Copies of the New York regulations that are incorporated by reference are available from West Group, 610 Opperman Drive, Eagan, MN 55123, ATTENTION: D3–10 (Phone #: 1–800–328–9352).

Note: Both the Federal and State requirements for the NY State Public Utilities Project XL, which were authorized effective August 31, 2009 (74 FR 31380), will, unless extended, expire on May 24, 2011.

* * * * *

[FR Doc. 2010–18927 Filed 8–2–10; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 1

[WC Docket No. 07–245; GN Docket No. 09–51; FCC No. 10–84]

Implementation of Section 224 of the Act; a National Broadband Plan for Our Future

AGENCY: Federal Communications Commission.

ACTION: Declaratory ruling.

SUMMARY: In this Declaratory Ruling, the Commission clarifies that communications providers have a statutory right to use space- and cost-saving techniques that are consistent with pole owners' use of those techniques. The Commission also establishes that providers have a statutory right to timely access to poles.

DATES: Effective September 2, 2010.

FOR FURTHER INFORMATION CONTACT: Jonathan Reel, Wireline Competition Bureau, Competition Policy Division, 202–418–1580.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Declaratory Ruling in WC Docket No. 07–245, GN Docket No. 09–51, adopted May 20, 2010, and released May 20, 2010. This Declaratory Ruling rules on issues raised in Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments, Notice of Proposed Rulemaking 73 FR 6879, February 6, 2008.

Synopsis of the Declaratory Ruling

1. In this Order, the Commission takes steps to clarify the statute to lower the costs of telecommunications, cable, and broadband deployment and to promote competition, as recommended in the National Broadband Plan. The Commission clarifies that communications providers have a statutory right to use space- and cost-saving techniques that are consistent with pole owners' use of those techniques. The Commission also establishes that providers have a statutory right to timely access to poles.

Background

2. In 1978, Congress first directed the Commission to ensure that the rates, terms, and conditions for pole attachments by cable television systems are just and reasonable when it added section 224 to the Act. The Telecommunications Act of 1996 (1996 Act) expanded the definition of pole attachments to include attachments by providers of telecommunications service, and granted both cable systems and telecommunications carriers an affirmative right of nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by a utility. However, the 1996 Act permits utilities to deny access where there is insufficient capacity and for reasons of safety, reliability or generally applicable engineering purposes. Besides establishing a right of access, the 1996 Act mandates a rate formula for telecommunications carriers that differs from the rate formula for attachments used solely to provide cable service.

3. The Commission implemented the new section 224 access requirements in the *Local Competition Order.* At that time, the Commission concluded that it would determine the reasonableness of a particular condition of access on a case-by-case basis. Finding that no single set of rules could take into account all attachment issues, the Commission specifically declined to adopt the National Electric Safety Code (NESC) in lieu of access rules. The Commission also recognized that utilities typically develop individual standards and incorporate them into pole attachment agreements, and that, in some cases, federal, state, or local laws also impose relevant restrictions. The *Local Competition Order* acknowledged concerns that utilities might deny access unreasonably, but rather than adopt a set of substantive engineering standards, the Commission decided that procedures for requiring utilities to justify the conditions they placed on access would best safeguard attachers' rights. The Commission did adopt five rules of general applicability and several broad policy guidelines in the *Local Competition Order.* The Commission also stated that it would monitor the effect of the case-specific approach, and would propose specific rules at a later date if conditions warranted.

4. In the *1998 Implementation Order,* the Commission adopted rules implementing the 1996 Act's new pole attachment rate formula for telecommunications carriers. The Commission also concluded that cable television systems offering both cable and Internet access service should continue to pay the cable rate. The Commission further held that the statutory right of nondiscriminatory access includes attachments by wireless carriers. The latter two determinations were challenged but ultimately upheld by the Supreme Court. In particular, the Court held that section 224 gives the Commission broad authority to adopt just and reasonable rates. The Court also deferred to the Commission's conclusion that wireless carriers are entitled by section 224 to attach facilities to poles.

5. On November 20, 2007, the Commission issued the *Pole Attachment Notice* 73 FR 6879, February 6, 2008 in recognition of the importance of pole attachments to the deployment of communications networks, in part in response to petitions for rulemaking from USTelecom and Fibertech Networks. USTelecom argued that incumbent LECs, as providers of telecommunications service, are entitled to just and reasonable pole attachment rates, terms, and conditions of attachment even though, under section 224, they do not count as "telecommunications carriers" and have no statutory right of access. Fibertech petitioned the Commission to initiate a rulemaking to set access standards for pole attachments, including standards for timely performance of make-ready work, use of boxing and extension arms, and use of qualified third-party contract workers, among other concerns. The *Pole Attachment Notice* focused on the effect of disparate pole-attachment rates on broadband competition and arrived at two tentative conclusions: first, that all attachers should pay the same pole attachment rate for all attachments used to provide broadband Internet access service and second, that the rate should be higher than the current cable rate, yet no greater than the telecommunications rate. In addition to the concerns raised by USTelecom and Fibertech, the *Pole Attachment Notice* inquired about application of the telecommunications rate to wireless pole attachments and other pole access concerns.

6. The American Recovery and Reinvestment Act of 2009 included a requirement that the Commission develop a national broadband plan to ensure that every American has access to broadband capability. On March 16, 2010, the National Broadband Plan was released, and identified access to rights-of-way—including access to poles—as having a significant impact on the deployment of broadband networks.

Accordingly, the Plan included several recommendations regarding pole attachment policies to further advance broadband deployment. Among other things, the Plan recommended that:

- The FCC implements rules that will lower the cost of the pole attachment "make-ready" process. For example, the FCC should authorize attachers to use space- and cost-saving techniques, such as boxing or extension arms, where practical and in a way that is consistent with pole owners' use of those techniques; and
- The FCC establish a comprehensive timeline for each step of the section 224 access process and reform the process for resolving disputes regarding infrastructure access.

Discussion

7. The National Broadband Plan recommended a number of actions intended to lower the cost and improve the speed of access to utility poles. The Commission finds that it is in the public interest to implement some of these recommendations immediately to clarify the statutory provisions governing pole attachments and to streamline the pole attachment process. In particular, the Commission clarifies that the statutory nondiscriminatory access requirement allows communications providers to use space- and cost-saving attachment techniques where practical and consistent with pole owners' use of those techniques. The Commission also concludes that the statutory right to just and reasonable access to poles includes the right of timely access.

Nondiscriminatory Use of Attachment Techniques

8. The Commission concludes that the nondiscriminatory access obligation established by section 224(f)(1) of the Act requires a utility to allow cable operators and telecommunications carriers to use the same pole attachment techniques that the utility itself uses. For example, in the 2007 *Pole Attachment Notice,* the Commission sought comment on the use of techniques such as boxing and bracketing. As attachers have explained, boxing and bracketing can help avoid the cost and delay of pole replacement or make-ready work involving electrical facilities, and could be appropriate when practical—for example, when the facilities on the pole can be safely reached by a ladder or bucket truck—and when such techniques previously have been allowed by the pole owner. Similarly, the National Broadband Plan recommends that the Commission give attachers the right to use these techniques "where practical and in a way that is consistent with pole owners' use of [them]."

9. The Commission now clarifies that utilities must allow attachers to use the same attachment techniques that the utility itself uses in similar circumstances, although utilities retain the right to limit their use when necessary to ensure safety, reliability, and sound engineering. Its conclusion here is consistent with the interpretation of the Act in prior bureau orders.

10. Clarifying this application of a utility's nondiscriminatory access obligation provides certainty that will spur competition and promote the deployment of a variety of technologies. As observed in the National Broadband Plan and by commenters, allowing attachers equal use of techniques like boxing and bracketing will encourage competition and advance the deployment of telecommunications, cable, and both wireless and wireline broadband services. Accordingly, any attachment technique that a utility uses or allows to be used will henceforth be presumed appropriate for use by attachers on that utility's poles under comparable circumstances. The Commission believes that this action will promote the deployment of and competition for telecommunications, cable, and broadband services.

11. The Commission's holding is carefully tailored to reflect the legitimate needs of pole owners, as well. Some pole owners contend that the use of boxing and bracketing complicates pole maintenance and replacement, can compromise safety, and may not be consistent with sound engineering practices. Commenters also assert that utilities should be free to prohibit their use or, at the very least, to consider the appropriateness of such techniques on a case-by-case basis. The Commission agrees and emphasizes that its commitment to ensuring this form of nondiscriminatory access is limited by the utility's existing practices. If a utility believes that boxing and bracketing are fundamentally unsafe or otherwise incompatible with proper attachment practice, it can choose not to use or allow them at all. Moreover, even once the presumption that such techniques are appropriate has been triggered, a utility may rebut it with respect to any single pole or class of poles for reasons of safety, reliability and generally applicable engineering purposes.

12. The Commission recognizes that some pole owners employ these techniques sparingly and may be concerned that this clarification will allow attachers to use boxing and attachment arms in situations where the pole owner itself would not. The Commission believes, however, that this framework will allow utilities to limit the use of these techniques whenever appropriate and, thereby, prevent attachers from employing the techniques inappropriately. The Commission's present holding is not designed to broaden the range of circumstances in which these techniques are used. Rather, it is to prevent utilities from denying attachers the benefits of these techniques in situations where the utility itself would, or has, used them.

13. If a utility chooses to allow boxing and bracketing in some circumstances but not others, the limiting circumstances must be clear, objective, and applied equally to the utility and attaching entity. They should also be publicly available—on a website, for instance—with the utility providing examples where helpful. Such *ex ante* guidance will help attachers make informed decisions and should facilitate the attachment process. If a utility denies an attachment technique that it uses for reasons not included in those made publicly available, it must explain its decision in writing to the requesting entity. In an accompanying Further Notice of Proposed Rulemaking (Further NPRM), FR Doc. 2010–17048, the Commission seeks comment on additional considerations regarding boxing and bracketing, including the ability of utilities to prohibit boxing and bracketing going forward, and whether utilities' decisions regarding the use of boxing and bracketing should also be made publicly available.

14. The Commission rejects the argument that its conclusion is inconsistent with section 224(f)(2) of the Act, which allows electric utilities to deny access where there is "insufficient capacity." Although the Commission recognizes that the Eleventh Circuit held in *Southern Co.* v. *FCC* that utilities are not obligated to provide access to a pole when it is agreed that the pole's capacity is insufficient to accommodate a proposed attachment, the Commission does not find that to be the case when boxing and bracketing are able to be used. The Eleventh Circuit held that the term "insufficient capacity" in section 224(f)(2) is ambiguous, and that the Commission has discretion in filling that "gap in the statutory scheme." The court upheld the Commission's finding that "insufficient capacity" means the absence of usable physical space on a pole. Applying that definition here, the Commission finds that a pole does not have "insufficient capacity" if it could accommodate an additional attachment using

conventional methods of attachment that a utility uses in its own operations, such as boxing and bracketing. Unlike requiring a pole owner to replace a pole with a taller pole, these techniques take advantage of usable physical space on the existing pole.

15. The Eleventh Circuit acknowledged in *Southern* that its decision was driven by the need to "construe statutes in such a way to 'give effect, if possible, to every clause and word of a statute.' " By virtue of that decision, however, the statutory language of section 224(f)(2) *is* given effect, in that utilities may deny access for "insufficient capacity" when "it is agreed that capacity on a given pole or other facility is insufficient." Thus, no particular interpretation of section 224(f)(2) is required in the context of boxing and bracketing simply to "give effect" to that statutory language.

16. The Commission finds that its reading of the ambiguous term "insufficient capacity" is a reasonable middle ground. Some utilities have argued that a pole has insufficient capacity—and thus access may be denied under section 224(f)(2)—if *any* make-ready work is needed. At the other extreme, the statute might be read to require a utility to completely replace a pole—an interpretation that some commenters oppose. The Commission sees no reason to adopt either of those extreme positions. Within those extremes is a range of practices, such as line rearrangement, overlashing, boxing, and bracketing that exploit the capacity of existing infrastructure in some way. Although commenters are divided regarding whether a pole has insufficient capacity if techniques such as boxing and bracketing are necessary to accommodate a new attachment, the Commission finds more persuasive the position that a pole does not have insufficient capacity if a new attachment can be added to the existing pole using conventional attachment techniques. Utilization of existing infrastructure, rather than replacing it, is a fundamental principal underlying the Act. As discussed above, the Commission finds that the Commission's interpretation still ensures that "insufficient capacity" is given some meaning, while also, to the greatest extent possible, helping spur competition and promoting the deployment of communications technologies, consistent with the broad "pro competitive" purposes of the 1996 Act, as well as the more specific direction of section 706 of the 1996 Act that the Commission promote the deployment of advanced services "by utilizing, in a manner consistent with the public interest, convenience, and necessity, * * * measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment." Accordingly, the Commission concludes that, where a pole can accommodate new attachments through boxing, bracketing, or similar attachment techniques, there is not "insufficient capacity" within the meaning of section 224(f)(2)

Timely Access to Pole Attachments

17. The Commission also holds that access to poles, including the preparation of poles for attachment, commonly termed "make-ready," must be timely in order to constitute just and reasonable access. Section 224 of the Act requires utilities to provide cable television systems and any telecommunications carrier with nondiscriminatory access to any poles, ducts, conduits, and rights-of-way owned or controlled by it, and instructs the Commission to ensure that the terms and conditions for pole attachments are just and reasonable. The Commission previously has recognized the importance of timeliness in the context of specific aspects of the pole attachment process. The National Broadband Plan likewise recognized the importance of timely access to poles. The Commission thus holds that, pursuant to section 224 of the Act, the duty to proceed in a timely manner applies to the entirety of the pole attachment process. Make-ready or other pole access delays not warranted by the circumstances thus are unjust and unreasonable under section 224.

18. Section 224 also provides for the adoption of rules to carry out its provisions, and the Commission seeks comment in the Further NPRM regarding a proposed comprehensive timeline for each step of the pole access process. The Commission clarifies, however, that utilities must perform make-ready promptly and efficiently, consistent with evaluation of capacity, safety, reliability, and generally applicable engineering practices, whether or not a specific rule applies to an aspect of the make-ready process.

Procedural Matters

Paperwork Reduction Act

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

Ex Parte Procedures

20. This proceeding shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules. Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required. Other requirements pertaining to oral and written presentations are set forth in § 1.1206(b) of the Commission's rules.

Ordering Clauses

21. Accordingly, *it is ordered* that pursuant to sections 1, 4(i), 4(j), 224, 251(b)(4), and 303 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i)–(j), 224, 251(b)(4), 303, this Order in WC Docket No. 07–245 *is adopted.*

22. *It is further ordered* that, pursuant to §§ 1.4(b)(1) and 1.103(a) of the Commission's rules, 47 CFR 1.4(b)(1), 1.103(a), this Order *shall be effective* September 2, 2010.

Federal Communications Commission.

Bulah P. Wheeler,

Deputy Manager.

[FR Doc. 2010–18904 Filed 8–2–10; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 101

[WT Docket No. 09–114; RM–11417; FCC 10–109]

Amendment of the Commission's Rules to Accommodate 30 Megahertz Channels in the 6525-6875 MHz Band; and to Provide for Conditional Authorization on Additional Channels in the 21.8-22.0 GHz and 23.0-23.2 GHz Band

Correction

In rule document 2010–17205 beginning on page 41767 in the issue of Monday, July 19, 2010, make the following corrections: