Docket Nos. 18-72689 (L), 19-70490

In the

United States Court of Appeals

For the

Ninth Circuit

AMERICAN ELECTRIC POWER SERVICE CORPORATION, CENTERPOINT ENERGY HOUSTON ELECTRIC, LLC, DUKE ENERGY CORPORATION, ENTERGY CORPORATION, ONCOR ELECTRIC DELIVERY COMPANY LLC, SOUTHERN COMPANY, TAMPA ELECTRIC COMPANY, VIRGINIA ELECTRIC AND POWER COMPANY and XCEL ENERGY SERVICES INC.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents,

VERIZON and USTELECOM-THE BROADBAND ASSOCIATION,

Respondents-Intervenors.

On Petition for Review of Order of the Federal Communications Commission, No. 18-111

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CORPORATE DISCLOSURE STATEMENT

USTelecom – the Broadband Association ("USTelecom") is a trade association representing companies offering a wide range of services across communications platforms, including voice, video, and data over local exchange, long distance, wireless, Internet, and cable facilities. USTelecom's members include telecommunications providers that attach facilities to utility poles owned by others and telecommunications providers that own utility poles and lease space to others. USTelecom has no parent company and no publicly held corporation owns 10% or more of its stock.

The Verizon companies participating in this action ("Verizon") are the regulated, wholly-owned subsidiaries of Verizon Communications Inc. Verizon Communications Inc. (Stock Symbol: VZ) has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the addendum of the Federal Communications Commission ("FCC") and the United States of America.

INTRODUCTION

The *2018 Order* under review[1] implements Congress's directive to the FCC to ensure that just and reasonable rates, terms, and conditions apply when communications providers attach to utility poles. The Petitioners, a group of electric utilities, seek to reverse the FCC's adoption of a sensible and well-supported presumption that comparable communications providers should pay the same pole attachment rates. Petitioners also ask this Court to reverse the FCC's important work to speed and streamline portions of the process for attaching to utility poles in order to facilitate broadband deployment. The *2018 Order* reflects a reasonable exercise of the FCC's authority under Section 224 of the Communications Act of 1934 and is well supported by the record evidence. The Court should deny the petition for review and uphold the *2018 Order*.

* * * * *

[1] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705 (2018) ("*2018 Order*") (ER 1–120).

Communications providers regularly attach wires and facilities to utility poles to reach their customers. Electric utilities like the Petitioners own most of these utility poles, as they have for decades. Congress has recognized that because access to poles is so critical for reaching customers, pole owners can—and often have—"charge[d] monopoly rents" to communications providers. *Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 330 (2002) ("*Gulf Power*"). Because artificially high rates can hinder deployment and discourage competition, however, Congress broadly directed the FCC to ensure that the rates, terms, and conditions for "pole attachments" by communications providers are "just and reasonable." 47 U.S.C. § 224(b)(1).

The *2018 Order* is the third FCC Order in the last decade that seeks to implement Congress's directive by ensuring that all communications providers have fair and speedy access to utility poles at just and reasonable pole attachment rates. But the FCC has faced consistent, intense resistance from electric utilities trying to preserve artificially high pole attachment rates, especially those imposed on traditional local telephone companies (referred to in the Communications Act as incumbent local exchange carriers, or "ILECs").

For decades ILECs have paid significantly higher rental rates than their competitors based on contracts with electric utilities (typically called "joint use agreements") that often date to a time before there was cable television or other

significant competition for communications services. As the market evolved, competitive telecommunications providers (referred to as "CLECs"), cable companies, broadband providers, and other entities sought to provide service by attaching new and additional facilities to utility poles increasingly owned by electric utilities. But as the number of attachers increased, and the number of utility poles owned by ILECs decreased, electric utilities refused to reduce the high legacy pole attachment rates they had imposed on ILECs. The result is an untenable competitive environment in which ILECs, seeking to invest in and deploy broadband and other advanced services, collectively pay up to $350 million more each year than they would pay if charged the regulated rates that their competitors pay to use about the same amount of space on a utility pole.[2]

In 2011[3] and again in 2015,[4] the FCC sought to eliminate artificial and outdated rate disparities among ILECs, CLECs, and cable companies—providers that all compete for voice, data, video, and broadband customers. At each step, electric utilities have resisted the FCC's efforts. And, although the FCC and the

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[2] *See Implementation of Section 224 of the Act; A National Broadband Plan for Our Future,* Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5330–31 (¶ 208) (2011) ("*2011 Order*"), *aff'd*, *Am. Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183 (D.C. Cir. 2013) ("*AEP*").

[3] *Id.*

[4] *See Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Order on Reconsideration, 30 FCC Rcd 13731 (2015) ("*2015 Order*"), *aff'd*, *Ameren Corp. v. FCC*, 865 F.3d 1009 (8th Cir. 2017).

courts have rejected their arguments each time, the outdated rate disparities imposed on ILECs persist. As a result, in the *2018 Order* under review, the FCC again tried to achieve its longstanding goal that all comparable providers pay the same "just and reasonable" rate. The FCC also adopted rules that further streamlined the processes required to attach facilities to utility poles in order "to facilitate faster, more efficient broadband deployment." *2018 Order* ¶ 13 (ER 7).

The electric utilities have challenged portions of the FCC's *2018 Order* that seek to make rental rates equitable for comparable providers and parts of the *Order*'s new requirements to speed the attachment process. But the FCC's determinations are well within the FCC's authority and are a reasonable exercise of its discretion to ensure "just and reasonable" rates, terms, and conditions for pole attachments. *See* 47 U.S.C. § 224. Each is backed by substantial record evidence that further action was needed to counteract continued resistance by electric utility pole owners that undermined the FCC's prior efforts to achieve the "just and reasonable" pole attachment rates, terms, and conditions as required by Congress. And each will encourage competition and broadband deployment, while ensuring that electric utility pole owners continue to recover pole attachment rent in amounts that the Supreme Court found fully compensatory. *See FCC v. Fla. Power Corp.*, 480 U.S. 245, 254 (1987). Petitioners' challenge to the *2018 Order* should be rejected.

STATEMENT OF THE CASE

Attaching communications infrastructure to utility poles promptly and at reasonable costs directly impacts how quickly and efficiently broadband is deployed and how far it reaches. The *2018 Order* under review is the FCC's third order this decade—following orders adopted in 2011 and 2015—that exercises the FCC's congressionally delegated authority over pole attachments to promote broadband deployment by eliminating artificial and outdated rate disparities among competing communications providers and by reducing the time required to deploy facilities. As they attempted with each of the two prior orders, electric utility pole owners now challenge the FCC's reforms in an attempt to preserve pole attachment rates well above cost.

A. Historical Background.

Decades ago, before there was cable television or broadband Internet service, utility poles were primarily owned and used by two companies: electric utilities and ILECs. The two companies typically entered into agreements to provide access to each other's poles (often called a "joint use agreement") because a single pole line was the strong preference of residents and local authorities. Indeed, zoning restrictions "and the very significant costs of erecting a separate pole network or entrenching cable underground" typically leave "'no practical

alternative [for network deployment] except to utilize available space on existing poles.'" *See 2011 Order*, 26 FCC Rcd at 5242 (¶ 4) (citation omitted).

As electric utilities reached new neighborhoods first, they acquired far more utility poles than ILECs. And pole owners with "'exclusive control over access to pole lines, are unquestionably in a position to extract monopoly rents … in the form of unreasonably high pole attachment rates.'" *Id*. (citation omitted). Certain electric utilities took full advantage of their pole ownership and charged "monopoly rents" for use of their poles. *See Gulf Power*, 534 U.S. at 330.

With the advent of cable television, cable companies sought pole access for their network equipment, but were faced with these monopoly rents. *AEP*, 708 F.3d at 185. Congress recognized that the shared use of utility poles provides significant benefits; for example, it "minimize[s] 'unnecessary and costly duplication of plant for all pole users.'" *2011 Order*, 26 FCC Rcd at 5242 (¶ 4) (citation omitted). As a result, in 1978 Congress adopted Section 224 of the Communications Act, also known as the Pole Attachment Act, to expressly direct the FCC to regulate the pole attachment rates, terms, and conditions for cable companies so that they are "just and reasonable." 47 U.S.C. § 224(b)(1).[5]

[5] The Pole Attachment Act applies to poles owned by "utilities," defined as a "local exchange carrier or an electric, gas, water, steam, or other public utility" that "owns or controls poles" used for wire communications. 47 U.S.C. § 224(a)(1). The Act does not reach poles owned by "any railroad, any person who is

The FCC set the "just and reasonable" rate for cable companies by formula, 47 C.F.R. § 1.1406(d)(1), and the Supreme Court found the resulting "cable rate" fully compensatory for the pole owner. *See Fla. Power Corp.*, 480 U.S. at 254; *see also Ala. Power Co. v. FCC*, 311 F.3d 1357, 1370–71 (11th Cir. 2002). ILECs continued to pay far higher rental rates for use of space on the same poles. *See Connecting America: The National Broadband Plan*, 2010 WL 972375, at *97 (Mar. 16, 2010).

In 1996, Congress introduced competition to the local telephone market, which added a new set of companies that needed to use space on utility poles. Congress gave these companies—known as competitive local exchange carriers or "CLECs"—a right of access to utility poles, which it also extended to cable companies. *See* 47 U.S.C. § 224(f). Congress also guaranteed that all "provider[s] of telecommunications service" would receive "just and reasonable" rates, terms, and conditions for their pole attachments. *See* 47 U.S.C. §§ 224(a)(4), (b)(1).

In 1998, Congress set the "just and reasonable" pole attachment rate for CLECs by adopting a "telecom rate" formula for CLECs that produced "significantly higher pole rental rates than rates derived from the cable rate formula." *2015 Order*, 30 FCC Rcd at 13734 (¶ 7); *2011 Order*, 26 FCC Rcd at

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cooperatively organized, or any person owned by the Federal Government or any State." *Id.* It also does not apply in States that have reverse-preempted the federal scheme by meeting certain statutory requirements. *Id.* § 224(c).

5247 (¶ 12). ILECs, the traditional phone companies, however, continued to pay pole attachment rates even higher than the telecom rate. *See National Broadband Plan*, 2010 WL 972375, at *97.

B. Regulatory and Procedural Background.

To enable competitive and innovative communications services, Congress has directed the FCC to "encourage" and "accelerate" the deployment of broadband and other advanced services "by removing barriers to infrastructure investment." *See* 47 U.S.C. §§ 1302(a)–(b). The FCC has found that pole attachment rate disparities and untimely, unpredictable access to poles thwart infrastructure investment and deployment, and so has worked to eliminate them.

1. Ensuring "Just and Reasonable" Pole Attachment Rates.

The FCC's 2010 National Broadband Plan recognized the need to eliminate the existing market distortions caused by disparate pole attachment rental rates. *See National Broadband Plan*, 2010 WL 972375, at *97. The FCC explained that "[d]ifferent rates for virtually the same resource (space on a pole), based solely on the regulatory classification of the attaching provider" were undermining Congress's broadband deployment goals. *Id.* The FCC found that ILECs, CLECs, and cable companies all offered comparable and competitive voice, data, and video services using similar facilities, but "the rental rates paid by communications companies to attach to a utility pole vary widely." *Id.* The same space on a single

pole may cost a cable company $7 per year, a CLEC $10 per year, and an ILEC more than $20 per year. *Id.* Yet the lowest of these rates—the cable rate—was "'just and reasonable' and fully compensatory" for the pole owner. *Id.* (citation omitted). The FCC therefore aimed to set "rental rates for pole attachments that are as low and close to uniform as possible, consistent with Section 224 of the Communications Act of 1934, to promote broadband deployment." *Id*. at *97–98; *see also 2018 Order* ¶ 123 (ER 63).

The FCC first attempted to harmonize rental rates in 2011. Finding that "widely disparate pole rental rates distort infrastructure investment decisions and in turn could negatively affect the availability of advanced services and broadband," the FCC sought to rationalize rates at the fully compensatory cable rate level. *See 2011 Order*, 26 FCC Rcd at 5243 (¶ 6). To do so, the FCC revised its telecom rate formula so that it would produce a rate that approximates the cable rate. *Id.* at 5244 (¶ 8). The replaced formula is now referred to as producing the "preexisting telecom rate" and the revised formula now produces the "new telecom rate." The FCC also confirmed that ILECs are statutorily entitled to "just and reasonable" rates and found that such rates must be competitively neutral. *See id.* at 5328 (¶¶ 202–03), 5336–37 (¶¶ 217–18); *see also* 47 U.S.C. §§ 224(a)(4), (b)(1).

The FCC directed electric utilities to negotiate just, reasonable, and "competitive[ly] neutral[ ]" rates with ILECs, explaining that if an ILEC "is

obtaining pole attachments on terms and conditions that leave them comparably situated to [CLECs] or cable operators, … it will be appropriate to use the rate of the comparable attacher as the 'just and reasonable' rate." *2011 Order*, 26 FCC Rcd at 5336 (¶ 217). In contrast, if the ILEC attaches pursuant to terms and conditions that give the ILEC a net material advantage as compared to its CLEC and cable competitors, the FCC decided that the preexisting telecom rate would be a reference point for the "just and reasonable" rate. *See id.* at 5336–37 (¶ 218).

If electric utilities refused to charge a "just and reasonable" rate under this standard, the FCC would set the "just and reasonable" rate in a complaint proceeding. *See id.* at 5333–38 (¶¶ 214–20). The FCC explained that this case-by-case approach would account for any "potential differences" between the pole attachment agreements that apply to ILECs, CLECs, and cable companies, as it could "weigh, and account for, different rights and responsibilities in joint use agreement[s]" as compared to license agreements. *Id.* at 5333, 5335 (¶¶ 214, 216 n.654). The D.C. Circuit upheld the FCC's *2011 Order*, finding "neither theory nor fact to contradict" the FCC's decision to eliminate "artificial, non-cost-based differences" in pole attachment rates, which "are bound to distort competition." *See AEP*, 708 F.3d at 190.

The FCC expected that its *2011 Order* would lead to significant rate reductions. It recognized that ILECs had been forced to pay far higher rates than

their competitors, and often lacked the ability to negotiate a lower rate due to "evergreen" provisions in most joint use agreements that lock in the rental rate for all existing attachments. *See, e.g.*, *2011 Order*, 26 FCC Rcd at 5336 (¶ 216) (noting that ILECs may "genuinely lack the ability to terminate" an existing rate). By requiring that the rates be set on par with their competitors, the FCC found that up to $350 million annually would be available to invest in broadband deployment and other advanced services. *See id.* at 5330–31 (¶ 208).

But the FCC's expected rate reductions did not occur. Electric utilities sought to evade the rate reductions during negotiations, arguing that the *2011 Order* did not apply to their agreements, or that it could not apply absent an FCC decision specific to a particular agreement. They also found a "loophole" in the new telecom rate formula that could be used to avoid the rate reductions intended for CLECs. *See 2015 Order*, 30 FCC Rcd 13731 (¶ 22). When the FCC eliminated that "loophole" in 2015 to try again to ensure comparable pole attachment rates for similarly situated competitors, electric utilities brought another challenge. *See Ameren*, 865 F.3d at 1013. But the Eighth Circuit agreed with the D.C. Circuit, finding that the elimination of unwarranted rate disparities was reasonable and lawful. *See id.* at 1013–14.

The years following the *2011 Order* were thus filled with "repeated disputes" over pole attachment rates. NPRM ¶ 44 (ER 155). The case-by-case

approach to setting ILEC rates proved costly, time-consuming, and ineffective in achieving the widescale rate reductions the FCC intended. *See, e.g.*, USTelecom Comments at 3 (June 15, 2017) (RER 188). It also exposed a fundamental flaw with the standard from the *2011 Order*: although electric utilities claimed that the rates they charged ILECs were justified by competitive "advantages," electric utilities did not have to prove that any such "advantages" exist. And often, their argument about competitive "advantages" boiled down to the mere historic difference that Petitioners assert again here—that "ILECs, unlike CLEC and CATV pole licensees, own numerous poles to which electric utilities are attached," meaning that "ILECs, unlike CLEC and CATV pole licensees, obtained access to electric utility poles under joint use agreements pursuant to which ILEC[s] and electric utilities share space on each other's poles." *See* Pet'rs Br. at 46. But pole ownership alone cannot justify charging an ILEC a higher rate than its competitors (which typically do not own poles) because pole ownership imposes significant additional responsibilities on the ILEC—and "just and reasonable" rates must "account for, the different rights *and responsibilities* in joint use agreement[s]." *2011 Order*, 26 FCC Rcd at 5335 (¶ 216 n.654) (emphasis added). And so rate disparities and disputes persisted despite the *2011 Order*'s efforts to address them. In one dispute involving years of negotiations and litigation, the FCC's Enforcement Bureau ultimately described the electric utility's alleged competitive

benefits as "overstated," criticized it for failing to "quantify the purported material advantages," and found that the electric utility had not "remotely justif[ied] the difference between the rate [the ILEC] pays and the rate that [C]LECs pay to attach to [the electric company's] poles." *Verizon Va., LLC v. Va. Elec. and Power Co.*, 32 FCC Rcd 3750, 3753, 3758–59 (¶¶ 7, 17, 18, 20) (2017).

Based on the pushback by electric utilities and a further decline in ILECs' percentage of pole ownership, the FCC found in the *2018 Order* that "[I]LECs' bargaining power vis-à-vis utilities has eroded since 2011." *2018* Order ¶¶ 125–26 (ER 64–65). As a result, in 2017—six years after the *2011 Order*—instead of aligning with CLEC or cable rates, ILEC rates had *increased* from about $26.00 per pole to an average of $26.12 per pole even as CLEC and cable rates declined to an average of $3.00 and $3.75 per pole per year, respectively, in 2017—down from $3.26 and $4.45, respectively, in 2008. USTelecom Letter, Attachment at 6 (Nov. 21, 2017) (RER 265); *see also 2018 Order* ¶ 125 (ER 64–65).

To address this continued and growing rate imbalance, the FCC in the *2018 Order* adopted a presumption that ILECs "are similarly situated to other telecommunications attachers" under new and newly-renewed agreements and so are "entitled to pole attachment rates, terms, and conditions that are comparable to the telecommunications attachers" (*i.e.*, the new telecom rate). *2018 Order* ¶ 126 (ER 65); *see also* 47 C.F.R. § 1.1413(b). An electric utility (the only company

with access to all of the relevant pole attachment agreements) may rebut the presumption with clear and convincing evidence that the ILEC "receives net benefits that materially advantage the [I]LEC over other telecommunications attachers." *2018 Order* ¶ 128 (ER 66–67); *see also* 47 C.F.R. § 1.1413(b). Should the electric utility rebut the presumption, the FCC converted the preexisting telecom rate (the higher telecom rate that pre-dated the *2011 Order*) from a "reference point" to a "hard cap" on the rate that may be charged. *2018 Order* ¶ 129 (ER 67). These changes, the FCC explained, should work to finally achieve the "greater rate parity" sought in the *2011 Order* which can "energize and further accelerate broadband deployment." *Id.* ¶¶ 126, 129 (ER 65, 67).

2. Incentivizing Timely Access to Utility Poles.

Rental rates were not the only impediment to deployment; the process for attaching to poles could also be very slow as new attachers waited for existing attachers to move or rearrange facilities on a pole to make more space. And so, for nearly a decade, the FCC has also sought to ensure timely access to utility poles through improvements to this so-called "make-ready" process.

In its *2011 Order*, the FCC set mandatory timelines for the completion of make-ready work. Further, to give companies "a way to obtain access to poles if a utility does not meet the deadlines we impose," the FCC adopted a "self-help" remedy under which an attacher may hire a contractor pre-approved by the utility

to complete work that a utility or an existing attacher failed to complete on time. *2011 Order*, 26 FCC Rcd at 5265 (¶ 49). The FCC required the attacher to give the utility advance notice and an opportunity to be present when the make-ready work is performed. *Id.* This *2011 Order* self-help remedy applied only to work in the communications space, on the grounds that "engineering specifications" may not yet have been developed for contractors to follow when completing make-ready for attachments in or above the electric space. *See id.* at 5262 (¶ 42).

Six years later, recognizing that "[h]igh-speed broadband is an increasingly important gateway to jobs, health care, education, information, and economic development," the FCC sought additional ways to "facilitate timely access to poles." NPRM ¶¶ 1, 7 (ER 142, 143). In the *2018 Order*, the FCC took "one large step and several smaller steps to improve and speed the process of preparing poles for new attachments, or 'make ready.'" *2018 Order* ¶ 2 (ER 2).

The FCC's "large step" provided a one-touch make-ready option that puts "new attachers … in control of the surveys, notices, and make-ready work necessary to attach their equipment to utility poles" by letting them hire a pre-approved contractor at the outset to complete all simple make-ready work required to deploy. *See id.* ¶ 16 (ER 10). Petitioners do not appeal the one-touch make-ready option portion of the *2018 Order*.

Petitioners instead challenge one of the "smaller steps" that applies where one-touch make-ready is not used—specifically, the FCC's decision to enhance the self-help remedy by making it available for make-ready "anywhere on the pole in the event that the utility or the existing attachers fail to meet the required deadlines." *Id.* ¶ 77 (ER 39); *see also* 47 C.F.R. § 1.1411(i). The FCC found that the absence of a self-help remedy above the communications space left attachers without a "meaningful remedy." *2018 Order* ¶ 98 (ER 48) (citation omitted). It also addressed safety concerns about work performed near electric facilities, explaining that "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." *Id.* ¶ 99 (ER 49). It also retained longer timelines for make-ready above the communications space and reminded electric utilities that they "may prevent self-help from being invoked by completing make-ready on time." *Id.* The FCC thus addressed the safety concerns while also "strongly encourag[ing] utilities and existing attachers to meet their make-ready deadlines." *Id.* ¶ 98 (ER 48).

3. Promoting Faster Deployment.

Petitioners also challenge two operational aspects of the *2018 Order* that continued the FCC's longstanding effort "to promote faster, less expensive broadband deployment." *See 2018 Order* ¶¶ 115–22 (ER 57–63).

The first is a rule that clarifies that "[a] utility may not deny [a] new attacher pole access based on a preexisting violation not caused by any prior attachments of the new attacher." 47 C.F.R. § 1.1411(c)(2). The Commission explained that "[s]imply denying new attachers access prevents broadband deployment and does nothing to correct the safety issue." *2018 Order* ¶ 122 (ER 63). It also found that "[h]olding 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." *Id.* ¶ 121 (ER 62).

The second is a rule about overlashing—a technique whereby a provider attaches new wires, cables, or equipment to its own or a third party's existing attachment. *See S. Co. Servs. v. FCC*, 313 F.3d 574, 578 (D.C. Cir. 2002) ("*Southern Co. II*") (describing overlashing as a "technique whereby a telecommunications provider attaches a wire to its own ... [or another party's] existing wires"); Verizon FNPRM Reply Comments at 18 (Feb. 16, 2018) (IER 50) (explaining that "overlashing practice for many years has included not only fiber

but also cable television amplifiers, splice boxes, optical nodes, Wi-Fi antennas, and other equipment"). In the *2018 Order*, the FCC "codif[ied its] longstanding policy that utilities may not require an attacher to obtain its approval for overlashing," but clarified that utilities may require attachers to give them advance notice of overlashing. *See 2018 Order* ¶¶ 115–20 (ER 57–62); 47 C.F.R. § 1.1415(c). Utilities may not, however, "use advance notice requirements to impose quasi-application or quasi-pre-approval requirements." *2018 Order* ¶ 119 (ER 61). 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.'" *Id.* ¶ 115 (ER 58) (citation omitted). By "codifying the existing overlashing precedent while adopting a pre-notification option," it sought "to promote faster, less expensive broadband deployment while addressing important safety concerns relating to overlashing." *Id.*

SUMMARY OF THE ARGUMENT

Section 224 of the Communications Act requires the FCC to regulate the use of utility poles by communications providers in order to ensure "just and reasonable" rates, terms, and conditions. 47 U.S.C. § 224(b)(1). In the *2018 Order* under review, the FCC exercised this authority to "continue [its] efforts to promote broadband deployment by speeding the process and reducing the costs"

associated with the use of utility poles. *2018 Order* ¶ 1 (ER 2). The Court should reject Petitioners' efforts to slow that deployment by forcing the FCC to allow them to maintain unreasonably high rates that are out of proportion to the rates paid by similarly situated communications providers.

1. Ensuring "Just and Reasonable" Pole Attachment Rates.

Petitioners challenge the FCC's decision to ensure that all communications providers, including ILECs, receive competitively neutral "just and reasonable" pole attachment rates. Their arguments mirror their unsuccessful efforts to overturn the *2011* and *2015 Orders*. Their arguments here, too, should fail.

Petitioners first ask the Court to deny the FCC deference because it detailed its authority in a section of the *2018 Order* that was dedicated to "legal authority" instead of in the section addressing outdated rate disparities. But this is form over substance because the organizational structure of an Order does not provide an escape hatch from the deference required by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Congress directed the FCC to ensure "just and reasonable" rates for ILECs. 47 U.S.C. § 224(b)(1). The FCC's exercise of that authority is entitled to *Chevron* deference.

Petitioners also argue that the FCC's decision to harmonize rental rates was arbitrary and capricious, contrary to law, and unsupported by the record. But the FCC had substantial evidence that ILECs continue to pay artificially high rental

rates based on outdated and irrelevant regulatory distinctions, and that these unreasonably high rates undermine deployment in broadband and other advanced services. The record further showed that the unreasonably high rental rates persisted despite the FCC's *2011 Order*, requiring refinements to the approach adopted then. By presuming that ILECs should get the same rate as their comparable competitors, but giving electric utilities the right to try to rebut that presumption, the FCC reasonably and incrementally sought to accelerate the rate reductions it expected seven years before. And by setting a "hard cap" on the rate that may be charged, the FCC resolved confusion that had stymied negotiations, while ensuring that pole owners will receive fully compensatory rates. The FCC thus "'considered the relevant factors and articulated a rational connection between the facts found and the choices made.'" *Alaska Oil & Gas Ass'n v. Jewell*, 815 F.3d 544, 554 (9th Cir. 2016) (citation omitted). The Court "should defer to the agency's expertise and uphold the action." *Id.*

2. Incentivizing Timely Access to Utility Poles.

Petitioners also challenge an enhanced self-help remedy that promotes timely deployment by giving new attachers the option to hire a pre-approved contractor to complete make-ready work anywhere on the pole if the existing attachers do not complete the work on time. *See* 47 C.F.R. § 1.1411(i). Petitioners argue that this enhanced remedy exceeds the FCC's jurisdiction, but the statute

gives the FCC broad authority to ensure that pole access is provided to communications providers on "just and reasonable" terms, and it has repeatedly and properly found that part of access being reasonable is that access is timely, regardless of where the attacher seeks to place its facilities on the pole. The self-help remedy is no different. It "provid[es] a strong incentive for utilities and existing attachers to meet their make-ready deadlines and give[s] new attachers the tools to deploy quickly when deadlines are not met." *2018 Order* ¶ 87 (ER 44).

Petitioners also argue that the remedy does not properly address concerns related to the safety and reliability of electric facilities. But the FCC built in several safeguards in response to these concerns. It retained longer deadlines for make-ready above the communications space, ensured that contractors would meet specified safety and reliability standards, required advance notice to electric utilities so they can complete the make-ready first, and gave them the right to be present when self-help work is completed. The FCC thus reasonably addressed safety concerns while ensuring the timely pole access that is statutorily required.

3. Promoting Faster Deployment.[6]

Petitioners challenge two additional rules designed to accelerate the speed of deploying facilities on utility poles. *First*, Petitioners challenge the FCC's new

[6] USTelecom did not address the issues addressed in this Section in the FCC proceeding and takes no position on them here.

rules barring utilities from denying access to poles because of preexisting violations, arguing that the rules violate Section 224(f)(2). But Section 224(f) does not give utilities "unfettered discretion" to deny access to poles for purported safety reasons. *S. Co. v. FCC*, 293 F.3d 1338, 1348–49 (11th Cir. 2002) ("*Southern Co. I*"). Here, the new rules simply require utilities and existing attachers to fix violations on a pole rather than deny access to a new attacher that did not cause the problem. They do not require utilities to allow unsafe attachments, and therefore do not violate Section 224(f)(2). Instead, the rules are a permissible exercise of the FCC's discretion under Section 224(b) and *Chevron*.

Second, Petitioners challenge the new rules on overlashing. Petitioners first argue that the new rules are unlawful because they allow attachers to have the final say on whether proposed overlashing is unsafe or otherwise implicate utilities' ability to deny access under Section 224(f)(2). But that challenge is not ripe for judicial review, and fails in any event because these new rules are likewise a reasonable exercise of the FCC's discretion.

Petitioners also challenge the FCC's decision to forbid utilities from imposing "quasi-application or quasi-pre-approval requirements, such as requiring engineering studies" when they require notice of proposed overlashing. *See 2018 Order* ¶ 119 (ER 61). Similarly, Petitioners challenge the new rule barring utilities from "charg[ing] a fee … for the utility's review of [a] proposed overlash." 47

C.F.R. § 1.1415(c). Both of these challenges fail too—the FCC reasonably determined that allowing utilities to impose these costs would unduly burden attachers and delay broadband deployment. That decision was well within the FCC's authority to "regulate the rates, terms, and conditions for pole attachments." 47 U.S.C. § 224(b)(1).

ARGUMENT

I. The FCC Reasonably Acted To Eliminate Outdated And Artificial Rate Disparities.

Petitioners' challenge to the FCC's 2018 rate reforms fails for the same reason that the challenges to the FCC's 2011 and 2015 rate reforms failed. The FCC has broad authority to set "just and reasonable" rates for pole attachments and has reasonably exercised that authority to reduce unwarranted rate disparities among competing companies. *See AEP*, 708 F.3d at 190; *Ameren*, 865 F.3d at 1014. Petitioners' effort to obtain a different result this time around should be rejected.

A. The *2018 Order* Is Entitled To *Chevron* Deference.

By statute, the FCC "shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable." 47 U.S.C. § 224(b)(1). The FCC acted squarely within this authority when it took further action to rationalize the "just and reasonable" rates that may be charged competing providers of essentially identical services making essentially

identical attachments to utility poles. *See* 47 C.F.R. § 1.1413(b); *2018 Order* ¶¶ 123–29 (ER 63–67). The Court, therefore, must review the FCC's decision "for reasonableness under the familiar standard of *Chevron*," which means that a "reasonable agency interpretation prevails." *AEP*, 708 F.3d at 186 (citation omitted); *see also City of Los Angeles v. Barr*, 929 F.3d 1163, 1177 (9th Cir. 2019) ("This standard is 'deferential and narrow'; there is a 'high threshold for setting aside agency action.'" (internal quotation omitted)); *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 994 (9th Cir. 2014) ("It is not the reviewing court's task to 'make its own judgment about' the appropriate outcome. 'Congress has delegated that responsibility to' the agency." (citation omitted)); *New Edge Network, Inc. v. FCC*, 461 F.3d 1105, 1112 (9th Cir. 2006) ("'If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation.'" (citation omitted)).

Petitioners seek to avoid this deferential standard because the FCC described its statutory authority in a section of the Order dedicated to "legal authority," instead of in the section of the Order "addressing outdated rate disparities." Pet'rs Br. at 43–46. This flawed and formulistic argument merits little response. The Supreme Court has previously held that Section 224 "*requires* the FCC to 'regulate

the rates, terms, and conditions for pole attachments.'" *Gulf Power*, 534 U.S. at 333, 340 (emphasis added). And here, the FCC expressly grounded its authority to "address outdated rate disparities" in Section 224, explaining that the statute "authorizes [the FCC] to prescribe rules ensuring that the rates, terms, and conditions of pole attachments are just and reasonable." *2018 Order* ¶ 135 (ER 69). The FCC's exercise of its authority is entitled to *Chevron* deference. *Id.*; *see also City of Arlington v. FCC*, 569 U.S. 290, 307 (2013) (holding that *Chevron* deference applies to "*all* the matters the agency is charged with administering"); *Trout Unlimited v. Lohn*, 559 F.3d 946, 954 (9th Cir. 2009) (finding, where agency action was "previously held" to be entitled to *Chevron* deference, new policy issued through notice-and-comment rulemaking under same Congressional grant of authority is also entitled to *Chevron* deference).

Petitioners are also wrong in claiming that the FCC did not "explain whether or how" its 2018 rate reforms comply with Section 224. *See* Pet'rs Br. at 43. To the contrary, the FCC stated that "Section 224 of the Act grants us broad authority to regulate attachments to utility-owned and -controlled poles," which "authorizes us to prescribe rules to: ensure that the rates, terms, and conditions of pole attachments are just and reasonable" and to "provide procedures for resolving pole attachment complaints." *2018 Order* ¶ 5 (ER 3). It then explained that its 2018 rate reforms are designed to ensure "just and reasonable" rates consistent with the

policy "adopted … in 2011 that similarly situated attachers should pay similar pole attachment rates for comparable access." *Id.* ¶ 123 (ER 63). The reforms should also accelerate competitively neutral "just and reasonable" rates through "'better informed pole attachment negotiations.'" *Id.* ¶ 129 (ER 67). And, if negotiations fail, the FCC detailed how the new rule would apply as a procedural matter in pole attachment complaint proceedings. *See, e.g.*, *id.* ¶ 128 (ER 66–67). The FCC thus gave more than "adequate reasons for its decisions." *See Barr*, 929 F.3d at 1181 ("The agency satisfies this requirement 'when the agency's explanation is clear enough that its path may reasonably be discerned.'" (citation omitted)); *cf. San Luis*, 776 F.3d at 1001 (holding that even if "the agency's analysis is not perfect," if "it may reasonably be discerned, [it] is thus not arbitrary or capricious" (citation omitted)).

This case is far afield from the cases on which Petitioners rely. *See* Pet'rs Br. at 43–46. Of those, one is a concurring opinion where the plurality did not reach the question of deference. *See Smith v. City of Jackson*, 544 U.S. 228, 230 (2005). Another found that the "bare notation" of an entity's regulatory status on a license did not resolve a separate and different question in the litigation. *See Telesaurus VPC, LLC v. Power*, 623 F.3d 998, 1005–06 (9th Cir. 2010). And a third explained that an agency's practice of repeatedly renewing suspension orders could not overcome the plain language of the relevant statute, which limited such

orders to "a period not exceeding ten days." *See SEC v. Sloan*, 436 U.S. 103, 105, 117 (1978) (citation omitted). Here, the FCC has broad authority to regulate "just and reasonable" rates and has detailed at length and in repeated orders why such "just and reasonable" rates should be the same for similarly situated broadband providers. It is entitled to *Chevron* deference. *See, e.g.*, *AEP*, 708 F.3d at 190; *Ameren*, 865 F.3d at 1014.

B. The FCC's Presumption That ILECs Are "Similarly Situated" To Their Competitors Is Consistent With The FCC's *2011 Order* And Supported By The Record Below.

The *2018 Order* reasonably follows the course the FCC set in its *2011 Order*. Under both *Orders*, an ILEC is entitled to the same rate as its competitors if it attaches to an electric company's poles pursuant to materially comparable terms and conditions. *See 2011 Order*, 26 FCC Rcd at 5336 (¶ 217); *2018 Order* ¶ 126 (ER 65). Also under both *Orders*, if an agreement gives an ILEC a net material advantage relative to its competitors, the ILEC may be charged a higher rate that accounts for the value of those net material advantages. *See 2011 Order*, 26 FCC Rcd at 5336–37 (¶ 218); *2018 Order* ¶ 129 (ER 67).

There are just two differences between the rules adopted in 2011 and 2018—each of which is an incremental and reasonable refinement designed to better achieve the rate parity that should have resulted from the *2011 Order*. *First*, the *2018 Order* places the burden on the electric utility to show that the ILEC receives

net material advantages under their joint use agreement—as compared to the electric utility's agreements with the ILEC's competitors—that justify charging the ILEC a higher rate. *2018 Order* ¶ 128 (ER 66–67). Placing the burden on the electric utility to justify its pole attachment rates is nothing new; the FCC's prior rules required the electric utility to "justify 'the rate, term or condition alleged in [a pole attachment] complaint not to be just and reasonable.'" *See Heritage Cablevision Assocs. of Dallas, L.P. v. Tex. Utils. Elec. Co*., 6 FCC Rcd 7099, 7105 (¶ 29) (1991) (quoting 47 C.F.R. § 1.1407(a)); *see also Verizon Va.*, 32 FCC Rcd at 3759–61 (¶¶ 20–22) (requiring electric utility to justify its rates). Enforcing this requirement in the context of ILEC rates had proven essential, as electric utilities had already thwarted the FCC's intended rate reductions for seven years by simply alleging that "competitive advantages" justified their exceptionally high rental rates. *See, e.g.*, USTelecom Letter, Attachment at 1 (Nov. 21, 2017) (RER 260) ("[T]he broad disparity in pole attachment rates not only continues, but in most instances has *increased*.").

The FCC's requirement that electric utilities justify the rates they charge ILECs is also supported by the record evidence that the electric utility is the only party that has access to all the relevant pole attachment agreements—the agreement with the ILEC and the agreements with the ILEC's competitors. *See, e.g.*, Verizon Letter at 4 (July 26, 2018) (IER 10) ("[P]ower companies have

hampered [I]LECs' ability to test power company claims of advantage by denying access, even on a confidential basis, to the company's signed license agreements."). Thus, if an electric utility's agreement with an ILEC provides net benefits that materially advantage the ILEC over its CLEC and cable competitors, the electric utility is undoubtedly in the best position to make that showing.

Second, the FCC converted the preexisting telecom rate from a "reference point" to the "maximum rate that the utility and [I]LEC may negotiate" if an ILEC has a net material advantage over its competitors. *2018 Order* ¶ 129 (ER 67). Doing so ensures that electric utilities are fully compensated in all circumstances because the preexisting telecom rate is higher than the fully compensatory new telecom and cable rates. *See, e.g.*, *2011 Order*, 26 FCC Rcd at 5297, 5321 (¶¶ 131 & n.399, 182). It also eliminates "uncertainty" surrounding the FCC's description of the preexisting telecom rate as a "reference point." *2018 Order* ¶ 129 (ER 67). Electric utilities had seized on that "uncertainty" to argue that higher rates remained lawful under the *2011 Order*. *See, e.g.*, Verizon Comments at 14 (June 15, 2017) (IER 191) ("Uncertainty about what this ['reference point'] means has contributed to problems negotiating new rates."). The *2018 Order* thus appropriately provides "'further certainty within the pole attachment marketplace'" and "'help[s] to further limit pole attachment litigation'"—each of which should

accelerate the rate parity intended in 2011. *See 2018 Order* ¶ 129 (ER 67) (citation omitted).

Petitioners argue that the record does not support the presumption that ILECs are comparable to their competitors, citing the historical fact that ILECs "own numerous poles" and "obtained access to electric utility poles under joint use agreements pursuant to which ILEC[s] and electric utilities share space on each other's poles." Pet'rs Br. at 46. But the FCC knew that ILECs are pole owners with joint use agreements; it simply found—as it previously found in 2011—that this historical difference does not justify a rental rate difference in today's competitive marketplace. *See, e.g.*, *2018 Order* ¶¶ 124–26 (ER 64–65); *see also, e.g.*, *2011 Order*, 26 FCC Rcd at 5330–31 (¶ 208). As the FCC explained, ILECs are in direct competition with CLECs and cable companies—yet pay electric utilities pole attachment rates that average $26.12 per pole when CLECs and cable companies pay less than $4, on average, for comparable space on an ILEC-owned pole. *2018 Order* ¶ 125 (ER 64–65).

And contrary to Petitioners' argument, the FCC cited substantial evidence that ILECs are comparable to their competitors for purposes of setting "just and reasonable" pole attachment rental rates. *See* Pet'rs Br. at 47. The FCC pointed to filings by USTelecom and its members that demonstrated "the lack of any meaningful benefits associated with joint use agreements and the extensive record

in the proceeding showing that there are no such benefits…. [A]ny benefits, whether financial or operational, are virtually non-existent." USTelecom Letter at 2–3 (July 27, 2018) (IER 2–3) (cited at *2018 Order* ¶ 127 n.476 (ER 66)); *see also, e.g.*, AT&T Letter at 4 (July 23, 2018) (IER 24) (cited at *2018 Order* ¶ 127 n.476 (ER 66)) ("[M]any of the terms perceived as beneficial are in fact not" and "[e]ven if some benefits are provided, they have not been quantified, are not material, and do not justify the excessive (and increasing) pole attachment rates charged by electric utilities."). "Thus, record evidence supported the FCC's findings …." *New Edge Network*, 461 F.3d at 1113.

The FCC also knew of the concerns with a standard that gives electric utilities "an incentive to avoid, or at least delay, meaningful rate reductions simply by alleging ambiguous or illusory 'benefits.'" Frontier Comments at 7 (June 15, 2017) (IER 145). Indeed, the only decision on the merits of an electric utility's allegation of "competitive benefits" confirmed that they did not exist. *See Verizon Va.*, 32 FCC Rcd at 3750. In that proceeding, the FCC's Enforcement Bureau found that the electric utility's allegations were "overstated," *id.* at 3758 (¶ 18), and that the utility had not quantified any competitive benefit or "remotely justif[ied] the difference between the rate [the ILEC] pays and the rate that [C]LECs pay to attach to [the electric company's] poles," *id.* at 3758–59 (¶¶ 17, 20).

A clear directive was thus essential to avoid "more of the same prolonged and expensive disputes that have delayed ILEC rate reductions and diverted scarce resources that could have been invested in broadband deployment during the six years since the 2011 Pole Attachment Order recognized an ILEC right to just and reasonable rates." USTelecom Reply Comments at 7 (July 17, 2017) (IER 61). By adopting a presumption, the FCC left open the possibility—as it did in the *2011 Order*—that there may be "*potential differences*" that justify a different rate for ILECs, as commenters contended. *See 2011 Order*, 26 FCC Rcd at 5333, 5335 (¶¶ 214, 216 n.654) (emphasis added) (quoted at Pet'rs Br. at 49); *see also 2018 Order* ¶ 124 (ER 64) (quoted at Pet'rs Br. at 47) ("joint use agreements *may* provide benefits to [I]LECs that are not typically found in pole attachment agreements between utilities and other telecommunications attachers" (emphasis added)). The FCC simply clarified that the electric utility must back up its allegation with more than its own, self-serving say-so. Doing so was lawful, reasonable, and entirely necessary to counteract the electric utilities' ongoing effort to preserve artificially high rental rates that have "undoubtedly inhibited broadband deployment in the United States." USTelecom Comments at 7 (June 15, 2017) (RER 192); *see also Southern Co. II*, 313 F.3d at 584–85 ("The possibility that a utility can present information [rebutting the presumption] makes it clear that the rule is not facially unreasonable.").

C. The FCC Reasonably Presumed That The Same "Just And Reasonable" Rate Should Apply To Comparable Attachers.

The FCC's decision that "similarly situated attachers should pay similar pole attachment rates for comparable access," *2018 Order* ¶ 123 (ER 63), follows directly from its statutory duty to ensure that ILECs, CLECs, and cable companies pay a "just and reasonable" pole attachment rate, 47 U.S.C. §§ 224(a)(4), (b)(2). Absent evidence of current-day real-world competitive differences among attachers, the "just and reasonable" rate is a comparable one. This will "'significantly reduce the marketplace distortions and barriers to the availability of new broadband facilities and services that arose from disparate rates.'" *AEP*, 708 F.3d at 189 (quoting *2011 Order*, 26 FCC Rcd at 5302 (¶ 151)). And it is most certainly a "reasonable" interpretation of the statute, even if Petitioners think it is not "the only possible interpretation." *Barr*, 929 F.3d at 1179–80 (quoting *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009)).

Petitioners seek to avoid the FCC's reasonable interpretation of Section 224 by repeating two already rejected arguments. *First*, Petitioners argue that, because Section 224(f) treats ILECs differently than CLECs with respect to pole access rights, Section 224(b)(1) should be construed to also treat ILECs differently with respect to "just and reasonable" rates. *See* Pet'rs Br. at 53–54. But this difference "embraces ILECs rather than excludes them" from the "just and reasonable" rate requirement. *AEP*, 708 F.3d at 187. Section 224 sets out a series of distinct rights.

See 2011 Order, 26 FCC Rcd at 5332 (¶ 212). Section 224(b)(1) grants one set of entities (cable companies and "provider[s] of telecommunications service," a term that includes ILECs) the right to just and reasonable rates, terms, and conditions for pole attachments. Section 224(f) then grants a different set of entities (cable companies and "telecommunications carrier[s]," a term that does not include ILECs) a specific right of nondiscriminatory access to poles owned by ILECs and electric utilities. This just means that "ILECs [are] in the position that cable television stations occupied between 1978 and 1996: open to the benefits of § 224(b) but with no explicit right to nondiscriminatory access." *AEP*, 708 F.3d at 188. It does not mean that the "just and reasonable" rate requirement of Section 224(b) cannot be consistently applied to all covered entities—ILECs, CLECs, and cable companies.

Second, Petitioners argue that the FCC's reading is at odds with Section 224 because the statute specifies two rate formulas—one for "cable television system[s]," 47 U.S.C. § 224(d), and another for "telecommunications carriers," 47 U.S.C. § 224(e). They contend the FCC cannot define an ILEC's right to a "just and reasonable" rate based on one of these formulas because the statute did not expressly apply either to ILECs. *See* Pet'rs Br. at 51–53. "This conclusion has no foundation in the plain language" of the statute. *See Gulf Power*, 534 U.S. at 335. As the Supreme Court explained: "The sum of the transactions addressed by the

rate formulas … is less than the theoretical coverage of the Act as a whole." *Id.* at 336. And the FCC must "set a just and reasonable rate" for all attachments within its jurisdiction, including attachments that are not expressly covered by one of the formulas. *Id.* at 337. It may certainly set that "just and reasonable" rate in a way that eliminates disparities with the specified formulas, particularly because doing so is consistent with the pro-competitive purpose of the statute. *See 2011 Order*, 26 FCC Rcd at 5329 (¶ 206); *Ameren*, 865 F.3d at 1013 ("the statute permits, but does not require, the [rates] to diverge.").

D. The FCC Fully Supported Its 2018 Rate Reforms With Record Evidence And Valid Policy Choices.

The FCC's 2018 rate reforms reasonably and appropriately "build[ ] on" the 2011 and 2015 rate reforms, *see, e.g.*, *2018 Order* ¶ 129 (ER 67), and are not in any way "erratic" or "irreconcilable" with them, *see* Pet'rs Br. at 56. Instead, the record includes substantial evidence that the FCC's further action was needed to ensure "that similarly situated attachers … pay similar pole attachment rates for comparable access." *2018 Order* ¶¶ 123–26 (ER 63–65).

The FCC expected that its *2011 Order* would "minimize the difference in rental rates paid for attachments that are used to provide voice, data, and video services, and thus … help remove market distortions that affect attachers' deployment decisions." *2011 Order*, 26 FCC Rcd at 5295 (¶ 126). This, in turn, would "enable consumers to benefit through increased competition, affordability,

and availability of advanced communications services, including broadband," and would "also improve[ ] the ability of different providers to compete with each other on an equal footing, better enabling efficient competition." *Id.*

But the anticipated rate reductions did not materialize. Instead, the FCC received substantial evidence that "'electric utilities continue to charge pole attachment rates significantly higher' than the rates charged to similarly situated telecommunications attachers." *2018 Order* ¶ 123 (ER 63) (citation omitted). Survey data showed that ILECs paid electric utilities higher rates after the *2011 Order*, as their average rate increased from $26.00 to $26.12 per pole, on average. *Id.* ¶ 125 (ER 64–65); *see also* USTelecom Letter, Attachment at 2 (Nov. 21, 2017) (RER 263). Further exacerbating the competitive disparity, ILECs' competitors paid lower rates since the *2011 Order*. *See* USTelecom Letter, Attachment at 3 (RER 264); *see also 2018 Order* ¶ 125 (ER 64–65). Survey data showed that "the weighted average regulated rate paid by CLEC attachers for attachments to ILEC poles has *decreased over 15* percent from $4.45 in 2008, to $3.75 today." USTelecom Letter, Attachment at 3 (RER 264). ILECs were thus in a worse competitive position after the *2011 Order* than before. As attachers, the pole attachment rates they paid increased. But as pole owners, the pole attachment rates they charged their competitors decreased. *See 2018 Order* ¶¶ 125–26 (ER 64–65).

The FCC's previous approach failed to result in meaningful rate relief for ILECs because it relied on private negotiations between companies that were not in an "equivalent bargaining position" given their widely disparate pole ownership numbers. *See 2011 Order*, 26 FCC Rcd at 5329 (¶ 206). Thus "[d]espite the Commission's intention to level the playing field for the pole attachment rates ILECs pay vis-à-vis cable operators and other competitors, this has not occurred through the negotiations contemplated in the 2011 Order." CenturyLink Comments at 22 (June 15, 2017) (IER 107). Where there is a pole ownership imbalance, ILECs generally lack "the leverage to renegotiate their agreements with [electric utilities] to change those rates." AT&T Letter at 4 (July 23, 2018) (IER 24). The record also showed that this pole ownership imbalance continues to grow. *2018 Order* ¶ 126 (ER 65). In 2011, the FCC found that electric utilities had about a 2-to-1 pole ownership advantage over ILECs. *See 2011 Order*, 26 FCC Rcd at 5329 (¶ 206). By 2017, the imbalance increased to 3.2 to 1 in FCC-regulated states. *See* USTelecom Letter, Attachment at 7 (RER 268).

As a result, "further reforms [we]re necessary to ensure the presence of greater rate parity among all categories of broadband providers." USTelecom Comments at 3 (June 15, 2017) (RER 188). Commenters asked the FCC "to afford ILECs the same type of mandatory and automatic rate relief that is enjoyed by their competitors." CenturyLink Letter at 5 (July 23, 2018) (IER 17). They explained

that "[a]ny ambiguity in the application of the just and reasonable ILEC rate will provide [electric utilities] with an ongoing incentive to refuse to provide competitively neutral rates until the Commission orders the [electric utility] to do so under each individual existing agreement." USTelecom Letter at 5 (Mar. 22, 2018) (IER 30). Indeed, the case-by-case approach adopted in 2011 "led to repeated disputes between [I]LECs and utilities over appropriate pole attachment rates." NPRM ¶ 44 (ER 155). The disputes were "cumbersome and time-consuming," increasing costs for ILECs and delaying the intended rate relief. *See* CenturyLink Comments at 21 (June 15, 2017) (IER 106); *see also* Frontier Comments at 5 (June 15, 2017) (IER 143) ("Frontier has been forced into litigation or formal proceedings in more than two dozen different instances" since the *2011 Order*); USTelecom Comments at 3 (June 15, 2017) (RER 188) (The approach adopted in 2011 "has proven to be unwieldy, ineffective and has burdened ILEC attachers and the Commission with an unnecessary and cost and time-prohibitive complaint-based framework"). At a minimum, more certainty was needed to "focus the parties' negotiations by cabining the range of rates at issue." Verizon Comments at 14 (June 15, 2017) (IER 191).

The FCC opted for a compromise approach in its *2018 Order*, "establish[ing] a presumption that may be rebutted, rather than a more rigid rule," and converting the preexisting telecom rate into a "hard cap" on the rate that

electric utilities and ILECs may negotiate. *See, e.g.*, *2018 Order* ¶¶ 126, 129 (ER 65, 67). This compromise approach was neither arbitrary nor capricious. *See* Pet'rs Br. at 54–58. It was a reasonable application of the statute that was incremental to, and consistent with, the FCC's *2011 Order*. *See* Section I.B, *supra*. And contrary to Petitioners' argument, it ensures that electric utilities *are* fully compensated for use of space on their poles. *See* Pet'rs Br. at 57–58. The preexisting telecom rate is "a higher rate than the regulated rate available to [CLECs] and cable operators." *See 2011 Order*, 26 FCC Rcd at 5337 (¶ 218). As the FCC explained, these lower regulated rates—*i.e.*, the new telecom and cable rates—are just and reasonable and "fully compensatory to utilities." *Id.* at 5321 (¶ 183 & n.569). As a result, the preexisting telecom rate will "account for particular arrangements that provide net advantages to [I]LECs relative to cable operators or telecommunications carriers," and ensure that electric utilities are appropriately compensated for the incremental costs associated with ILECs' use of their poles. *See id.* at 5337 (¶ 218).

The FCC's rate reforms are backed by other strong policy considerations as well. They should accelerate needed rate relief by "provid[ing] further certainty within the pole attachment marketplace, and help[ing] to further limit pole attachment litigation." *2018 Order* ¶ 129 (ER 67). And they should finally provide the "greater rate parity between [I]LECs and their telecommunications

competitors [that] 'can energize and further accelerate broadband deployment.'" *Id.* ¶ 126 (ER 65) (citation omitted). As the FCC accurately found eight years ago, "actions to reduce input costs [for broadband service], such as pole rental rates, can expand opportunities for investment." *2011 Order*, 26 FCC Rcd at 5330 (¶ 208). The FCC had ample evidence that electric utilities thwarted those rate reductions, requiring further action. Indeed, "[n]ow, more than ever, access to this vital [utility pole] infrastructure must be swift, predictable, safe, and affordable, so that broadband providers can continue to enter new markets and deploy facilities that support high-speed broadband." *2018 Order* ¶ 1 (ER 2). Petitioners' challenge of the 2018 rate reforms must be rejected.

II. The FCC Reasonably Enhanced Its Self-Help Remedy To Incentivize Timely Pole Access.

Petitioners' challenge to the FCC's enhanced self-help remedy also lacks merit. *See* 47 C.F.R. §§ 1.1411(e)(2), (i)(2); *2018 Order* ¶¶ 96–108 (ER 47–54). The strengthened remedy was neither unprecedented nor unexpected. It was squarely within the FCC's authority and designed to respect the rights and safety of all attachers, including electric utilities, while ensuring the timely pole access that is needed to effectively and efficiently expand broadband service.

First, Petitioners argue that the FCC lacked jurisdiction to apply the self-help remedy to the electric space on a pole because electric facilities are not included in Section 224(a)(4)'s definition of "pole attachment." *See* Pet'rs Br. at

35–38. But the FCC's self-help remedy is "designed to facilitate timely and non-discriminatory access *to poles*" and thus "falls well within the Commission's jurisdiction." *2018 Order* ¶ 100 (ER 49) (emphasis added). The FCC is required to ensure that pole access is provided at "just and reasonable" "rates, terms, and conditions." 47 U.S.C. §§ 224(b)(1), (f)(1). And "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." *See 2018 Order* ¶ 100 n.355 (ER 49–50) (quoting *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Order and Further Notice of Proposed Rulemaking, 25 FCC Rcd 11864, 11873 (2010)).

As a result, the FCC has routinely regulated pole access where the electric facilities on the pole may be impacted. The FCC has "clarif[ied] that blanket prohibitions on pole top access are not permitted," over the objection of electric utilities that sought to reserve that space for their exclusive use. *See 2011 Order*, 26 FCC Rcd at 5250 (¶ 19). The FCC has also adopted make-ready timelines that apply "above the communications space" where electric facilities may require rearrangement to accommodate a new attacher. *See id.* at 5253 (¶ 23). And the FCC held that access to a pole may not be denied if the "'new attacher could be accommodated by rearranging existing attachments or with conventional attachment techniques to the same extent that the utility uses them.'" *See Gulf*

Power Co. v. FCC, 669 F.3d 320, 324 (D.C. Cir. 2012) (citation omitted). The FCC thus had authority to require the electric utility to rearrange its own facilities to make space for a new attacher. *Id.* It certainly also has authority to provide a remedy where the electric utility fails to do so.

Second, Petitioners argue that the enhanced self-help remedy "came as a complete surprise to many affected parties." Pet'rs Br. at 34 n.7. Not so. The FCC sought "comment on potential remedies, penalties, and other ways to incent utilities, existing attachers, and new attachers to work together to speed the pole attachment timeline," and asked "whether the Commission should adopt rules that would allow new attachers to use utility-approved contractors to perform 'routine' make-ready work and also to perform 'complex' make-ready work … in situations where an existing attacher fails to do so," NPRM ¶¶ 13–14 (ER 145).

Some electric utilities argued that any approach involving contractors performing make-ready should "apply only to the communications space on the poles and not the utility space." *See* Edison Electric Comments at 19 n.18 (June 15, 2017) (ER 472). Other electric utilities argued that "[t]o the extent an alternative pole attachment process is adopted—regardless of whether it involves expanded use of qualified contractors by new attachers or a broader [one-touch make-ready] process—the Commission must ensure that this process is limited to work in the communications space." *See* Midwest Utilities' Comments at 33 (June

15, 2017) (ER 243). The FCC's self-help rule, therefore, could not have been a "surprise," *see* Pet'rs Br. at 34 n.7, because the FCC "assembled a record on the issue of self-help above the communications space and received comments and additional filings from both those in favor and opposed to the idea," *2018 Order* ¶ 97 n.340 (ER 48).

Third, Petitioners argue that the FCC did not point to "any change in the facts that could rationally support" its expansion of the self-help remedy. *See* Pet'rs Br. at 42. Of course, a change in facts is not required to sustain the FCC's expanded self-help remedy; "it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better." *FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2009); *accord Ctr. for Biological Diversity v. Zinke*, 868 F.3d 1054, 1061 (9th Cir. 2017) ("Agencies may change course."); *New Edge Network*, 461 F.3d at 1113 (noting that *Chevron* deference applies even to "an agency's reversal of position"). That standard was certainly satisfied here; the expanded self-help remedy "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." *2018 Order* ¶ 87 (ER 44). And, in any event, the facts since 2011 *did* support an expansion of the self-help remedy. Since then, communications companies have "safely installed thousands of pole top wireless

attachments," such that they "are no longer the unusual event that utilities were claiming before 2011." Crown Castle Comments at 18 (June 15, 2017) (RER 126). But the lack of a self-help remedy for the electric space proved to be "a significant impediment to timely make-ready." *Id.* at 18–19 (RER 126–27). Commenters explained that it had become "increasingly common," *id.* at 19 (RER 127), that "[t]he 'self-help' remedy provides no protection for an attacher" because it does not apply "if the utility needs to move its own equipment and does not do so within the 60-day make-ready period," American Cable Comments at 44 (June 15, 2017) (RER 52). The FCC thus had new reasons to give electric utilities further incentive to provide timely pole access.

Finally, Petitioners argue that the expanded self-help remedy could "endanger public or worker safety or the reliability of the electric grid." *See* Pet'rs Br. at 38–39. But the FCC took "several steps to address these important issues." *2018 Order* ¶ 99 (ER 48–49). It retained longer deadlines for make-ready above the communications space. *Id.* It set standards for the pre-approved contractors that can complete the self-help work. *See* 47 C.F.R. § 1.1412(c). It required advance notice to electric utilities so that they can perform the work instead. *2018 Order* ¶ 99 (ER 49). It gave electric utilities a right to be present when the pre-approved contractor completes the self-help work. *Id.* And—perhaps most importantly—the FCC made sure that electric utilities can avoid the use of self-

help by completing make-ready on time or after they are given advance notice of self-help. *Id.* The FCC's enhanced self-help remedy should be affirmed.

III. The FCC Reasonably Sought To Expedite Deployment Through Other Operational Reforms.[7]

A. The FCC's Rules On Preexisting Violations Do Not Violate Section 224(f).

Petitioners also challenge the new rules clarifying that "[a] utility may not deny [a] new attacher pole access based on a preexisting violation not caused by any prior attachments of the new attacher." 47 C.F.R. § 1.1411(c)(2); *see also id.* § 1.415(b) ("A utility may not prevent an attacher from overlashing because another existing attacher has not fixed a preexisting violation."). Petitioners argue that the FCC lacked statutory authority to issue the rules, citing 47 U.S.C. § 224(f).

Section 224(f)(1) requires a utility to "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." 47 U.S.C. § 224(f)(1). Section 224(f)(2) creates a limited exception to the general rule of non-discriminatory access by permitting utilities to "deny … access to [their] poles, ducts, conduits, or rights-of-way, on a nondiscriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable

[7] USTelecom did not address the issues addressed in this Section in the FCC proceeding and takes no position on them here.

engineering purposes." *Id.* § 224(f)(2). Utilities do not enjoy "unfettered discretion" to deny access under Section 224(f)(2). *Southern Co. I*, 293 F.3d at 1348–49. Rather, the FCC may adopt reasonable limitations on a utility's ability to invoke capacity, safety, reliability, and engineering concerns with a new attachment, lest the purpose of the general right be undermined. *See id.*

Here, the preexisting-violations rules do not violate Section 224(f)(2). As the FCC's order makes clear, the rules simply 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" when the poles "were out of compliance prior to the new attachment." *2018 Order* ¶ 121 (ER 62). The rules require utilities and existing attachers to correct preexisting violations in a timely manner so that a new attacher can access the pole; they do *not* require utilities to allow unsafe attachments.

The new rules respond to a specific problem—namely, that utilities were frequently requiring new attachers to either fix preexisting problems on poles at their own expense or forgo access indefinitely. *2018 Order* ¶¶ 121–22 (ER 62–63). The FCC reasonably determined that the proper solution is for utilities or existing attachers to correct the preexisting violations, not just to deny access to new attachers and leave poles in an unsafe condition. Likewise, the FCC reasonably determined that the cost of correcting violations should be borne by

either the entity that caused the problem or the entity that owns the pole, not the new attacher. "[A]s the utilities will be the primary beneficiaries of efforts to modernize their facilities, it is logical for the FCC to mandate that they bear some share of the costs" associated with bringing their own poles into compliance with relevant safety standards. *Southern Co. I*, 293 F.3d at 1352.

Petitioners contend that the new rules will "endanger[ ] the safety of life and property." Pet'rs Br at 25. That is hyperbole. In the proceedings below, Petitioners themselves recognized that the rules "seem[ ] to put the onus on the electric utility to push forward with correcting the violation" when a new attacher requests access. Georgia Power, et al. Letter at 5 (July 26, 2018) (ER 943). The rules forbid a utility from leaving a pole in an unsafe condition and denying access "solely based on safety concerns arising from a pre-existing violation." *2018 Order* ¶ 122 (ER 63). In that circumstance, "[s]imply denying new attachers access prevents broadband deployment and does nothing to correct the safety issue." *Id.*

In any event, the new rules are a reasonable exercise of the FCC's authority to interpret Section 224(f) and "regulate the rates, terms, and conditions for pole attachments." 47 U.S.C. § 224(b)(1); *see Chevron*, 467 U.S. at 843. Congress did not define the phrase "reasons of safety," and therefore left a "gap in the statutory scheme" for the FCC to fill. *Cf. Southern Co. I*, 293 F.3d at 1348 (the phrase

"insufficient capacity" in Section 224(f)(2) is ambiguous). The new rules reasonably balance utilities' authority to deny access for "reasons of safety" with their larger obligation to provide access to their poles, and hence are a proper exercise of the FCC's discretion.

In short, the preexisting-violations rules do not violate Section 224(f)(2) because they merely require utilities and existing attachers to fix violations on a pole, and do not require utilities to allow unsafe attachments. Instead, the rules are a permissible interpretation of Section 224(f).

B. The FCC's Rules On Overlashing Are Also Lawful.

Next, Petitioners challenge the new rules on overlashing. Overlashing is a technique whereby a provider attaches additional wires, cables, or equipment to its own or a third party's existing attachment. *See Southern Co. II*, 313 F.3d at 578 (describing overlashing as a "technique whereby a telecommunications provider attaches a wire to its own . . . [or another party's] existing wires"); Verizon FNPRM Reply Comments at 18 (Feb. 16, 2018) (IER 50) (explaining that "overlashing practice for many years has included not only fiber but also cable television amplifiers, splice boxes, optical nodes, Wi-Fi antennas, and other equipment").

The FCC has long forbidden utilities from requiring attachers to seek pre-approval before they overlash their equipment. *See 2018 Order* ¶ 115 n.418 (ER

57–58). The new rules merely clarify that utilities may require attachers to give them advance notice of overlashing. *See* 47 C.F.R. § 1.1415(c); *2018 Order* ¶¶ 115–20 (ER 57–62). The rules also clarify that utilities may not use advance-notice requirements to impose unnecessary burdens on overlashers that would be akin to applications for permission to overlash. *2018 Order* ¶ 119 (ER 61). These rules, too, are reasonable and readily upheld.

1. Petitioners' Challenge To Section 1.1415(c) Is Not Ripe And Fails In Any Event.

The FCC's new overlashing rules, codified at 47 C.F.R. § 1.1415, provide that if a "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." 47 C.F.R. § 1.1415(c). The overlasher must then "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." *Id.* According to Petitioners, this language could be interpreted to give the overlashing attacher, not the utility, the last word on whether the overlash would "create a capacity, safety, reliability, or engineering issue." If that is so, Petitioners say, it is inconsistent with utilities' ability to deny access under the exception in Section 224(f)(2).

As a threshold matter, Petitioners' challenge is not ripe because the FCC has not yet addressed this purported ambiguity in Section 1.1415(c). "Ripeness

doctrine seeks to 'prevent the courts from entangling themselves in abstract disagreements over administrative policies, and also to protect administrative agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" *Habeas Corpus Resource Ctr. v. U.S. Dep't of Justice*, 816 F.3d 1241, 1252 (9th Cir. 2016) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49 (1967)) (alterations omitted). To determine whether a challenge is ripe, a court "must consider: (1) whether delayed review would cause hardship to the [petitioners]; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented." *Id.* (internal quotation marks omitted).

Here, each of these considerations suggests that Petitioners' challenge is not ripe. Delayed review will cause no hardship to Petitioners, since they can litigate any ambiguity in Section 1.1415(c) in future proceedings at the FCC and then seek judicial review of the agency's decision. Judicial intervention here would interfere with the FCC's authority to interpret its own regulations in the first instance. *See Auer v. Robbins*, 519 U.S. 452, 461–62 (1997). And reviewing courts would benefit from further development of this issue in concrete factual settings—that is, situations where a utility and attacher cannot agree on an overlashing proposal.

For all of these reasons, it would be premature for this Court to rule on the merits of Petitioners' challenge.

If the Court does address this issue on the merits, then Petitioners' challenge still fails. As discussed, Section 224 authorizes the FCC to fill statutory gaps regarding how and when utilities may deny access under Section 224(f)(2). *See Southern Co. I*, 293 F.3d at 1348. And here, regardless of whether the utility or overlashing attacher gets the final say on an overlashing proposal, the other party may file a complaint with the FCC asking the agency to decide if the proposal should be allowed to go forward. *See* 47 C.F.R. § 1.1401 *et seq.*; Pet'rs Br. at 29 (recognizing that if the utility makes "the final binding decision," its decision would be "subject to FCC review through the agency's complaint process"). Accordingly, the scenario Petitioners foresee—a utility trying to stop an overlasher from making its poles unsafe, and the overlasher unilaterally rejecting the utility's legitimate concerns—will never come to pass, since utilities may always ask the FCC to step in. And if the FCC "unreasonably rejects" utilities' complaints, they may still "seek judicial review." *Southern Co. I*, 293 F.3d at 1349. That is enough to protect utilities' rights under Section 224(f)(2). *See id.*

In sum, Petitioners' challenge to the new rule allowing attachers to respond to a utility's concerns with overlashing is not ripe for judicial review. But if the

Court reaches the merits, it should hold that the new rule is a reasonable exercise of the FCC's discretion to interpret and implement the Pole Attachment Act.

2. The FCC Reasonably Prohibited Utilities From Imposing "Quasi-Application" Requirements On Overlashing And Charging Fees.

Although the FCC clarified that utilities may require up to 15 days' advance notice of overlashing, it further specified that they may not impose "quasi-application or quasi-pre-approval requirements, such as requiring engineering studies." *See 2018 Order* ¶ 119 n.444 (ER 61). The FCC also prohibited utilities from charging a fee "for the utility's review of the proposed overlash." 47 C.F.R. § 1.1415(c); *2018 Order* ¶ 116 (ER 59). Petitioners argue that these decisions were arbitrary and capricious and therefore invalid, but Petitioners are wrong.

The FCC may reasonably adopt a rule under the Pole Attachment Act on the ground that the rule "limits the financial burden on telecommunications providers and therefore encourages growth and competition in the industry." *Southern Co. II*, 313 F.3d at 581. Here, the FCC concluded that allowing utilities to impose extensive paperwork obligations under the guise of notice requirements would impose excessive costs on attachers and "unduly slow deployment with little offsetting benefit." *2018 Order* ¶ 119 n.444 (ER 61). Further, requiring attachers to submit extensive paperwork, including engineering studies and detailed specifications about the overlashed equipment, is "unnecessary because the

overlasher is ultimately responsible for any necessary repairs subsequently discovered by the pole owner." *Id.* In addition, utilities may "perform an engineering analysis of [their] own" if they believe one is necessary. *Id.* This logical reasoning was more than sufficient to justify the FCC's decision.

In *Southern Co. II*, the D.C. Circuit upheld a previous version of the FCC's overlashing rules even though, unlike the current rules, the previous version did not explicitly allow utilities to require prior notice of overlashing. *See* 313 F.3d at 582. The rules showed "due consideration for the utilities' statutory rights and financial concerns," and reasonably balanced those concerns "with the efficiency gains that overlashing brings to the [telecommunications] industry." *Id.* So too here, where the FCC gave utilities even *more* protection by explicitly allowing them to require prior notice.

Petitioners' argument that the FCC should allow them to charge fees for reviewing overlashing proposals fails for similar reasons. The FCC determined that "such fees will increase the costs of deployment." *2018 Order* ¶ 116 (ER 59). And the new rule does not require utilities to bear more than their fair share of the costs of maintaining their poles. In fact, utilities need not incur any costs *at all* when an attacher provides them notice, since nothing requires utilities to prepare engineering studies or otherwise supervise the attachers' work. As Petitioners concede, the FCC's one-touch-make-ready rules—which Petitioners do not

challenge—also require utilities to bear their own costs if they choose to review attachers' work on their poles. *See id.* ¶ 116 n.430 (ER 59); Pet'rs Br. at 33. That the FCC did the same thing for overlashing was not arbitrary and capricious.

The new overlashing rules were well-reasoned and fully within the FCC's statutory authority to regulate the "rates, terms, and conditions for pole attachments." 47 U.S.C. § 224(b). This Court should uphold them.

CONCLUSION

For the foregoing reasons, the Petition for Review should be denied.

Respectfully submitted,

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August 29, 2019

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit R. 32-1, that this brief complies with the type-volume requirements of Ninth Circuit R. 32-2(b) because it contains 12,814 words, as determined by the word count feature of Microsoft Word, excluding the portions of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface in 14-point Times New Roman font.

August 29, 2019

/s/ *Christopher S. Huther*
Christopher S. Huther

This Certificate is also submitted on behalf of Respondent-Intervenor Verizon, which concurs in its content. *See* Ninth Circuit Rule 25-5(e).

STATEMENT OF RELATED CASES

The *Order* on appeal has not previously been the subject of review by this Court or any other court. All petitions for review of this *Order* have been consolidated before this Court under either *City of Portland v. FCC*, No. 18-72689, or *Sprint Corp. v. FCC*, No. 19-70123, as appropriate, and are being briefed pursuant to the Briefing Order for the cases.

August 29, 2019

/s/ *Christopher S. Huther*
Christopher S. Huther

This Statement is also submitted on behalf of Respondent-Intervenor Verizon, which concurs in its content. *See* Ninth Circuit Rule 25-5(e).

CERTIFICATE OF SERVICE

I hereby certify that I caused to be filed electronically the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 29, 2019. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ *Christopher S. Huther*
Christopher S. Huther

This Certificate is also submitted on behalf of Respondent-Intervenor Verizon, which concurs in its content. *See* Ninth Circuit Rule 25-5(e).