79, FCC 18-111, adopted August 2, 2018 and released August 3, 2018. The full text of this document is available for public inspection during regular business hours in the FCC Reference Information Center, Portals II, 445 12th Street SW, Room CY-A257, Washington, DC 20554. It is available on the Commission's website at <https://docs.fcc.gov/public/attachments/FCC-18-111A1.pdf>.

Synopsis

I. Introduction

1. 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." 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), 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. 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.

2. We also adopt other improvements to our pole attachment rules. To provide certainty to all parties and reduce the costs of deciphering our old decisions, we codify and refine our existing precedent that requires utilities to allow "overlapping," which helps maximize the usable space on the pole. We clarify that new attachers are not responsible for the costs of repairing preexisting violations of safety or 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.

3. Finally, in this *Third 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.

II. Background

4. Section 224 of the Communications Act of 1934, as amended (Act), grants us broad authority to regulate attachments to utility-owned and -controlled poles, ducts, conduits, and rights-of-way. The Act authorizes us to prescribe rules to: Ensure that the rates, terms, and conditions of pole attachments are just and reasonable; require utilities to provide nondiscriminatory access to their poles, ducts, conduits, and rights-of-way to telecommunications carriers and cable television systems (collectively, attachers); provide procedures for resolving pole attachment complaints; govern pole attachment rates for attachers; and allocate make-ready costs among attachers and utilities. The Act exempts from our jurisdiction those pole attachments in states that have elected to regulate pole attachments themselves. Pole attachments in thirty states are currently governed by our rules.

5. Our rules take into account the many purposes of utility poles and how an individual pole is divided into various "spaces" for specific uses. Utility poles often accommodate equipment used to provide a variety of services, including electric power, telephone, cable, wireline broadband, and wireless. Accommodating a variety of services on the same pole benefits the public by minimizing unnecessary and costly duplication of plant for all pole

users. Different vertical portions of the pole serve different functions. 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 and other small wireless facilities to the portion of the pole near the ground. Above that, the lower usable space on a pole—the “communications space”—houses low-voltage communications equipment, including fiber, coaxial cable, and copper wiring. The topmost portion of the pole, the “electric space,” houses high-voltage electrical equipment. Work in the electric space generally is considered more dangerous than work in the communications space. 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.

6. 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. 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. Our current rules, adopted in 2011, prescribe a multi-stage process for placing new attachments on utility poles:

- *Application Review and Survey.* The new attacher applies to the utility for pole access. Once the application is complete, the utility has 45 days in which to make a decision on the application and complete any surveys to determine whether and where attachment is feasible and what make-ready is required. The utility may take an additional 15 days for large orders. Our current rules allow new attachers in the communications space to perform surveys when the utility does not meet its deadline.

- *Estimate.* The utility must provide an estimate of all make-ready charges within 14 days of receiving the results of the survey.

- *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.

- *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 as defined in 47 CFR 1.1411(g)). A utility may take 15 additional days after the make-ready period ends to complete make-ready itself. 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.

7. A number of commenters allege that pole attachment delays and the high costs of attaching to poles have deterred them from deploying broadband. 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.

8. 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. 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.

9. 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, and one of our top priorities is assisting in the rebuilding of network infrastructure in the wake of such events. We have also made clear our commitment to ensuring that our own federal regulations do not impede restoration efforts.

III. Third Report and Order

10. 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. Our rules provide processes that apply in the absence of a negotiated agreement, but we recognize that they cannot account for every distinct situation and encourage parties to seek superior solutions for themselves through voluntary privately-negotiated solutions. In addition, we recognize that some states will seek to

build on the rules that we adopt herein in order to serve the particular needs of their communities. As such, nothing here should be construed as altering the ability of a state to exercise reverse preemption of our pole attachment rules.

A. Speeding Access to Poles

11. Most fundamentally, we amend our rules to allow new attachers (defined as a cable television system or telecommunications carrier requesting to attach new or upgraded facilities to a pole owned or controlled by a utility) 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.

12. 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.

1. New OTMR-Based Pole Attachment Process

13. 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

14. 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. 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. 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. There is substantial support in the record, both from utilities and attachers, for allowing OTMR for simple make-ready; and because this option will apply to the substantial majority of pole attachment projects, 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.

15. Our new rules define "complex" make-ready, as the BDAC does, as transfers and work within the communications space that would be reasonably likely to cause a service outage or facility damage, including work such as splicing of any communication attachment or relocation of existing wireless attachments. We consider any and all wireless activities, including those involving mobile, fixed, and point-to-point wireless communications and wireless internet service providers to be complex. We agree with Verizon that the term "wireless activities" does not include a wireless attacher's work on its wireline backhaul facilities, which is not different than wireline work done by other attachers. 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, and thus we conclude that they should fall into the complex category of work.

16. There is substantial support from commenters in the record for not using OTMR for complex make-ready work at this time. We agree that we should exclude these more challenging attachments from OTMR at this time to minimize the likelihood and impact of service disruption. In particular, cutting or splicing of existing wires on a pole has the heightened potential to result in a network outage. 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.

17. The new OTMR process also will not be available for work above the communications space, including the electric space. 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. 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. 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. 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. At the same time, we adopt rules aimed at mitigating the safety and reliability concerns about the OTMR process we adopt today, and we are optimistic that once parties have more experience with OTMR, either they will by contract or we will by rule expand the reach of OTMR. In the meantime, we find that the benefits of moving incrementally by providing a right to elect OTMR only in the communications space and only for simple wireline projects outweigh the costs.

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

19. OTMR speeds broadband deployment by better aligning incentives than the current multi-party process. It puts the parties most interested in efficient broadband deployment—new attachers—in a position to control the survey and make-ready processes. The misaligned incentives in the current process often result in delay by current incumbents and utilities and high costs for new attachers as a result of the coordination of sequential make-ready work performed by different parties. 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. Because existing attachers lack an incentive to accommodate new attachers quickly, these delays in sequential attachment are all too common. OTMR eliminates this problem.

20. We also agree with commenters that OTMR will benefit municipalities and their residents by reducing closures and disruptions of streets and sidewalks. 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.

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

22. 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. 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. We also adopt several safeguards herein that incentivize the new attacher and its contractor to perform work correctly.

23. 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; ensure the reliability and security of the electric grid; and maintain the safety and reliability of existing attachers' facilities in order to prevent service outages. 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. 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. This requirement addresses existing attachers' apprehension about unfamiliar contractors working on their facilities and also guards against delays that result when utilities fail to maintain approved contractor lists. Second, we require new attachers to provide advance notice and allow representatives of existing attachers and the utility a reasonable opportunity to be present when surveys and OTMR work are performed in order to encourage new attachers to perform quality work and to provide the utility and existing attachers an opportunity for oversight to protect safety and prevent equipment damage. 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. However, 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.

24. 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. 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.

25. We disagree with NCTA's contention that these safeguards do not adequately protect existing attachers from substandard work performed on their equipment by third-party contractors. 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, 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.

26. 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. Conversely, if new attachers fail to prevent physical harm or outages, we will not hesitate to revisit whether to maintain an OTMR option.

27. 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. Therefore, we permit new attachers to elect our existing pole attachment regime (as modified herein) rather than the new OTMR process.

28. *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) of the Act. Section 224(h) 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." We agree with Verizon that there is no statutory right under Section 224(h) for an existing attacher to add to or modify its existing attachment when a new attacher is performing the make-ready. On its face Section 224(h) only applies to situations where the pole owner modifies or alters the pole, and thus is not implicated under the OTMR approach we adopt today: Under our approach new attachers, not pole owners, perform OTMR work.

29. We also find that OTMR does not constitute a government taking of existing attachers' property that requires just compensation under the Fifth Amendment to the U.S. Constitution, and we reject arguments to the contrary. As an initial matter, OTMR is not a "permanent physical occupation" of an existing attacher's property; at most it gives contractors of the new attacher a temporary right to move and rearrange attachments. 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.* 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." 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, 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. To the extent that movement affects existing attachers' or utilities' property, such impact is incidental and not our purpose, which is to promote broadband deployment and further the public interest.

b. Contractor Selection Under the OTMR Process

30. 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, then we adopt rules that require OTMR attachers to use a contractor that meets key safety and reliability criteria, as recommended by the BDAC. 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. At the same time, existing attachers are understandably apprehensive about having unfamiliar contractors work on and potentially damage their facilities. The process we adopt addresses both of these problems by preventing delays in the engagement of contractors and by establishing clear minimum qualifications.

31. *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. 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. 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. Therefore, we give the utilities the option of maintaining a list of approved contractors for OTMR work but do not impose a mandate.

32. 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.

33. 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; 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. 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. 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.

34. *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. 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. The new attacher must certify to the utility (either in the three-business-day advance notice for surveys or in the 15-day make-ready notice) that the named contractor meets the same five minimum requirements for safety and reliability discussed above.

35. 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). Ideally, such requirements for contractors would also be found in the pole attachment agreement between the utility and the new attacher. This condition will guard against pole damage and resulting outages and safety hazards due to particular local conditions, while ensuring that utilities do not use these additional requirements as a roadblock to deployment. 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.

36. Where there is no utility-approved list of contractors, we adopt rules, consistent with the BDAC's recommendation, allowing the utility to veto any contractor chosen by the new attacher. 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. We agree with ACA that we should prevent unwarranted vetoes by requiring the utility to have a "reasonable" basis for vetoing the new attachers' contractor. 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. In reaching this determination, we agree with the Coalition of Concerned Utilities that the safety and reliability of the pole is extremely important and, as a result, utilities should be able to disqualify contractors that raise concrete workmanship dangers. 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. When vetoing an attacher's chosen contractor, however, the utility must identify at least one qualified contractor available to do the work.

37. *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. 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. 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. 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. As several commenters point out, in many markets, contractors approved by the utilities may already be the same as those approved by existing attachers. 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.

c. OTMR Pole Attachment Timeline

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

(i) Conducting a Survey

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

40. 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. Despite claims to the contrary, 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. 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. 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. 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. In the case of reasonable scheduling conflicts, however, we encourage the parties to work together to find a mutually-agreeable time for the survey. We also encourage all attachers to provide a point of contact publicly (e.g., on their websites) so that new attachers know whom to contact when providing notices required under the OTMR regime.

41. 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.

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

42. 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. 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. 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. Some commenters oppose letting the new attacher's contractor make the simple

versus complex determination. However, we agree with those commenters that argue that the new attachers' 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. 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. 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."

43. 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). We decline suggestions that we extend the objection right to existing attachers because we 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. 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.

44. 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, so the utility will have ample opportunity to have the information it needs to determine whether to object before the deadline.

45. 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. 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.

46. 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. 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.

47. 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 contractor from performing the make-ready work in a 'simple' manner, if at all." 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 (although the new attacher may choose to continue OTMR work on other poles to the extent that such work is simple). 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.

(iii) Review of Application for Completeness

48. 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. 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 timeline—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.

49. While the current definition of a complete application only requires "information necessary under [the utility's] procedures," 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.

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

- 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.

• The new attachers 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.

51. 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. 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 "doomed 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. 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

52. For OTMR attachments, we shorten the time period within which a utility must decide whether to grant a complete application from 45 days to 15

days for standard requests and from 60 days to 30 days for larger requests as defined under 47 CFR 1.1411(g). 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. 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. 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 relates to a denial of access for reasons of safety, reliability, lack of capacity, or engineering standards.

(v) Make-Ready

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

54. Although the BDAC recommendation provides for 25 days prior written notice for OTMR, 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. 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, which is not much time savings for an OTMR process that we adopt for simple work that is unlikely to cause safety issues. We also disagree with NCTA's request for a longer notice period for larger projects; 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.

55. 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. 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. 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. 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. In addition, providing the name of the new attacher's OTMR contractor allows existing attachers to notify the utility and the utility to object if the contractor is not properly qualified.

56. 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. 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, 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.

57. 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. 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. 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. 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. 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.

(vi) Post Make-Ready

58. 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. 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. 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. 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. 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.

59. 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. 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. We provide the utility or existing attacher options regarding repair to maximize their flexibility in addressing issues for which they are not at fault. The safeguards we establish in the OTMR process collectively give the new attacher the incentive to ensure its contractor performs work correctly; we therefore expect the invocation of this remediation procedure to be infrequent.

60. 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." 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

61. 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. To the extent that process proves insufficient, injured parties may seek judicial relief based on State law claims.

62. We find, consistent with the BDAC's recommendation, that federally-imposed indemnification is not necessary. The record indicates that the existing legal regime, including contract and tort law, provides sufficient protection for existing attachers without broad federal regulatory intrusion. The repair process we adopt in our OTMR rules adds an additional layer of protection. With these other remedies already available, we disagree with NCTA that a Commission-mandated indemnification requirement is the "only practical mechanism by which an existing attacher can hold a new attacher or its contractor accountable for the consequences of performing shoddy work" in situations where there is no privity of contract between the parties or a statutory requirement to hold harmless existing attachers. Rather, we find that adding a federal layer of indemnification would not be efficient or assist in speeding broadband deployment. Further, we agree with Google Fiber that indemnification obligations are typically not one-size-fits-all provisions, such that it would be difficult to craft a regulatory solution that is workable in all situations.

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

63. 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.

64. 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. 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

65. 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. 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. While the current definition of a complete application only requires information necessary under the utility's procedures, 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. 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. We also 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.

(ii) Review of Whether To Grant Complete Application and Survey

66. We decline to shorten the 45-day period in our existing rules during which the utility must review a complete pole attachment application and survey the affected poles for non-OTMR projects. In so doing, we reject proposals by some attachers that we shorten the application review and survey stage 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. 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. Failure by the utility to 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. 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 47 CFR 1.1411(i)(1).

67. 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. 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. 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. 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. However, in the case of reasonable scheduling conflicts, we encourage the parties to work together to find a mutually-agreeable time for the survey. 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. 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.

68. 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 selecting 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. To the extent such work is complex, it will be governed by our existing pole attachment timeline where the utility performs the survey and must give advance notice of the survey to affected attachers. 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.

(iii) Make-Ready Stage

69. 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, 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.

70. *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. 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. 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. The make-ready timelines we adopt for work in the communication space should be sufficient for both simple and complex work.

71. While the BDAC recommended that we impose a 30-day deadline for complex make-ready work in the communications space, 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.

72. 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). In establishing the existing deadlines for make-ready above the communications space, which are 30 days longer than the existing deadlines for make-ready work in the communications space, the Commission pointed to the safety risks associated with working on attachments in, near, or above the electric space and the recognized lack of real-world experience at the time with pole-top attachments. We recognize that both utilities and attachers have more experience with these types of attachments than when the Commission adopted these deadlines in 2011, but the same safety risks identified by the Commission in 2011 are still relevant today, 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), 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.

73. 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. 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. 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. 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.

74. 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. 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 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. If no utility-approved contractor is available, then the new attacher must follow the procedures outlined *infra* for choosing an appropriate contractor. 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.

75. We further accelerate communications space attachments by eliminating the optional 15-day extension period for the utility to complete the make-ready work. 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. However, with respect to work above the communications space, we retain the optional 15-day extension period for utility make-ready. 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. 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.

76. *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. We adopt this additional notice requirement to empower the new attacher to promote the timely completion of make-ready. At the same time, we expect existing attachers to respond in a timely manner to requests from the new attacher for information, including estimated completion dates and work status updates, and to cooperate with the new attacher and other existing attachers to complete make-ready prior to the date set in the notice.

b. Enhancing the Self-Help Remedy

77. 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, and new attachers' frustration with delays caused by missed deadlines for make-ready work, the record shows that, at present, new attachers rarely invoke the existing self-help remedy in the communications space. 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.

78. *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." 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 small cells, when utilities and existing attachers have not met make-ready work deadlines. Accenture estimates that wireless providers will invest \$275 billion dollars over the next decade to deploy 5G, which is expected to create three million new jobs across the country and boost the U.S. gross domestic product by half a trillion dollars. 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. 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.

79. 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. We agree with commenters that argue that complaints are an important but insufficient tool for encouraging compliance with our deadlines and speeding broadband deployment. 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. 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.

80. We recognize the valid concerns of utilities regarding the importance of safety and equipment integrity, particularly in the electric space, and we take several steps to address these important issues. As an initial matter, in response to concerns expressed by utilities, 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. 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, 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. Our rules also contain additional pre-existing protections for utilities that empower them to promote safety and reliability. 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.

81. *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. The record shows that pole replacements can be complicated to execute and are more likely to cause service outages or facilities damage. Given the particularly disruptive nature of this type of work, we make clear that pole replacements are not eligible for self-help.

82. *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, 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. 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 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.

83. Just as in the OTMR context, the advance notice must include the date and time of the work, the nature of the work, and the name of the contractor being used by the new attacher. 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. As in the OTMR context, we also require the new attacher 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. 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 require the new attacher to fix the damage at its expense immediately following notice from the utility or existing attacher. Upon notice from the existing attacher or the utility to fix damages 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, 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. 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. 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.

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

c. Contractor Selection for Self-Help

85. 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. 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.

86. For complex work and work above the communications space, we take a different approach and require new

attachers to select a contractor from the utility's list. We also require utilities to make available and keep an up-to-date a reasonably sufficient list of contractors it authorizes to perform complex and non-communications space self-help surveys and make-ready work. We thus maintain our existing contractor selection requirements as to complex self-help in the communications space and extend those requirements to self-help above the communications space.

87. We treat the utility list as mandatory for complex and above the communications space work for several reasons. These types of make-ready involve greater risks than simple make-ready, and we agree with numerous commenters that utility selection of eligible contractors promotes safe and reliable work in more challenging circumstances. Although the current selection process sometimes entails delays where utilities fail to provide a list of approved contractors, 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. We recognize that self-help above the communications space is novel and poses particularly heightened safety and reliability risks. We therefore find it especially important to give the utility control over who performs such work. 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.

88. 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. To alleviate this problem for complex and above the communications space work, we set forth in our rules—as we do in the context of OTMR and simple self-help—that new and existing attachers may request that qualified contractors be added to the utility's list and that the utility may not unreasonably withhold its consent for such additions. As in the context of OTMR and simple self-help, to be reasonable, a utility's decision to withhold consent must be prompt, set forth in writing that describes the basis for rejection, nondiscriminatory, and

based on fair application of commercially reasonable requirements for contractors relating to issues of safety or reliability.

d. Detailed Make-Ready Costs

89. 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. We require estimates of all make-ready charges to be detailed and include documentation that is sufficient to determine the basis for all charges, as well as similarly detailed post-make-ready invoices.

90. The record reflects frustration over the lack of transparency of current estimates of make-ready work charges. ACA, Lumus, 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. They, along with other commenters, argue that, in many cases, utilities currently do not provide detailed estimates or detailed final invoices. 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. Numerous commenters describe experiencing "bill shock," where a utility's make-ready invoices far exceed the utility's initial estimates, and add that the lack of transparency of make-ready costs inhibits their ability to plan network expansions. 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.

91. 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. Although some utilities claim they are poorly positioned to provide estimates for make-ready work other than their own, 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. 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; therefore, we clarify that utilities may comply with this

requirement by compiling estimates from third-parties for submission to the new attacher. 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. We do not require utilities to compile and submit final invoices of make-ready work performed by third-party existing attachers. To the extent that the utility is an existing attacher, it is still responsible, where applicable, for providing a final invoice. 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.

92. 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. While we recognize that requiring utilities to provide costs on a per-pole basis may be more burdensome than providing a less granular estimate, 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. 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. 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), and therefore the rules we adopt today allow for such fixed costs to 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.

93. 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. While we understand that this requirement places a burden on utilities, 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." 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.

3. Treatment of Overlapping

94. We codify our longstanding policy that utilities may not require an attacher to obtain its approval for overlapping. Consistent with Commission precedent, the utility also may not require pre-approval for third party overlapping of an existing attachment, when such overlapping is conducted with the permission of an existing attacher. In addition, we adopt a rule that allows utilities to establish reasonable advance notice requirements. As the Commission has previously found, the ability to overlap often marks the difference between being able to serve a customer's broadband needs within weeks versus six or more months when delivery of service is dependent on a new attachment. In codifying the existing overlapping precedent while adopting a pre-notification option, we seek to promote faster, less expensive broadband deployment while addressing important safety concerns relating to overlapping. We find that our codification will hasten deployment by resolving disagreements over whether utilities may impose procedural requirements on overlapping by existing attachers.

95. While we make clear that pre-approval for overlapping is not permissible, we adopt a rule that utilities may, but are not required to, establish reasonable pre-notification requirements including a requirement that attachers provide 15 days (or fewer) advance notice of overlapping work. 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, overlapping even one additional cable on a pole may cause an overloading. Such pole overloading could hamper the installation or maintenance of electric facilities, or other on-going wireline or wireless facility installations. We find these concerns to be valid and supported by the record. 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. 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, 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. Consistent with our approach to OTMR and self-help, 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. 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. A utility may not deny access to overlash due to a pre-existing violation on the pole. 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.

96. We find that an approach to overlashing that allows for pre-notification without requiring pre-approval is superior to more extreme solutions advocated by some commenters. We are unpersuaded, for example, by arguments that utility pre-approval for overlashing is necessary to ensure safety. Pre-approval is not currently required, and the record does not demonstrate that significant safety or reliability issues have arisen from the application of the current policy. Rather, the record reflects that an advance notice requirement has been sufficient to address safety and reliability concerns, as it provides utilities with the opportunity to conduct any engineering studies or inspections either prior to the overlash being completed or after completion. For instance, after an Edison Electric Institute member received advance notice of overlashing on 5,188 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." Similarly, in 2016, Oncor Electric Delivery in Texas received advance notice of overlashing and discovered 13.8% of the poles had existing

clearance violations between existing attachments and power facilities. Further requiring that attachers receive prior approval for overlashing would unnecessarily increase costs for attachers and delay deployment.

97. 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. 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. Finally, just as new attachers electing OTMR are responsible for any corrective measures needed because of their work, 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. Poorly performed overlashing can create safety and reliability risks, and the Commission has consistently found that overlashers must ensure that they are complying with reasonable safety, reliability, and engineering practices. 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.

98. 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. 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

99. 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. This includes situations where a pole has been "red tagged"—that is, found to be non-compliant with safety standards and placed on a replacement schedule—so new attachers are not responsible for the cost of pole replacement. Although utilities have sometimes held new attachers responsible for the costs of correcting preexisting violations, this practice is inconsistent with our long-standing principle that a new attacher is responsible only for actual costs incurred to accommodate its attachment. 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. This is true whether the make-ready work that corrects these preexisting violations is simple or complex. Also, 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.

100. 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 Lightower alleges sometimes occurs. Simply denying new attachers access prevents broadband deployment and does nothing to correct the safety issue. We also clarify that a utility cannot delay completion of make-ready while the utility attempts to identify or collect from the party who should pay for correction of the preexisting violation.

C. Addressing Outdated Rate Disparities

101. 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. Incumbent LECs allege, however, that electric utilities continue to charge pole attachment rates significantly higher than the rates charged to similarly situated telecommunications attachers, and that these higher rates inhibit broadband deployment. To address this problem, we revise our rules to 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). 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.

102. 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. 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. 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. 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, 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.

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

104. 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). 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. 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 § 1.1306(s)(2) of the Commission's rules. 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. 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.

105. We extend this rebuttable presumption to newly-negotiated and newly-renewed joint use agreements. A new or newly-renewed pole attachment agreement is one entered into, renewed, or in evergreen status after the effective date of this *Third Report and 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 Pole Attachment Order* and before the effective date of the *Third Report and Order* we release today. This includes circumstances where an agreement has been terminated and the parties continue to operate under an "evergreen" clause.

106. 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. We recognize that this divergence from past practice will impact privately-negotiated agreements and so the presumption will only apply, as it relates to existing contracts, upon renewal of those agreements. 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. 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. To the extent incumbent LECs receive net benefits distinct from those given to other telecommunications attachers, a utility may rebut the presumption.

107. Utilities can rebut the presumption we adopt today in a complaint proceeding by demonstrating that the incumbent LEC receives net benefits that materially advantage the incumbent LEC over other telecommunications attachers. Such material benefits may include paying

significantly lower make-ready costs; no advance approval to make attachments; no post-attachment inspection costs; rights-of-way often obtained by electric company; guaranteed space on the pole; preferential location on pole; no relocation and rearrangement costs; and numerous additional rights such as approving and denying pole access, collecting attachment rents and input on where new poles are placed. If the utility can demonstrate that the incumbent LEC receives significant material benefits beyond basic pole attachment or other rights given to another telecommunications attachers, then we leave it to the parties to negotiate the appropriate rate or tradeoffs to account for such additional benefits.

108. 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. 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. 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, we make this rate a hard cap. In so doing, we remove the potential for uncertainty caused by considering the rate merely as a "reference point."

D. Legal Authority

109. 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. We

find that the actions we take today to speed broadband deployment further these statutory goals. While we rely solely on Section 224 for legal authority, our prioritization of broadband deployment throughout today's *Third 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." 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.

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

110. Several parties have requested that the Commission provide a transition period in which to implement its revised rules governing pole attachments. As AT&T notes, this *Third 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." 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. 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 *Third Report and Order* (i.e., Sections III.A–E) and the rule amendments adopted therein shall become effective on the later 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. 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 *Third Report and Order*. The remainder of this *Third Report and Order* will be effective 30 days after publication in the *Federal Register*.

F. Rebuilding and Repairing Broadband Infrastructure After Disasters

111. We will not allow state and local laws to stand in the way of post-disaster restoration of essential communications networks. In the *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. We find that Sections 253 and 332(c)(7) of the Act 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. 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. We also 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. As the Commission has previously recognized, certain federal regulations may impede restoration efforts, and we are working to address those too—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.

112. 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.

113. 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. 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, 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. As the Public Safety and Homeland Security Bureau is responsible for coordinating the Commission's disaster response and recovery activities 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. Final Regulatory Flexibility Analysis

114. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated into the April 2017 Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment (*Wireline Infrastructure Notice*) and into the November 2017 Report and Order and Declaratory Ruling, and Further Notice of Proposed Rulemaking (*Wireline Infrastructure Order*) in this wireline infrastructure proceeding. The Commission sought written public comment on the proposals in the *Wireline Infrastructure Notice* and in the *Wireline Infrastructure Order*, including comment on the IRFAs. The Commission received no comments on the IRFAs. Because the Commission amends its rules in this *Third Report and Order*, the Commission has included this Final Regulatory Flexibility Analysis (FRFA). This present FRFA conforms to the RFA.

A. Need for, and Objectives of, the Rules

115. 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.

116. 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; (2) set a 180-day shot clock for resolution of pole access complaints; and (3) grant incumbent local exchange carriers (LECs) reciprocal access to infrastructure controlled by other LECs. In the *Further Notice of Proposed*

Rulemaking, the Commission sought comment on (1) the treatment of overloading by utilities; and (2) what actions the Commission can take to facilitate the rebuilding and repairing of broadband infrastructure after natural disasters.

117. Concurrently, the BDAC, a federal advisory committee chartered in 2017, formed five active working groups, as well as an ad hoc committee on rates and fees, to address the issues raised in the *Wireline Infrastructure Notice*. During five public meetings, the BDAC adopted recommendations related to competitive access to broadband infrastructure. These recommendations informed the Commission's policy decisions on pole attachment reform.

118. Pursuant to the objectives set forth in the *Wireline Infrastructure Notice*, this *Third 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; (2) adopt a substantially shortened timeline for such application review and make-ready work (OTMR pole attachment timeline); (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; (4) create a more efficient pole attachment timeline for complex and work above the communications space (and for new attachers that chose the non-OTMR timeline for simple work); (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; (6) requires 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; (7) require utilities to provide new attachers with detailed, itemized estimates and final invoices for all required make-ready work; (8) codify the Commission's existing precedent that prohibits a pre-approval requirement for overloading, and adopt a rule that allows utilities to establish reasonable advance notice requirements of up to 15 days for overloading and

holds overlashers responsible for ensuring that their practices and equipment do not cause safety or engineering issues; (9) establish a rebuttable presumption that, for newly-negotiated and newly-renewed 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; 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. The modifications to our pole attachment rules will facilitate deployment 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 IRFAs

119. The Commission did not receive comments addressing the rules and policies proposed in the IRFAs in either the *Wireline Infrastructure Notice* or the *Wireline Infrastructure Order*.

C. Response to Comments by the Chief Counsel for Advocacy of the SBA

120. 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

121. 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*. The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small-business concern" under the Small Business Act. 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.

122. The changes to our pole attachment rules affect obligations on utilities that own poles and telecommunications carriers and cable television systems that seek to attach equipment to utility poles.

123. *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. 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. These types of small businesses represent 99.9% of all businesses in the United States which translates to 29.6 million businesses.

124. Next, the type of small entity described as a "small organization" is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field." Nationwide, as of August 2018, there were approximately 356,494 small organizations based on registration and tax data filed by nonprofits with the Internal Revenue Service (IRS).

125. 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." U.S. Census Bureau data from the 2012 Census of Governments indicate that there were 90,055 local governmental jurisdictions consisting of general purpose governments and special purpose governments in the United States. Of this number there were 37,133 general purpose governments (county, municipal, and town or township) with populations of less than 50,000 and 12,184 special purpose governments (independent school districts and special districts) 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. Based on this data we estimate that at least 49,316 local government jurisdictions fall in the category of "small governmental jurisdictions."

126. *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." 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. Census data for 2012 show that there were 3,117 firms that operated that year. Of this total, 3,063 operated with fewer than 1,000 employees. Thus, under this size standard, the majority of firms in this industry can be considered small.

127. *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. Census data for 2012 show that there were 3,117 firms that operated that year. Of this total, 3,063 operated with fewer than 1,000 employees. The Commission therefore estimates that most providers of local exchange carrier service are small entities that may be affected by the rules adopted.

128. *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. According to Commission data, 3,117 firms operated in that year. Of this total, 3,063 operated with fewer than 1,000 employees. Consequently, the Commission estimates that most providers of incumbent local 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. Of this total, an estimated 1,006 have 1,500 or fewer employees.

129. *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, 3,063 operated with fewer than 1,000 employees. 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. 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. In addition, 72 carriers have reported that they are Other Local Service Providers. Of this total, 70 have 1,500 or fewer employees. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, Shared-Tenant Service Providers, and Other Local Service Providers are small entities that may be affected by the adopted rules.

130. *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. According to Commission data, 359 companies reported that their primary telecommunications service activity was the provision of interexchange services. Of this total, an estimated 317 have 1,500 or fewer employees and 42 have more than 1,500 employees. Consequently, the Commission estimates that the majority of interexchange service providers are

small entities that may be affected by the adopted rules.

131. *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 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. 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. 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. Of these, an estimated 279 have 1,500 or fewer employees. Consequently, the Commission estimates that most Other Toll Carriers that may be affected by our rules are small.

132. *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. 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. 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. Of this total, an estimated 261 have 1,500 or fewer employees. 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.

133. *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. Industry data indicate that there are currently 4,600 active cable systems in the United States. Of this total, all but nine cable operators nationwide are small under the 400,000-subscriber size standard. In addition, under the Commission's rate regulation rules, a "small system" is a cable system serving 15,000 or fewer subscribers. Current Commission records show 4,600 cable systems nationwide. 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. Thus, under this standard as well, we estimate that most cable systems are small entities.

134. *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. 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. Based on available data, we find that all but nine incumbent cable operators are small entities under this size standard. 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. 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.

135. *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." 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. For this category, Census Bureau data for 2012 show that there were 1,442 firms that operated for the entire year. Of those firms, a total of 1,400 had annual receipts less than \$25 million. Consequently, we conclude that the majority of All Other Telecommunications firms can be considered small.

136. *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." 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. According to Census Bureau data for 2012, there were 1,742 firms in this category that operated for the entire year.

137. *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." The SBA has developed a small business size standard for this industry, which is all such firms having 1,000 or fewer employees. According to Census Bureau data for 2012, there were 422 firms in this category that operated for the entire year. 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. Thus, the majority of firms in this category can be considered small.

138. *Water Supply and Irrigation Systems.* This economic census category "comprises establishments primarily engaged in operating water treatment plants and/or operating water supply systems. The water supply system may include pumping stations, aqueducts, and/or distribution mains. The water may be used for drinking, irrigation, or other uses." 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. According to Census Bureau data for 2012, there were 3,261 firms in this category that operated for the entire year. Of this total, 3,035 firms had annual sales of less than \$25 million. 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

139. *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.

140. 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 application, or within 30 days for larger requests.

141. 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 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.

142. 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 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). Any such objection by the 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.

143. 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.

144. 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 attachor of any damage or any code violations caused to their equipment by the new attachor'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 attachor can either complete any necessary remedial work and bill the new attachor for reasonable costs to fix the damage or violations, or require the new attachor to fix the damage at its expense within 14 days following notice from the utility or existing attachor.

145. 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 nondiscriminatory, 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 attachor 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 attachor'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.

146. The utility or new attachor 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 nondiscriminatory, in writing, and publicly available (*i.e.*, on the utility's website).

147. *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 attachor; 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 attachor's self-help remedy by making the remedy available for surveys and

make-ready work for all attachments anywhere on the pole to the extent that the utility or the existing attachers fail to meet the required deadlines; and revising the contractor selection process for a new attachor's self-help work.

148. 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.

149. The *Order* also requires a utility to permit the new attachor 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 attachor and each existing attachor, 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.

150. The *Order* amends the existing make-ready timelines 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 attachor 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 attachor 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 assure completion of make-ready work on a timely basis.

151. 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.

152. 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.

153. 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.

154. *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 overhanging party to fix the damage at its expense within 14 days following notice from the utility.

155. The *Order* provides that a utility may not prevent an attacher from overhanging because another attacher has not fixed a preexisting violation or require an existing attacher that overhangs 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 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 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

156. 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.

157. The *Order* also finds that adopting the DTMR 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.

158. 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 overhanging, and adopting a rule allowing utilities to require advance notice of overhanging will eliminate the industry uncertainty that currently exists regarding overhanging, 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

159. The Commission will send a copy of the *Order*, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act. In addition, the Commission will send a copy of the *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.

V. Procedural Matters

160. *Final Regulatory Flexibility Analysis.* As required by the Regulatory Flexibility Act of 1980 (RFA), the Commission has prepared a Final Regulatory Flexibility Analysis (FRFA) relating to this *Third Report and Order*.

The FRFA is contained in Section IV above.

161. *Paperwork Reduction Act.* The *Third 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 will be 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.

162. In this document, we have assessed the effects of reforming our pole attachment regulations and find that doing so will serve the public interest and is unlikely to directly affect businesses with fewer than 25 employees.

163. *Congressional Review Act.* The Commission will send a copy of the *Third 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).

VI. Ordering Clauses

164. 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.

165. It is further ordered that Part 1 of the Commission's rules is amended as set forth below.

166. It is further ordered that this *Third Report and Order* shall be effective 30 days after publication in the Federal Register, except for Sections III.A–E of this *Third Report and Order*, which will be effective on the latter of six months after release of this *Third 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 *Third Report and Order*. OMB approval is necessary for the information collection requirements in 47 CFR 1.1411(c)(1) and (3), (d) introductory text and (d)(3), (e)(3), (h)(2) and (3), (j)(1) and (2), (j)(1) through (5), 1.1412(a) and (b), 1.1413(b), and 1.1415(b).

167. It is further ordered that the Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, shall send a copy of this Third 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).

List of Subjects in 47 CFR Part 1

Administrative practice and procedure, Communications common carriers, Pole attachment complaint procedures, Reporting and recordkeeping requirements, Telecommunications.

Federal Communications Commission.
Marlene Bertch,
Secretary.

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 1 as follows:

PART 1—PRACTICE AND PROCEDURE

§ 1. The authority for part 1 is revised to read as follows:

Authority: 47 U.S.C. 151, 154(i) and (j), 155, 157, 160, 301, 224, 225, 237, 303, 309, 310, 332, 1493, 1494, 1451, 1452, and 1455.

§ 2. Amend § 1.1492 by adding paragraphs (e) through (r) to read as follows:

§ 1.1402 Definitions.

(c) The term *make-ready* means the modification or replacement of a utility pole, or of the lines or equipment on the utility pole, to accommodate additional facilities on the utility pole.

(p) The term *complex make-ready* means transfers and work within the communications space that would be reasonably likely to cause a service outage(s) or facility damage, including work such as splicing of any communication attachment or relocation of existing wireless attachments. Any and all wireless activities, including those involving mobile, fixed, and point-to-point wireless communications and wireless internet service providers, are to be considered complex.

(q) The term *simple make-ready* means make-ready where existing attachments in the communications space of a pole could be transferred without any reasonable expectation of a service outage or facility damage and does not require splicing of any existing communication attachment or relocation of an existing wireless attachment.

(r) The term *communications space* means the lower usable space on a utility pole, which typically is reserved for low-voltage communications equipment.

§ 3. Amend § 1.1403 by revising paragraphs (c) introductory text and (c)(3) 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 § 1.1411(a), routine maintenance, or modification in response to emergencies.
* * * * *

§ 4. Amend § 1.1411 by:

- § a. Revising paragraphs (a), (c), and (d) introductory text and (d)(2);
- § b. Adding paragraphs (d)(3) and (4);
- § c. Revising paragraphs (e)(1) and (2);
- § d. Adding paragraph (e)(3);
- § e. Revising paragraphs (f), (g)(1), (g)(4) and (5), (h), and (i); and
- § f. Adding paragraph (j).

The revisions and additions 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 attachor" 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 attachor" means any entity with equipment on a utility pole.

(c) *Application review and survey---*

(1) *Application completeness.* A utility shall review a new attachor's attachment application for completeness before reviewing the application on its merits. A new attachor'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 attachor's attachment application whether the application is complete and notify the attachor 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 attachor 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 attachor which reasons were not addressed and how the resubmitted application did not sufficiently address the reasons. The new attachor 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 attachor 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 attachor pole access based on a preexisting violation not caused by any prior attachments of the new attachor.

(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 attachor and any existing attachors 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 attachors 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 attachor has conducted a survey pursuant to

paragraph (j)(2) of this section, 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 paragraph (j)(3) of this section 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 paragraph (j)(3) of this section to satisfy all of its obligations under paragraph (c)(3)(i) of this section 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 paragraph (c) of this section, 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 incurs fixed costs that are not reasonably calculable on a pole-by-pole basis, the utility 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 estimate 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 estimated charges, including any projected material, labor, and other related costs that form the basis of its estimate.

(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 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 email 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)(1)(i) of this section.

(vi) State the name, telephone number, and email 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) of this section for communications space attachments or paragraph (e)(2)(ii) of this section 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) of this section at 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.

(b) *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

(B) Require the new attacher to fix the damage 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 60 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) *Pole replacements*. Self-help shall not be available for pole replacements.

(i) *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) through (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 attachers 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.

(ii) [Reserved].

(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

(B) Require the new attacher to fix the damage 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 paragraphs (d) through (j) of this section and the utility shall provide the notice required by paragraph (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.

■ 5. Amend § 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 paragraphs (c)(1) through (5) of this section 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 paragraphs (c)(1) through (5) of this section and the utility may not unreasonably withhold its consent.

(2) 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)(i), (i)(2)(i), (j)(3)(i), and (j)(4).

(2) 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)(i), (i)(2)(i), (j)(3)(i), and (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)(1) 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.

* * * * *

§ 6. Revise § 1.1413 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 § 1.1408(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.

§ 7. Add § 1.1415 to read as follows:

§ 1.1415 Overlashing.

(a) *Price approval.* A utility shall not require prior approval for:

(1) An existing attacher that overlashes its existing wires on a pole; or

(2) For third party overlashing 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 overlashing 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 overlashing. If a utility requires advance notice for overlashing, then the utility must provide existing attachers with advance written notice of the notice requirement or include the notice requirement in the attachment agreement with the existing attacher. If after receiving advance notice, the utility determines that an overlash would create a capacity, safety, reliability, or engineering issue, it must provide specific documentation of the issue to the party seeking to overlash

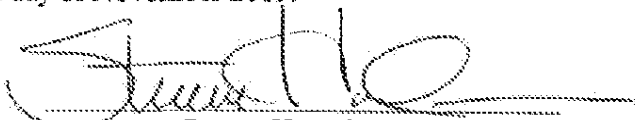
within the 15 day advance notice period and the party seeking to overlash must address any identified issues before continuing with the overlash either by modifying its proposal or by explaining why, in the party's view, a modification is unnecessary. A utility may not charge a fee to the party seeking to overlash for the utility's review of the proposed overlash.

(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.

CERTIFICATE OF SERVICE

I, Steven Hamula, counsel for Lumos Networks LLC dba Segra and Lumos Networks of West Virginia Inc. dba Segra do hereby certify that copies of the foregoing document have been served upon the following parties of record by First Class United States Mail, postage prepaid, on this 14th day of November 2019.



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