

use of additional resources. Finally, because the remedy takes effect automatically, the benefit is immediate, and does not depend on the time- and resource-consuming complaint process.¹⁴⁶

51. As many attachers argue, time is of the essence for the success of their businesses.¹⁴⁷ Utilities allege, however, that they face many impediments to accomplishing make-ready work.¹⁴⁸ We find that permitting this self-help remedy should address both sets of concerns. Moreover, we find this to be a practical solution. The record shows that contractors already work for utilities to perform surveys and make-ready work in the communications space on a regular and professional basis, and presumably can perform the same activities for attachers.¹⁴⁹

52. We are not persuaded by contentions that use of contractors is impractical or unduly burdensome.¹⁵⁰ We agree that the statutory obligation to provide access to poles places some burden on pole owners. It is, however, a burden that Congress found appropriate to place on utilities in order to facilitate the critical delivery of video, telecommunications, and other communications services, including broadband, and one that the courts have upheld. We find no persuasive evidence in the record that the burdens on utilities of attachers' use of contractors are significant or that utilities are unable to work around the other impediments they claim. For example, pole owners argue that agreements limit the *utilities'* ability to hire outside contractors, but those agreements do not and cannot restrict who the attachers hire.¹⁵¹ We also reject the argument that attachers' use of outside contractors exposes utilities to liability for substandard work.¹⁵² The point of utility oversight of utility-authorized contractors is to ensure that the work meets utility engineering requirements. We also find unpersuasive the contention by electric utilities that qualified contract workers are unavailable.¹⁵³ A shortage of qualified *electric* workers is irrelevant to the availability of qualified engineers to perform surveys or workers qualified to perform make-ready work in the communications space. Moreover, our requirement that attachers use contractors that the utility has approved should substantially limit concerns about contractor qualifications.

¹⁴⁶ See Peter McGowan, New York Public Service Commission, Panel Discussion at the FCC Pole Attachments Workshop (Sept. 28, 2010), *video available at* <http://reboot.fcc.gov/video-archives> (at approximately 33 minutes) (stating that since adopting rules, the NY Comm'n has seen relatively few complaints).

¹⁴⁷ See, e.g., Centurylink Comments at 35; Charter Comments at 22; CTIA Comments at 13.

¹⁴⁸ See, e.g., Oncor Comments at 25 (arguing that utilities should not be made into on-demand contractors); Verizon Comments at 39 (stating that, when it is a joint user, it cannot dictate how the utility pole owner processes applications or completes make-ready work); Ameren *et al.* Comments at 11; AT&T Comments at 32; Coalition Comments at 70–71 (all requesting indemnification and protection from liability).

¹⁴⁹ See, e.g., Oncor Comments at 22; Florida IOUs Comments at 31.

¹⁵⁰ See, e.g., Verizon Comments at 39–40; Coalition Comments at 23–24, 49, 52 (arguing that collective bargaining agreements prohibit work by outside personnel); Oncor Comments at 45–46 (arguing that there is a shortage of qualified contractors); Idaho Power Comments at 6 (arguing that training contractors would be burdensome); NRECA Comments at 11–12 (arguing that electric utilities are unable to assess competence of communications contractors).

¹⁵¹ See, e.g., Coalition Comments at 49 (“Many utilities like NSTAR are parties to collective bargaining agreements that prohibit the hiring of outside contractors in certain circumstances.”); USTelecom Comments at 21–22 (arguing that the use of outside contractors may be subject to existing labor obligations) Verizon Comments at 39–40 (arguing that many incumbent carriers have unionized workforces and Verizon’s labor agreements typically restrict Verizon’s ability to use outside contractors for make-ready work).

¹⁵² APPA Comments at 27 (arguing that use of outside contractors expose utilities to liability for the violation of state regulations due to overloading and substandard work performed by contractors outside of the utilities’ control).

¹⁵³ Coalition Comments at 23–24; Oncor Comments at 45–46 (arguing that there is a shortage of qualified contractors).

53. Some utilities contend that contractors do not share their long-term commitment to safety and reliability, but rather will owe their allegiance to the new attacher, whose overriding objective is to attach to the poles as quickly as possible.¹⁵⁴ Others object more generally that contractors do not work to utility standards, so their work may undermine safety and reliability.¹⁵⁵ We recognize that surveys and make-ready pertain directly to the capacity, safety, reliability, and sound engineering of the poles, and therefore trigger legitimate concern to all pole owners.¹⁵⁶ Indeed, competent performance of surveys and make-ready concerns not only utilities but also existing attachers and the general public, all of which rely on utility poles for delivery of vital services. We therefore adopt rules to address concerns relating to safety, reliability, and general competence.

54. *List of Authorized Contractors.* Attachers that utilize the self-help remedy above must use contractors that the utility has approved. We require utilities to identify and publish a list of authorized contractors for requesting entities to choose from when hiring a contractor after a timeline deadline has been missed.¹⁵⁷ Utilities have discretion about which contractors to include, and the listed contractors must be made available to attachers without discrimination. If a utility fails to list approved contractors, attachers may use the “same qualifications” standard that we have previously adopted.¹⁵⁸ Pursuant to this default rule, the contractor must have the “same qualifications, in terms of training, as the utility’s own workers,” and this means the qualifications that are appropriate for a utility worker or contractor performing the particular work, such as survey or make-ready in the communications space.¹⁵⁹

55. Requiring utilities to prepare and publish a list of authorized contractors ensures that only qualified contractors work on utility poles. We do not adopt more particular proposed regulations governing contractor qualifications.¹⁶⁰ For example, in the *Further Notice*, the Commission proposed that contractors that have worked for the utility should automatically be included on that utility’s list.¹⁶¹ Utilities argue persuasively, however, that the list should not automatically include such contractors because the contractor may have performed poorly, or been hired only out of necessity to restore power.¹⁶² We therefore conclude that utilities may use their own best judgment in listing contractors they currently view as qualified. We also decline to adopt the proposal requiring each utility to post the qualifications it uses to evaluate contractors for approval and certification. Commenters have convinced us that doing so is unnecessary in light of the substantial duties on utilities to act reasonably and nondiscriminatorily.

¹⁵⁴ See, e.g., Coalition Comments at 49–50; Idaho Power Comments at 7; Oncor Comments at 39.

¹⁵⁵ See, e.g., Coalition Comments at 14–15, 48; Idaho Power Comments at 5–6; Oncor Comments at 43 citing Utilities Telecom Council White Paper at 15–16 (66% of reporting utilities did not permit licensees to hire third parties for field surveys and 78% of utilities did not allow licensees to hire third parties for make-ready).

¹⁵⁶ See 47 U.S.C. § 224(f)(2); *Local Competition Order*, 11 FCC Rcd at 16081, para. 1176 (acknowledging that, in some circumstances, incumbent LECs have legitimate safety and engineering concerns).

¹⁵⁷ 47 C.F.R. § 1.1422(a). For allegations of non-compliance with the estimate stage of the timeline, our traditional complaint regulations would apply. See 47 C.F.R. §§ 1.1403, 1.404.

¹⁵⁸ See *Further Notice*, 25 FCC Rcd at 11892, para. 64; see *Local Competition Order*, 11 FCC Rcd at 16083, para. 1182 (setting requirements for contractors that attach facilities to poles).

¹⁵⁹ *Local Competition Order*, 11 FCC Rcd at 16083, para. 1182.

¹⁶⁰ See *Further Notice*, 25 FCC Rcd at 11891–92, paras. 61–65.

¹⁶¹ *Further Notice*, 25 FCC Rcd at 11891–92, para. 62; see MetroPCS Comments at 14–15.

¹⁶² Coalition Comments at 58.

56. Utilities inquire whether they may require listed contractors to meet the requirements they impose on contractors that they employ as virtual extensions of full-time utility personnel.¹⁶³ Any requirements that a pole owner wishes to place on listed contractors must be just, reasonable, and nondiscriminatory.¹⁶⁴ We decline to reach *a priori* conclusions about specific requirements. If a requirement advances and is tailored narrowly to ensure safety, reliability, and generally applicable engineering practices, it is likely reasonable. If a requirement is customary and prudent whenever a contractor is hired, such as requiring a service bond and license to practice, it is likely reasonable. If a requirement governs aspects of the business relationship, such as requiring a contractor to give priority to the utility over the attacher, such requirement probably does not pass a “reasonable and nondiscriminatory” test. Beyond these rules of reason, the record does not support specific conclusions, or indicate that utilities need further guidance in order to identify authorized contractors.

57. Attachers may only select a contractor that is not on the utility’s list of authorized contractors if the utility fails to develop and keep up-to-date a list of contractors.¹⁶⁵ In this way, and in keeping with our goal of accelerating the pole attachment process to facilitate broadband deployment, we do not permit inaction by a utility to bring progress to a halt. Off-list contractors may not be hired, however, merely because the listed contractors are already engaged.¹⁶⁶ We find this solution less cumbersome than those we proposed in the *Further Notice*, and adequate for our purpose of encouraging utilities to develop and maintain lists of approved contractors to perform survey and make-ready work.¹⁶⁷ While we do not expressly adopt a minimum number of contractors as the threshold for the list, we emphasize that maintaining a reasonably sufficient and up-to-date list of contractors is a key element of this obligation. What constitutes a reasonable number may vary, depending upon the number of potential contractors that serve the area. We will monitor industry practices in this area, including through our complaint process.

58. *Utility Oversight.* To guard against substandard work or undue haste, we also require attachers to provide the utility with an opportunity for a utility representative to accompany and consult with the attacher and the attacher’s authorized contractor whenever the contractor visits a pole.¹⁶⁸ Consistent with the nondiscrimination requirement in section 224(f)(1), the utility representative may monitor a contractor’s work, and may insist that the work meet utility specifications for safety and

¹⁶³ See, e.g., Oncor Comments at 46–47 (maintaining that many approved contractors have contractual agreements with utilities setting out specific requirements); Coalition Comments at 53–54 (proposing specific contractor safeguards).

¹⁶⁴ 47 U.S.C. § 224(b)(1) (rates, terms, and conditions required to be just and reasonable), (f)(1) (right of nondiscriminatory access).

¹⁶⁵ See ITTA Comments at 4; Level 3 Comments at 12–13 (both arguing that any pole owner should have the right to certify and approve contract workers, provided that it establishes and maintains a certification and approval process).

¹⁶⁶ See, e.g., Oncor Comments at 45–46 (arguing that approved contractors may have contracts with utilities especially during storm restoration); Coalition Comments at 23–24 (contending that there is a shortage of qualified contractors).

¹⁶⁷ See *Further Notice*, 25 FCC Rcd at 11891–92, para. 62 (proposing that utilities be required to list any contractors that the utility itself uses, and to post or otherwise share with attachers the standards the utility uses to evaluate contractors for approval); ITTA Comments at 4; Level 3 Comments at 12–13 (arguing that any pole owner should have the right to certify and approve contract workers, provided that it establishes and maintains a certification and approval process); ACA Comments at 8 (supporting proposal to allow attachers to use outside contractors to perform surveys and make-ready work if a utility has failed to perform its obligations within the timeline).

¹⁶⁸ See *infra* App. A (including rule 1.1422(b), which we adopt today).

reliability, including requirements that may exceed NESC standards.¹⁶⁹ The utility oversight should protect against any attacher pressure to cut corners, and mitigates concerns about the contractor's potential conflict of interest.¹⁷⁰

59. Consistent with the statutory distinction of section 224(f)(2), we authorize electric utilities, but not incumbent LECs, to render a final attachment decision. Specifically, if the pole owner is an electric utility, it retains the statutory right to deny access where there is insufficient capacity or for reasons of safety, reliability, or generally applicable engineering purposes.¹⁷¹ We recognize that no matter how rigorous a survey is carried out, disputes over interpretation or changed circumstances can arise in the field. Where the attacher and an electric utility's representative disagree, they are obligated to try to reach an accommodation within a reasonable amount of time, and disputes should be escalated within the companies when no agreement is reached on the ground.¹⁷² If the electric utility and the attacher are unable to reach agreement, or to find a suitable alternative, the electric utility may make the final decision on such a matter, subject to Commission review through our complaint process.

60. Although the Commission has long recognized that incumbent LECs are interested in pole capacity, safety, reliability, and sound engineering,¹⁷³ we find that there are legal and policy reasons to distinguish between utilities and incumbent LECs. We therefore do not permit incumbent LECs to render final attachment decisions. First, the statute authorizes only utilities, not incumbent LECs, to deny access for reasons such as lack of capacity or safety concerns.¹⁷⁴ Moreover, the Commission has recognized that, unlike electric utilities, incumbent LECs may view other attachers as rivals. Since the initial adoption of access requirements, the Commission has determined that objections from incumbent LECs based on alleged engineering concerns "will be scrutinized very carefully, particularly when the parties concerned are in a competitive relationship."¹⁷⁵ We therefore decline to give incumbent LECs veto power over the engineering judgments of a contractor selected in accordance with our rules.

61. Some utilities support our decision to allow attachers to use contractors under the circumstances and with the conditions set forth above.¹⁷⁶ However, other utilities argue that, even with

¹⁶⁹ See Oncor Comments at 47–48 (seeking assurance that contractors will follow its standards when these are more stringent than the NESC, including Texas-specific stringent specifications); *Local Competition Order*, 11 FCC Rcd at 16070–72, paras. 1148–50.

¹⁷⁰ See, e.g., Idaho Power Comments at 7 (arguing that contractors will be forced into conflicts between attachers' interest in timely make-ready work and utilities' interest in safe and reliable service); Oncor Comments at 39 (arguing that Oncor must maintain control over the performance of survey and make-ready on its poles to maintain quality control, and that attachers' desires for speed to market provide an incentive for "blow and go" construction); Coalition Comments at 14–15, 48 (arguing that only electric utilities do the surveys and make-ready work safely and properly, and that attachers' contractors increase safety violations, unauthorized attachments, and shoddy attacher workmanship).

¹⁷¹ 47 U.S.C. § 224(f)(2) (providing that electric utilities may deny access where there is insufficient capacity or for reasons of safety, reliability, or generally applicable engineering purposes).

¹⁷² See *infra* Part IV, para. 100.

¹⁷³ *Local Competition Order*, 11 FCC Rcd at 16081, paras. 1176–77.

¹⁷⁴ 47 U.S.C. § 224(a)(1), (a)(5), (f)(2).

¹⁷⁵ *Local Competition Order*, 11 FCC Rcd at 16081, para. 1177.

¹⁷⁶ See, e.g., Ameren *et al.* Comments at 13 (stating that outside contractors should perform make-ready work if and only if the pole owner has failed to perform such work within the timeline); Florida IOUs Comments at 30–31 (stating that make-ready in communications space is handled without significant involvement from electric utilities).

the above protections, the use of contractors presents safety and quality concerns.¹⁷⁷ We find these objections unpersuasive. The record, as well as the experience of some states, provides ample basis for concluding that the combination of utility authorization and oversight that our rules provide for, along with allowing utilities to make final decisions about capacity, safety, reliability, and sound engineering, will adequately address these concerns and ensure the public interest in a safe and reliable network. We find that the rules we adopt to facilitate access, combined with the conditions and protections we impose, strike the proper balance between encouraging deployment of facilities and safeguarding the network.

4. Limitations and Exceptions

62. As proposed in the *Further Notice* and in response to the practical concerns of utilities in processing pole attachment requests in conjunction with their other critical work, we adopt rules that limit or create exceptions to the timelines in appropriate circumstances. Utilities may process pole attachment requests, whether in the communications space or above, according to size limits based either on a percent of a utility's poles in a state or an absolute number of poles in a state, whichever is lower, and utilities may treat all in-state requests from a single attacher within a 30-day interval as a single request. Also, as proposed in the *Further Notice*, we adopt rules and standards for "stopping the clock" (*i.e.*, for tolling the timeline).¹⁷⁸

63. *Limit on Order Size.* Based on the record before us and successful state models, we adopt limits on the size of attachment requests that are subject to the timelines we adopt today.¹⁷⁹ The limits on size of attachment requests apply both to attachments in the communications space and the longer timeline for wireless attachments above the communications space. Specifically, we apply the timeline to orders up to the lesser of 0.5 percent of the utility's total poles within a state or 300 poles within a state during any 30-day period. For larger orders—up to the lesser of 5 percent of a utility's total poles in a state or 3,000 poles within a state—we add 15 days to the timeline's survey period and 45 days to the timeline's make-ready period, for a total of 60 days. For in-state orders greater than 3,000 poles, we require parties to negotiate in good faith regarding the timeframe for completing the job. An attacher always has the ability to submit requests of up to 3,000 poles in any 30-day period, so an attacher could start a 9,000 pole order within a single state through the timeline over three successive months.

64. We rely in part on the successful experience of Utah, which has implemented comparable limits on the number of orders that are subject to a timeline.¹⁸⁰ Like the plan we adopt today, Utah applies a different timeline at the 0.5 percent/300 pole level than at the 5 percent/3,000 pole level.¹⁸¹ Vermont, by contrast, relies exclusively on percentages as a gating mechanism for large orders, and

¹⁷⁷ See, e.g., Oncor Comments at 40 (stating that Oncor is willing to permit approved contractors in the communications space but unwilling for attachers' contractors to perform critical surveys and make-ready).

¹⁷⁸ *Further Notice*, 25 FCC Rcd at 11887, para. 51 (stopping and restarting the clock).

¹⁷⁹ See, e.g., Utah Admin. Code § R746-345-3(C)(1) (shorter timeframes for orders of 20 or fewer poles); AT&T Comments at 28; TWC Comments at 18; Coalition Comments at 33; Associations Comments at 10–11. *But see* Level 3 Comments at 6–7.

¹⁸⁰ See Utah Admin. Code § R746-345-3(C) (implementing single-attacher batch mechanism and adjusting timeline length to accommodate large orders).

¹⁸¹ For applications that represent greater than 20 poles, but equal to or less than 0.5% of the pole owner's poles in Utah, or 300 poles, whichever is lower, the time for construction is 120 days; for applications equal to or less than 5% of the pole owner's poles in Utah, or 3,000 poles, whichever is lower, the time for construction is 180 days; for applications that represent greater than 5% of the pole owner's poles in Utah, or 3,000 poles, whichever is lower, the times for the above activities will be negotiated in good faith. Utah Admin. Code § R746-345-3(C)(1)–(4).

allows for no comparable ceiling at an absolute number of pole attachments per request.¹⁸² We agree with commenters that a percentage-based system alone could be onerous for larger utilities with very large numbers of poles within a single state, and therefore follow Utah in offering an absolute number alternative.¹⁸³ Although the Vermont and Utah timelines differ somewhat from the timeline we adopt, (e.g., they are somewhat longer overall), we find this approach to be a reasonable method that appropriately scales the work required with the existing resources of the utility.

65. We further find that both the percentage-based caps and the absolute number caps in use in Utah are within the zone of reasonableness suggested in the record. At one end of the proposals, several pole owners propose caps such as 100, 200, or 250 pole attachments per order.¹⁸⁴ At the other end, several attachers suggest limits of 3,000 or even 5,000 poles per month, even for the shortest timeline.¹⁸⁵ The Utah model accommodates both categories and receives favorable comment from both utilities and attachers.¹⁸⁶ We adopt similar caps to Utah's, although our record indicates that the overall timelines should be somewhat shorter than Utah's.¹⁸⁷

66. We find that setting both a numerical cap and a cap based upon the percentage of poles owned in a state is a fair approach, as well as one that is easy to understand and administer.¹⁸⁸ By contrast, we reject less administrable and more subjective proposals, such as capping timeline orders based on the size of a utility's workforce or the complexity of a request.¹⁸⁹ We are not persuaded by those commenters who dispute the assumption that the size of an order correlates to how long it will take to complete the order.¹⁹⁰ We recognize that some pole make-ready projects are more difficult to complete

¹⁸² Vermont has a 120-day deadline to complete make-ready for an attachment request of up to 0.5% of a company's poles, and a 180-day deadline to complete make-ready for an attachment request of 0.5 % to 3 percent of a company's poles. Vermont PSB Rules § 3.708(E)(1).

¹⁸³ See, e.g., Oncor Comments at 11 (stating that Oncor has 2 million poles in Texas); Florida IOUs Reply at 10 (stating that two member companies each have 1.1 million poles).

¹⁸⁴ See, e.g., Coalition Comments at 33 (arguing 45 days is adequate if single orders capped at 250 poles per order among other limitations); AT&T Comments at 28 (arguing that orders for 200 poles or more should be deemed "special orders" not subject to the timeline); Associations Comments at 10–11 (suggesting cap at 100 pole attachments per order).

¹⁸⁵ See, e.g., Level 3 Comments at 6–7 (suggesting cap at 3,000 pole attachments per order); Letter from Alan Fishel, Counsel for Sunesys, LLC to Marlene Dortch, Secretary, FCC, WC Docket No. 07-245 at 9–10 (filed Mar. 11, 2011) (proposing cap at the lesser of 5000 or 5% of a utility's poles).

¹⁸⁶ See, e.g., Coalition Comments at 28–29; CTIA Comments at 10; Qwest Comments at 9 (deeming the Utah system "ideal"). But see EEI/UTC Comments at 25 (arguing that requests for access to a limited number of attachments or to a small percentage of a utility's poles does not mean that a utility can automatically process the request and complete make-ready work in proportionately less time).

¹⁸⁷ See, e.g., *infra* note 200; TWTC/COMPTEL Comments at 10–11; NTELOS Comments at 5–7.

¹⁸⁸ See Qwest Comments at 8–9 (arguing timeframe should permit automatic extensions for large pole attachment requests); Ameren *et al.* Comments at 7–8 (favoring establishment of a maximum number of pole attachment requests that may be submitted per individual permit application); Coalition Comments at 31 (arguing that the total number and size of requests for make-ready within a certain period should be limited to an amount that is reasonable in light of the utility's other responsibilities). But see Sunesys Reply at 11–12 (suggesting that limits are prejudicial to large orders).

¹⁸⁹ See, e.g., Coalition Comments at 30–35 (suggesting that an electric utility should not be required to devote more than 10 percent of its workforce to third-party work, and setting out criteria to distinguish complex make-ready from non-complex make-ready work).

¹⁹⁰ See, e.g., EEI/UTC Comments at 25 (arguing that size-of-order and workforce percentage limits do not mean orders can automatically be processed in proportionately less time); Verizon Comments at 32.

than others, and electric utilities report the size of the order as the primary reason they miss the 45-day survey deadline.¹⁹¹ However, the experience in the states and the scalability of such work supports a correlation between an order's relative size and its expected processing time. We further reject proposals that utilities and attachers should negotiate the size and scope of all access requests;¹⁹² the record demonstrates the problems with an open-ended approach that lacks the certainty and predictability of a timeline with specific caps.¹⁹³

67. As previously described, for purposes of calculating the limit, utilities may aggregate into one order all requests from a single entity within a 30-day period.¹⁹⁴ Capping the size of an order from any single attacher within a 30-day period helps utilities to manage workflow and ensures that utilities can meet incremental goals within each project. When orders from a single attacher are processed on a 30-day rolling basis, the attacher may hire contractors if a deadline for a particular monthly batch is missed. Utilities should undertake to perform smaller orders in a shorter amount of time; as stated when discussing the make-ready stage, a cap that is reasonable for this timeline does not preclude an alternative, shorter, "best practice" timeline for smaller orders.¹⁹⁵ Utilities may not consider the timeline a safe harbor for very small orders, but rather remain subject to section 224(b)(1)'s overall requirement of reasonableness, which includes timeliness in the context of the obligation to provide access to poles.¹⁹⁶ However a utility structures its size and time limits relating to small orders, its policy must be made public and applied without discrimination.

68. *Stopping the Clock.* Emergencies and certain events during the make-ready phase that are beyond a utility's control may legitimately interrupt pole attachment projects, and the *Further Notice* sought comment on how best to reconcile the timeline with this reality.¹⁹⁷ We adopt a "good and sufficient cause" standard under which a utility may toll the timeline for no longer than necessary where conditions render it infeasible to complete the make-ready work within the prescribed timeframe. For example, utilities may toll the timeline to cope with an emergency that requires federal disaster relief, but may not stop the clock for routine or foreseeable events such as repairing damage caused by routine seasonal storms; repositioning existing attachments; bringing poles up to code; alleged lack of resources;

¹⁹¹ Utilities Telecom Council White Paper at 12–13 (finding most frequent cause of survey delays to be the size of the project).

¹⁹² Ameren *et al.* Comments at 7–8 (arguing that utilities should manage the size and scope of access requests); Oncor Comments at 21–22 (arguing that Commission should continue to allow parties to negotiate and enforce contractual terms and course of dealings in this area).

¹⁹³ See, e.g., Alpheus and 360networks NPRM Comments at 2 (arguing that unknown make-ready intervals make it extremely difficult to introduce services or promise timely delivery on potential sales); Cavalier *NPRM* Comments at 6 (arguing that potential customers will not engage a service without knowing when they will begin receiving the service, and stating that some utilities provide Cavalier access within three months while others take more than five times as long).

¹⁹⁴ See Utah Admin. Code § R746-345-3(C).

¹⁹⁵ See, e.g., Coalition Comments at 33; Sunesys Comments at 11; Verizon Comments at 32–33 (arguing that smaller requests do not justify shorter timeframes). *But see, e.g.,* Fibertech Comments at 7–8; Level 3 Comments at 6–7 (arguing that small orders should require shorter timeframes). See also Qwest Comments at 8 (arguing that larger orders need longer timeframes).

¹⁹⁶ *2010 Order*, 25 FCC Rcd at 11873–74, paras. 17–18 (concluding that access to poles must be timely in order to be reasonable). See, e.g., Level 3 Comments at 6–7 (arguing that the proposed timeline should not be construed as a "safe harbor" when an application involves only a small number of poles); Fibertech Comments at 7–8 (stating that the proposed timeframe is unsuited for smaller applications where a customer is within a short distance from the network backbone and where pole attachment application is limited in size); TWC Comments at 18 (proposing that make-ready work for fewer than 20 poles should be complete in 30 days).

¹⁹⁷ *Further Notice*, 25 FCC Rcd at 11887, para. 51.

or awaiting resolution of regulatory proceedings, such as a state public utilities commission rulemaking, that affect pole attachments.¹⁹⁸ Aside from these examples of very serious occurrences that impede make-ready on the one hand, and routine events that do not justify tolling the timeline on the other hand, a utility must exercise its judgment in invoking a clock stoppage in the context of its general duty to provide timely and nondiscriminatory access.¹⁹⁹ An attacher may challenge a utility's failure to either meet its deadline or surrender control of make-ready if a clock stoppage is not justified by good and sufficient cause.

69. Time is of the essence for requesting entities, their investors, and their potential consumers.²⁰⁰ We limit the size of orders subject to the timeline in part to create a manageable workflow that will allow the timeline to absorb occasional interruptions.²⁰¹ Whenever possible, a utility should accommodate a moderate interruption without interruption in the timeline, and if a utility resorts to stopping the clock, its reason for doing so should usually be apparent. For example, Oncor states that the two longest power outages due to weather that its customers have suffered in recent memory lasted six and 10 days.²⁰² Therefore, even assuming that Oncor needed some extra days to return to normal operations after a 10-day storm-related outage, Oncor might have been able to complete attachment requests within the 60-day make-ready period.²⁰³ We recognize, however, that no timeline can absorb all interruptions.²⁰⁴

70. New York allows its timeline to be interrupted for "events beyond the utility's control" and several commenters support this standard.²⁰⁵ We find this standard unsuitably broad for our purposes, however, because every downed pole could presumably be characterized as due to an event beyond the utility's control. Thus, as some commenters correctly note, a "beyond the utility's control" exception could be applied to swallow the rule.²⁰⁶

71. When a utility stops the clock, it must notify the requesting entity and other affected attachers as soon as practicable.²⁰⁷ The clock does not stop until a utility provides notice to all relevant

¹⁹⁸ See EEI/UTC Comments at 22–25 (suggesting clock should stop for, *inter alia*, severe weather conditions, state and local regulatory proceedings, failure of an existing attacher to cooperate, or the need to correct for safety violations).

¹⁹⁹ 47 U.S.C. § 244(f)(1); 2010 Order, 25 FCC Rcd at 11873–74, paras. 17–18 (holding that utilities must perform make-ready promptly and efficiently whether or not a specific rule applies to an aspect of the make-ready process).

²⁰⁰ Local Competition Order, 11 FCC Rcd at 16101, para. 1224 (finding that "time is of the essence"); see, e.g., Centurylink Comments at 35; Charter Comments at 22; CTIA Comments at 13.

²⁰¹ We anticipate that capping timeline orders will leave utilities with enough spare resources to handle the occasional interruption and still stay on schedule.

²⁰² Oncor Comments at 27 (stating that a June 2004 storm caused outages that lasted for ten days and a February 2010 storm caused outages that lasted for 6 days).

²⁰³ It is not suggested that weather events may never be cause for stopping the clock, but rather that, even in the face of severe disruptions, utilities should consider whether or not lost time can be made up over the course of the entire timeline.

²⁰⁴ See, e.g., Ameren *et al.* Comments at 9–10; EEI/UTC Comments at 22–25; Coalition Comments at 30–35; Florida IOUs Comments at 16–17; Sunesys Comments at 14–15. *But see* TWC Reply at 13–14 (arguing that proposed timeline needlessly extends make-ready process).

²⁰⁵ Further Notice, 25 FCC Rcd at 11887, para. 51; see, e.g., Verizon Comments at 9; Coalition Comments at 20–23; Ameren *et al.* Comments at 4.

²⁰⁶ Sunesys Comments at 14; Florida IOUs Comments at 11; TWC Reply at 14–15. *See* Oncor Comments at 29.

²⁰⁷ Sunesys Comments at 9. The utility must notify the same parties that received notice of the initial make-ready deadline.

parties that the deadline must be deferred. Notification may be brief, but must be in writing and include the reason for and date of the stoppage.²⁰⁸ As soon as the reason for the clock stoppage no longer exists, the utility must notify affected entities of the new deadline and the date that the clock will restart. This minimal notice burden on utilities is within the bounds of a utility's duty to provide just, reasonable, and nondiscriminatory access, and any burden on the utility is outweighed by the need for affected entities to receive notice and remain informed.

72. The clock stoppage may be no longer than necessary based on the nature of the event. The clock must restart no later than the date when the utility returns to routine operations.²⁰⁹ Moreover, under the statute, utilities may not discriminate against pole attachment projects.²¹⁰ Utilities state candidly, however, that their highest priority is providing service to their customers.²¹¹ In the aftermath of an emergency, a utility will naturally and reasonably devote its utmost resources to public safety and restoring service. When the utility resumes normal operations, however, nondiscrimination requires a utility to resume pole attachment projects in place with internal work orders in the utility's queue.²¹²

73. In light of the scaled approach to limiting the order size, and the timeline tolling provisions we adopt, we disagree with utilities that argue that the timeline imposes a rigid, "one-size-fits-all" solution that lacks the flexibility utilities need to accommodate pole attachment requests.²¹³ Although we appreciate the complexity of some attachment requests, we find that several measures adequately address this concern. First, the timeline applies to orders that are within the scope of the timeline and subject to the volume cap set forth in this section.²¹⁴ Second, the timeline does not begin to run until engineering protocols and technical standards have been established for the prospective attachments at issue.²¹⁵ We leave utilities free to implement the timeline consistent with our rules. We leave the details of specific application criteria and processes to individual utilities, but the criteria must be reasonable.²¹⁶ For example, some utilities have "detailed permit manuals which explain the application and attachment process," and at least one utility has a "web-based application platform, which provides an on-line, step-by-step, item-by-item description of the application and attachment process."²¹⁷ We do not dictate utility

²⁰⁸ The writing may be sent by email to the recipients.

²⁰⁹ Sunesys Comments at 9.

²¹⁰ 47 U.S.C. § 224(f)(1).

²¹¹ See, e.g., Coalition Comments at 14, 17–18; EEI/UTC Comments at 13–14; Verizon Comment at 29 (arguing that pole owners must prioritize core service).

²¹² See Coalition Comments at 34 (arguing that electric utilities should be able to show compliance by demonstrating that they have scheduled communications company make-ready work as if the attacher were a rate paying customer).

²¹³ See, e.g., NRECA Comments at 9–10 (stating that a one size fits all approach fails to consider the varied circumstances of the pole attachment process); Qwest Comments at 6–7 (arguing against mandating a one-size-fits-all process given the complexity of the pole attachment process, and stating that a timeline must be flexible enough to address realities of the pole attachment process); Idaho Power Comments at 2–3 (arguing that no single set of rules can take into account all of the issues that arise in the context of an attachment).

²¹⁴ See *supra* Part III.A.2; para. 19.

²¹⁵ See *supra* Part III.A.2 (discussing scope of the timeline).

²¹⁶ EEI/UTC Comments at 21; see 47 U.S.C. § 224(b)(2); 2010 Order, 25 FCC Rcd at 11874, para. 18.

²¹⁷ Florida IOUs Comments at 14 (describing various members' application procedures).

implementation procedures.²¹⁸ When we consider these factors together, we reject the contention that the timeline is inflexible.

B. Wireless

74. In the timeline portion of this order, section III.A.1, *supra*, we make clear that our new timeline applies equally to wireline and wireless equipment in the communications space, and a modified version applies to wireless attachments above the communications space. Here, we address two issues that have arisen with regard to wireless attachments regardless of the applicability of a timeline: (1) the section 1.1403(b) requirement that any denials of requests for section 224 access be specific in nature; and (2) the section 224 requirement that attachers be allowed to access the space above what has traditionally been referred to as “communications space” on a pole.

1. Specificity of Denials

75. We clarify that, regardless of whether a utility has a master agreement with a wireless carrier, the specificity requirement of section 1.1403(b) applies to all denials of requests for access. The Commission’s rules require that, when a utility denies a request for access, it must state with specificity its reasons for doing so. Section 1.1403(b) requires that denials of access be confirmed in writing within 45 days of the request.²¹⁹ The utility also “shall be *specific*, shall include all relevant evidence and information supporting its denial, and shall explain how such evidence and information relate to a denial of access for reasons of lack of capacity, safety, reliability or engineering standards.”²²⁰ In the *Further Notice*, the Commission proposed that, where a utility has no master agreement with a carrier for wireless attachments requested, the utility may satisfy the requirement to respond with a written explanation of its concerns with regard to capacity, safety, reliability, or engineering standards.²²¹

76. We agree with those commenters who assert that the proposed standard would be susceptible to abuse.²²² It is not sufficient for a utility to dismiss a request with a written description of its blanket concerns about a type of attachment or technology, or a generalized citation to section 224. Instead, we find that a utility must explain in writing its precise concerns—and how they relate to lack of capacity, safety, reliability, or engineering purposes—in a way that is specific with regard to both the particular attachment(s) and the particular pole(s) at issue. Furthermore, such concerns must be reasonable in nature in order to be considered nondiscriminatory. Concerns that appear to be mere pretexts rather than legitimate reasons for denying statutory rights to access will be given serious scrutiny by the Commission, including in any complaint proceeding arising out of a denial of access. We believe that this clarification regarding the specificity of denials will encourage communication and cooperation between utilities and wireless attachers,²²³ and thereby promote the deployment of and competition for telecommunications and broadband services.

²¹⁸ *Further Notice*, 25 FCC Rcd at 11881, para. 33; 47 U.S.C. § 224(b), (f); *see, e.g.*, Coalition Comments at 15–17, 30–31, 88; Oncor Comments at 42; Verizon Reply at 26. The statute requires nondiscriminatory access, which forecloses procedures and requirements that are not available to all requesting entities. *See* 47 U.S.C. § 224(f)(1).

²¹⁹ 47 C.F.R. § 1.403(b).

²²⁰ *Id.* (emphasis added).

²²¹ *Further Notice*, 25 FCC Rcd at 11887–88, para. 52.

²²² *See, e.g.*, MetroPCS Comments at 12; NextG Comments at 11–14; DAS Forum Comments at 9–12.

²²³ *See, e.g.*, NextG Comments at 11–14 (explaining how open communication and good-faith negotiation can help overcome initial concerns about wireless antennas).

2. Pole Tops

77. We clarify that section 224 allows wireless attachers to access the space above what has traditionally been referred to as “communications space” on a pole.²²⁴ On previous occasions, the Commission has declined to establish a presumption that this space may be reserved for utility use only, and has stated that the only recognized limits to access for antenna placement are those contained in the statute.²²⁵ Yet wireless attachers assert that pole top access is persistently challenged by pole owners, who often impose blanket prohibitions on attaching to some or all pole tops.²²⁶ Blanket prohibitions are not permitted under the Commission’s rules.²²⁷ We reject the assertions of some utilities that our rule regarding pole tops will create a “*de facto* presumption in favor of pole top attachments” or otherwise “restrict an electric utility’s right to deny access for reasons of safety and reliability.”²²⁸ Instead, we clarify that a wireless carrier’s right to attach to pole tops is the same as it is to attach to any other part of a pole. Utilities may deny access “where there is insufficient capacity, and for reasons of safety, reliability, and generally applicable engineering purposes.”²²⁹ The record in this proceeding is replete with examples of various types of pole top attachments that have been successfully accommodated, both for wireless attachers and for the utilities themselves.²³⁰

C. Use of Contractors for Attachment

78. As proposed in the *Further Notice*, we resolve an ambiguity in the Commission’s rules regarding the use of contractors to attach facilities “in the proximity of electric lines” after make-ready has been completed and attachment permits issued. Specifically, we clarify that “proximity of electric lines” in this context includes work that extends into the safety space that separates the communications space from the electric space, but does not include work among the power lines. While an attacher may use a contractor to attach a wireless antenna above the communications space and associated safety space, we find that an attacher may only use a contractor that has the proper qualifications and that the utility has approved to perform such work.²³¹ Utilities are not required to keep a separate list of contractors for this purpose, but must be reasonable in approving or disapproving contractors. Accordingly, as we explain

²²⁴ See 47 U.S.C. § 224(f).

²²⁵ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket No. 96-98, Order on Reconsideration, 14 FCC Rcd 18048, 19074, para. 72 (1999); *Wireless Telecommunications Bureau Reminds Utility Pole Owners of Their Obligations to Provide Wireless Telecommunications Providers with Access to Utility Poles at Reasonable Rates*, Public Notice, 19 FCC Rcd 24930 (WTB 2004).

²²⁶ See, e.g., DAS Forum Comments at 12–13; NextG Comments at 21. Wireless attachments often require placement at or near the top of the pole in order to efficiently provide distributed antenna systems (DAS) or other wireless services. See, e.g., DAS Forum Comments at 12 (“Pole top installations are typically at the optimal elevation for DAS antennas. If antennas are lower the (wireless) coverage footprint will be too small.”); Letter from William J. Sill, Counsel, ATC Outdoor DAS, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245 (filed Mar. 15, 2011).

²²⁷ 47 C.F.R. § 1.1403(b).

²²⁸ Florida IOUs Reply at 38–40; see Alliance Reply at 62–63.

²²⁹ 47 U.S.C. § 224(f)(2).

²³⁰ See, e.g., Letter from Robert Millar, Senior Regulatory Counsel, NextG, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, GN Docket No. 09-51, at 2 (filed Mar. 14, 2011) (stating that NextG has built over 800 pole top wireless installations in Pennsylvania); Oncor Comments at 33 (stating that Oncor’s poles have approximately 755 wireless attachments from three different attachers).

²³¹ The record indicates that the utilities routinely perform this work themselves because of the location and the type of work involved. See, e.g., Oncor Comments at 40; Florida IOUs Comments at 29.

below, the standard for attachment by a contractor in the communications space remains that of the “same qualifications” as the utility, but any attachment in the electric space must be at the higher utility-approved standard.

79. The Commission has long guaranteed attachers the right to choose the workers they hire to attach their facilities to poles. With regard to contractors, the Commission in 1996 “agree[d] that utilities should be able to require that only properly trained persons work in the proximity of the utilities’ lines,” but held that “we will not require parties seeking to make attachments to use the individual employees or contractors hired or pre-designated by the utility.”²³² Rather, “[a] utility may require that individuals who will work in the proximity of electric lines have the same qualifications, in terms of training, as the utility’s own workers, but the party seeking access will be able to use any individual workers who meet these criteria.”²³³ The Commission reasoned that “[a]llowing a utility to dictate that only specific employees or contractors be used would impede the access that Congress sought to bestow on telecommunications providers and cable operators and would inevitably lead to disputes over rates to be paid to the workers.”²³⁴ In the *Further Notice*, we recognized that the word “proximity” is ambiguous, and could mean either “up to the electric lines” or “among the electric lines.”²³⁵ We proposed that the former reading was the more reasonable choice, and sought comment from interested parties.

80. We find that the phrase “proximity of electric lines” where attachers may engage contractors for attachment means up to and including the safety space, but not among the electric lines, for historical, statutory, and safety reasons. The NESC requires 40 inches of clearance between electric power lines and communications cable on the same pole.²³⁶ Because the *Local Competition Order* does not discuss attachment of facilities above the communications space or endorse in any way attachers’ contractors entering the electric space, we read “proximity of electric lines” to refer to the 40-inch “safety space,” and not to the region above it. Also, as we discuss above, the statute provides electric utilities the right to deny access where there is insufficient capacity or for reasons of safety, reliability, and generally applicable engineering purposes. The *Local Competition Order* considered this provision of the statute to reflect congressional acknowledgment that capacity, safety, reliability and engineering issues raise heightened concerns when electricity is involved, because electricity is inherently more dangerous than communications services.²³⁷ We affirm this interpretation today, and likewise maintain that safety concerns must take priority when communications equipment is installed among or above potentially lethal electric lines. Therefore, we clarify that the longstanding right of attachers to use attachment contractors solely of their own choosing is confined to the communications space and associated safety space.

²³² *Local Competition Order*, 11 FCC Rcd at 16083, para. 1182.

²³³ *Id.*

²³⁴ *Id.* On reconsideration, the Commission reaffirmed this approach. *Local Competition Reconsideration Order*, 14 FCC Rcd at 18079, para. 86.

²³⁵ *Further Notice*, 11 FCC Rcd at 11894–95, para. 69. In the *Further Notice*, the Commission explained that generally, attachments on a pole, from the bottom up, include traditional communications attachments (including space for attachments by incumbent LECs, cable service providers, and other telecommunications service providers), followed by several feet of safety space separating the communications space from the upper space on a pole, traditionally used for the attachment of energized electrical lines. *Id.* at 11894 n.187.

²³⁶ See, e.g., *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, CC Docket No. 78–144, Memorandum Opinion and Second Report and Order, 72 FCC 2d 59, 69–71 (1979) (*Second Report and Order*) (discussing cost allocation of safety space).

²³⁷ *Local Competition Order*, 11 FCC Rcd at 16081, para. 1177.

81. We disagree with Fibertech and others who argue that utility control of the electric space improperly delays attachers “from timely completing their work” in a meaningful way.²³⁸ With regard to attachment of facilities in the electric space, if a utility’s legitimate concern over safety conflicts with an attacher’s concern over timeliness, the statute already resolves the conflict in favor of the utility.²³⁹ Additionally, we agree with MetroPCS that, if a wireless carrier consents to the utility’s specified contractor to work above or among the lines, additional contractors should not be required to work with antenna equipment.²⁴⁰ We agree that a single contractor with the proper qualifications may be all that is needed.

D. Joint Ownership

82. In the *Further Notice*, we proposed to require owners to consolidate authority in one managing utility when more than one utility owns a pole and to make the identity of this managing utility publicly available.²⁴¹ We decline to adopt the proposed rules relating to joint ownership,²⁴² but we clarify and emphasize that we expect joint owners to coordinate and cooperate with each other and with requesting attachers consistent with pole owners’ duty to provide just and reasonable access.²⁴³

83. After careful consideration of the record, we find that the potential benefits of these proposals do not justify the likely costs. We are convinced by evidence in the record that, on balance, consolidating authority in a single managing utility would create substantial administrative burdens for the managing utility.²⁴⁴ The proposed rule would have required joint owners of millions of poles to confer and designate a managing utility, even though the vast majority of those poles would not be subject to pole attachment requests in the near future, if at all. In addition, because the joint owners typically consist of an electric utility and an incumbent LEC, which have different rights under section 224(f)(2) and often have different competitive incentives *vis a vis* a new attacher, there exists a real possibility that it may be difficult to ensure that only the electric utility is actually asserting section 224(f)(2) rights.

84. We emphasize, however, that joint ownership or control of poles should not create or justify a confusing or onerous process for attachers. Thus, for example, we would consider utility procedures requiring attachers to undergo a duplicative permitting or payment process to be unjust and unreasonable.²⁴⁵ Avoiding such duplication might involve, for example, joint owners establishing a single administrative contact point for all pole attachment applications--or joint owners agreeing, and informing the attacher, that one of the owners will be the attacher’s point of contact for a specific pole

²³⁸ See, e.g., Fibertech Comments at 4–5; T-Mobile Comments at 13.

²³⁹ 47 U.S.C. § 224(f)(2).

²⁴⁰ MetroPCS Comments at 15. This responds to a proposal in our *Further Notice* that utilities be required to admit among the power lines contract personnel with specialized communications-equipment training or skills that the utility cannot duplicate, such as work with wireless antenna equipment. *Further Notice*, 25 FCC Rcd at 11894–95, para. 69.

²⁴¹ *Further Notice*, 25 FCC Rcd at 11895–96, paras. 72–73.

²⁴² *Id.*

²⁴³ See 47 U.S.C. § 224; see also *Cable Telecommunications Association of Maryland, Delaware and the District of Columbia, et al. v. Baltimore Gas and Electric Company and Bell Atlantic – Maryland, Inc.*, File No. PA 00-001, Order, 16 FCC Rcd 5447, 5450, para. 7 (Cable Serv. Bur. 2001) (*CTA v. BGE*) (“It is unreasonable to expect attachers to separately negotiate agreements with more than one pole owner for attachment to a single pole that is jointly owned.”). “Joint ownership” also includes situations in which the pole is controlled, if not actually owned, by two entities.

²⁴⁴ See Coalition Comments at 74; ITTA Comments at 6.

²⁴⁵ See *CTA v. BGE*, 16 FCC Rcd at 5450, para. 7.

attachment application or series of applications, for certain types of attachments, or for attachments on certain parts of the pole or in certain geographic areas. If access is denied, the joint pole owners must clearly identify to the attacher which owner is denying access, and on what basis.

85. We also believe that some of the other remedies adopted today will cure or mitigate many of the delays associated with joint ownership and control. In particular, the timeline and the rules on the use of contractors should help to ensure timely access to all poles, including those that are jointly owned or used.²⁴⁶ We will closely monitor the effect of the rules we adopt today and will adjust the framework as appropriate.

E. Other Access Proposals

1. Schedule of Charges

86. We decline to require utilities to make available to attaching entities a schedule of common make-ready charges, and find that the burdens of such a requirement would exceed its benefits. In the *Further Notice*, the Commission suggested that such a schedule could provide transparency to providers seeking to deploy their networks.²⁴⁷ T-Mobile and TWC agree,²⁴⁸ but other commenters point out that make-ready is priced based on specific tasks at specific locations.²⁴⁹ Actual charges vary depending on numerous unique factors, including material and labor costs which fluctuate.²⁵⁰ As such, the price of make-ready does not lend itself well to a fixed schedule of charges.²⁵¹ Plus, many utilities already make information about common charges available upon request.²⁵² Thus, we conclude, on balance, that the limited benefit of this proposal would not outweigh the burdens it would impose on utilities, and we decline to adopt it at this time.

2. Payment for Make-Ready Work

87. In the *Further Notice*, the Commission asked whether it should attempt to align incentives to perform make-ready work on schedule.²⁵³ In particular, it proposed to adopt the Utah rule, under which applicants pay for make-ready work in stages and may withhold a portion of that payment until

²⁴⁶ See *supra* Parts III.A.1; III.A.3.

²⁴⁷ *Further Notice*, 25 FCC Rcd at 11895, para. 71.

²⁴⁸ T-Mobile Comments at 13; TWC Reply at 12–13.

²⁴⁹ See, e.g., Ameren *et al.* Comments at 20 (arguing that a schedule of charges falsely implies that a particular task will always cost a particular amount to complete, regardless of construction circumstances or nuances); Idaho Power Comments at 8 (stating that a uniform schedule of charges fails to consider the unique nature of each pole attachment request); ITTA Comments at 5–6 (stating that there are few “common” fees as costs fluctuate depending on the varied circumstances surrounding different attachments).

²⁵⁰ Other factors that vary the price of make-ready for a specific task at a specific location include the types of equipment required to perform the work, the location of the pole (front lot or rear lot), site conditions, city or county permitting requirements, environmental issues, congested attachments, necessary switching, and necessary tree trim. Florida IOUs Comments at 33–34; see NRECA Comments at 16–17; Ameren *et al.* Comments at 20. The Florida IOUs argue that in order to create a firm price sheet, it would have to price common make-ready charges based on the costliest permutation of potential factors. Florida IOUs Comments at 34.

²⁵¹ See ITTA Comments at 6 (stating that “there are few ‘common’ fees”).

²⁵² See, e.g., Verizon Comments at 36–37; Oncor Comments at 32. Cf. Dairyland Reply at 2 (smaller, non-investor owned utility indicating that creating and keeping current a list of charges could be unduly burdensome); Idaho Comments at 8–9 (same).

²⁵³ *Further Notice*, 25 FCC Rcd at 11895, para. 70.

work is complete.²⁵⁴ It also sought comment on alternatives, including schedules of payments used in comparable situations in other commercial contexts.²⁵⁵

88. Based on the record before us, we decline to adopt the Utah rule or any other schedule of payment for make-ready work at this time. Although a staggered payment system might motivate pole owners to perform make-ready work more quickly, as some commenters point out,²⁵⁶ it would also unfairly expose them to a greater risk of non-payment for make-ready work necessary to accommodate attachers.²⁵⁷ The record contains little evidence that up-front payment is a barrier to telecommunications, cable, or broadband deployment,²⁵⁸ but, as the Coalition indicates, attaching entities frequently lose contracts for new business, change routes or ownership, go out of business, or experience other difficulties that cause make-ready costs to remain unpaid after work has been completed.²⁵⁹ In any of these situations, a utility might be unable to recover its costs if required to accept payment for make-ready work in stages. A staggered payment system would also administratively burden utilities²⁶⁰ and, in some cases, could actually delay the make-ready process.²⁶¹ Moreover, up-front payment is both consistent with the way that utilities charge other customers for construction work,²⁶² and either encouraged or required by a number of state tariffs.²⁶³ For these reasons, we are persuaded that any benefit that might result from the proposed rule likely would be outweighed by its costs.

3. Data Collection

89. We decline to adopt requirements regarding the collection and availability of information about the location and availability of poles, ducts, conduits, and rights-of-way. In the *Further Notice*, we sought comment on the type of data that would be beneficial to maintain, how such data should be collected, the scope of the task, and potential benefits.²⁶⁴ The record before us indicates that the burdens of such a data collection are outweighed by the potential benefits. EEI and UTC, for instance, report that a database of their members' assets would take years and hundreds of millions dollars to create, then

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *See, e.g.*, ACA Comments at 9; TWTC/COMPTEL Comments at 15–16. *But see, e.g.*, Verizon Reply at 35 (asserting that staggered make-ready payments would not provide any incentive for completing make-ready work faster because the timing of make-ready work is often determined by numerous factors that are outside of pole owners' control); HTI Reply at 17 (arguing that installment payments would increase costs for attachers and often delay the completion of make-ready work).

²⁵⁷ *See, e.g.*, Verizon Comments at 28; EEI/UTC Comments at 38; ITTA Comments at 6–7.

²⁵⁸ *See, e.g.*, Sunesys Comments at 19 (“oppos[ing] the Utah rule proposal because it is unfair to utilities”); Verizon Reply at 35 (arguing that staggered payments would not improve access to poles).

²⁵⁹ Coalition Comments at 77.

²⁶⁰ *See, e.g.*, HTI Comments at 17 (“Utilities, unlike contractors, are not in the business of providing construction services and do not have expertise or resources devoted to managing installment payments.”); Oncor Comments at 30.

²⁶¹ *See, e.g.*, EEI/UTC Comments at 38 (asserting that up-front payment streamlines the make-ready process).

²⁶² *See, e.g.*, HTI Reply at 17 (pointing out that utilities would need to halt make-ready work if payments are not received in a timely fashion); Florida IOUs Comments at 32; Coalition Comments at 77.

²⁶³ *See Ameren et al.* Comments at 19–20 (“utility tariffs routinely require payment in advance for the total estimated cost of requested construction”); Alliance Reply at 53–55 (“Electric utilities are also subject to State regulations that can further complicate—or preclude altogether—any such scheme for payment of make ready”).

²⁶⁴ *See Further Notice*, 25 FCC Rcd at 11897, paras. 75–76.

would require annual maintenance.²⁶⁵ Such a data collection would necessarily take significant time for the millions of poles that a single utility can own, and it is not likely that such data for all utilities would be kept sufficiently up-to-date for a prospective attachers to rely on for access and network planning.²⁶⁶ Major events like storms can compromise the integrity of data, as can the activities of unauthorized attachers.²⁶⁷ Moreover, legitimate concerns exist about making critical infrastructure information and proprietary information available to the public,²⁶⁸ and about whether a database would be susceptible to abuse by unauthorized attachers.²⁶⁹ Meanwhile, the record reflects significant doubt—from both utilities and telecommunications providers—that improving the collection and availability of data would have much value to attachers.²⁷⁰ For these reasons, we are not persuaded by those commenters who support the idea of a central database in order to improve tracking of attachments and to cut down on unauthorized attachments.²⁷¹ After considering the record, we find that the burdens associated with an information collection requirement likely outweigh the benefits, and therefore, we decline to adopt such a proposal at this time.

F. Legal Authority

90. We conclude that section 224 authorizes the Commission to promulgate the access rules, we adopt today, including the timeline and its self-effectuating remedy for failure to meet the timeline in the communications space. Through section 224(b)(1), Congress explicitly delegated authority to the Commission to “regulate the rates, terms, and conditions for pole attachments,”²⁷² as well as to develop procedures necessary for resolving complaints arising under the Commission’s substantive regulations, and to fashion appropriate remedies.²⁷³ In addition, section 224(b)(2) directs the Commission to make

²⁶⁵ EEI/UTC Comments at 30–32. For instance, Ameren estimates that it would take approximately 4–5 years and cost \$42 million to inventory two million poles in Missouri and Illinois, and Idaho Power estimates that it would take at least six years and cost nearly \$20 million to field and record data for its 550,000 distribution poles. *Id.* at 31.

²⁶⁶ *See, e.g.*, Florida IOUs Comments at 37; EEI/UTC Comments at 30.

²⁶⁷ *See, e.g.*, Florida IOUs Comments at 37; ITTA Comments at 8–9; Oncor Comments at 55.

²⁶⁸ *See, e.g.*, EEI/UTC Comments at 28–29; Qwest Comments at 14–15.

²⁶⁹ *See* Alliance Reply at 64–65.

²⁷⁰ *See, e.g.*, Verizon Comments at 40–41 (indicating that a national database or reporting requirements would not eliminate the need to file applications, conduct make-ready surveys, or perform make-ready work); USTelecom Comments at 24–25 (describing the Commission’s proposal as “a monumental undertaking without any apparent benefit” and stating that “there is no evidence that a problem currently exists that would be addressed by such a database”).

²⁷¹ *See* T-Mobile Comments at 13–14; TWC Comments at 20.

²⁷² 47 U.S.C. § 224(b)(1); *see Southern Co. v. FCC*, 293 F.3d 1338 (11th Cir. 2002) (finding that the Act does not specify which sorts of concerns constitute the section 224(b)(1) “conditions” of pole attachment but that there was no statutory language that would suggest that physical attachment is outside the scope of “conditions.”) (*Southern Co. I*).

²⁷³ 47 U.S.C. § 224(b)(1). The section also creates exceptions to our authority for railroads, cooperatives, federal entities, and state entities, 47 U.S.C. § 224(a)(1), as well as substantive reverse preemption for states who choose to regulate attachments themselves. 47 U.S.C. § 224(c).

rules to carry out the provisions of this section.²⁷⁴ Congress also gave more specific substantive guidance for access to poles in section 224(f): “just and reasonable” access must also be “nondiscriminatory.”²⁷⁵

91. The language and structure of the statute, as well as Commission precedent, support our conclusion. As we recognized in the *Further Notice*, the “Commission’s expectation that ‘swift and specific enforcement procedures’ would satisfy the need for timely access to pole attachments”²⁷⁶ has not been met. While we affirm that “no single set of rules can take into account all of the issues that can arise in the context of a single installation or attachment,”²⁷⁷ a set of broadly applicable rules in discrete areas will help to “ensure that the terms and conditions of access to pole attachments are just, reasonable, and nondiscriminatory.”²⁷⁸ In particular, in relation to the remainder of section 224, the broad language of section 224(b)(1) and (b)(2) indicate a delegation of comprehensive rulemaking authority over all attachment issues, including access. Where a statute specifically provides for promulgation of rules to carry out the provisions of the statute, rules that further define and flesh out the content of the statute are valid exercises of agency authority.²⁷⁹ We interpret section 224(b)(1)’s parallel construction in its first sentence to contain two separate Congressional directives: to make rules *and* to adopt procedures for adjudication.²⁸⁰ Further, section 224(b)(2) specifically mandates that the Commission must “prescribe *by rule* regulations to carry out the provisions of *this section*,”²⁸¹ evincing Congressional intent to give the Commission rulemaking authority over the entirety of section 224.²⁸² The relatively narrower scope of other subsections of section 224 supports our construction. For example, section 224(e)(1) only applies “when the parties fail to resolve a dispute over such charges,” but section 224(b)(1) contains no such limitation.²⁸³ Because section 224(b)(2) applies the Commission’s rulemaking authority to the entire section, the choice necessarily lies with the Commission whether to implement the Congressional directive in section 224(f) via rulemaking, adjudication, or both. The access rules we adopt today fit squarely within our statutory authority over terms and conditions for pole attachments pursuant to section 224(f).

92. This reading of section 224 is consistent with Commission and judicial precedent. Although the Commission adopted a predominantly adjudicatory model for regulating access to poles in

²⁷⁴ 47 U.S.C. § 224(b)(2).

²⁷⁵ See 47 U.S.C. § 224(b)(1) (just and reasonable rates, terms, and conditions), (f) (nondiscriminatory access to poles); *Local Competition Order*, 11 FCC Rcd at 16067, para. 1143 (discussing the “reasonableness of particular conditions of access”).

²⁷⁶ *Further Notice*, 25 FCC Rcd at 11875, para. 22 (quoting *Local Competition Order*, 11 FCC Rcd at 16101–02, para. 1224).

²⁷⁷ *Local Competition Order*, 11 FCC Rcd at 16068, para. 1145; see *Further Notice*, 25 FCC Rcd at 11875, para. 22.

²⁷⁸ *Further Notice*, 25 FCC Rcd at 11875, para. 22.

²⁷⁹ See, e.g., *Gulf Power*, 534 U.S. at 339 (“agencies have authority to fill gaps where the statutes are silent.”) (citation omitted); *Shaker Med. Ctr. Hosp. v. Sec’y of Health and Human Serv.*, 686 F.2d 1203, 1209 (6th Cir. 1982) (“It is within the power of an agency to promulgate prophylactic regulations which are broad in scope in order to effectuate the purposes of enabling legislation.”); *Camp v. Herzog*, 104 F. Supp. 134, 137–38 (D.D.C. 1952).

²⁸⁰ See 47 U.S.C. § 224(b)(1) ([T]he Commission shall regulate the rates, terms, and conditions for pole attachments, . . . and shall adopt procedures necessary and appropriate to hear and resolve complaints . . .”).

²⁸¹ 47 U.S.C. § 224(b)(2) (emphasis added). The Communications Assistance for Law Enforcement Act struck “[W]ithin 180 days from the date of enactment of this section the Commission” and inserted “The Commission”, expanding the reach of this particular subsection. Communications Assistance for Law Enforcement Act, Pub. L. No. 103-414, § 304, 108 Stat. 4279, 4297 (1994).

²⁸² See TWC Reply at 20–21 (arguing that FCC has broad authority pursuant to 224(b)(1)–(2), (f)).

²⁸³ Compare 47 U.S.C. § 224(b)(1), with 47 U.S.C. § 224(e)(1).

the *Local Competition Order*, the Commission also adopted access rules of general applicability, many of which were upheld by the court in *Southern Company*.²⁸⁴ Adopting a case-by-case approach while the Commission gained greater subject matter expertise in pole attachments hardly precludes adoption of further substantive rules years later.²⁸⁵ In fact, the Commission expressly anticipated the possible need to revisit its adjudicatory model and impose such regulations: “We will monitor the effect of this [case-specific] approach and propose more specific rules at a later date if reasonably necessary to facilitate access and the development of competition in telecommunications and cable services.”²⁸⁶ For these reasons, we are not persuaded by commenters who argue that we lack rulemaking authority or substantive statutory authority under the section 224 to adopt access rules here.²⁸⁷

93. We also reject the argument raised by some commenters that the Commission improperly applied both the “just and reasonable” and “nondiscriminatory” standards to access in the *Further Notice*,²⁸⁸ and that only the latter standard actually applies.²⁸⁹ Section 224(b)(1) applies the “just and reasonable” standard to *all* rates, terms, and conditions of pole attachments, including the conditional access regime set up under section 224(f).²⁹⁰ Section 224(f) is a broad mandate of “nondiscriminatory” access with a specific carve-out for certain conditions where electric utilities may deny access (*i.e.*, insufficient capacity, safety, reliability, and generally applicable engineering purposes).²⁹¹ While the Commission continues to accord substantial leeway to electric utilities with regard to the practical application of this important exception,²⁹² the Commission has not and could not delegate away the authority to ensure “just and reasonable” and “nondiscriminatory” terms and conditions under which utilities may grant or deny access.²⁹³ Interpreting section 224(f) as a Congressional delegation of

²⁸⁴ See *Local Competition Order*, 11 FCC Rcd at 16071–74, paras. 1151–58, *aff’d in part, rev’d in part*, *Southern Co. I*, 293 F.3d 1338; see also TWTC/COMPTEL Reply at 20–22.

²⁸⁵ See *supra* note 279.

²⁸⁶ *Local Competition Order*, 11 FCC Rcd at 16067, para. 1143. As we explain above, the market has changed significantly since the *Local Competition Order* and the limitations of the case-specific approach have become apparent, requiring more substantive guidance from the Commission. See Part II, paras. 19–20. *But see* Verizon Comments at 29 (arguing that nothing has changed to warrant a departure from the “guideline” approach”).

²⁸⁷ See, e.g., Oncor Comments at 16–19; Coalition Comments at 69, 81–82; EEI/UTC Comments at 2, 5, 13, 34–35; Florida IOUs Comments at 57 (arguing that the Commission’s jurisdiction limited to adjudication); Coalition Comments at 7 (“It is no coincidence that Congress left to electric utilities the sole right to determine whether access to their poles, ducts, conduits or rights-of-way should be denied ‘for reasons of safety, reliability and generally applicable engineering purposes.’ This is the function of utilities, not the FCC.”); EEI/UTC Comments at 2–5, 13, 34 (arguing that the Commission may not regulate before access is requested or a complaint is filed).

²⁸⁸ Florida IOUs Comments at 12 (citing *Further Notice*, 25 FCC Rcd at 11875–76, 11879–80, paras. 22, 25, 30).

²⁸⁹ See, e.g., Florida IOUs Comments at 12 (arguing that section 224(f) is the only portion of the statute that regulates access); EEI/UTC Comments at 34–35 (stating that the FCC’s authority to review engineering practices is limited to evaluating whether they are nondiscriminatory).

²⁹⁰ NCTA Reply at 2; Sunesys Reply at 6–7. *But see* Oncor Comments at 33; Alliance Reply at 51 (arguing that the FCC has no jurisdiction over make-ready timelines).

²⁹¹ 47 U.S.C. § 224(f)(2).

²⁹² *Local Competition Order*, 11 FCC Rcd at 16070, para. 1148 (recognizing that a utility normally will have its own operating standards that dictate conditions of access).

²⁹³ See *Southern Co. I*, 293 F.3d at 1348 (“Petitioners’ construction of the Act, which claims that the utilities enjoy the unfettered discretion to determine when capacity is insufficient, is not supported by the Act’s text.”)

authority to utilities to define the terms and conditions of attachment²⁹⁴ would trump the grant of rulemaking authority to the Commission in section 224(b)(1) and (2), and would render such determinations effectively unreviewable by the Commission.²⁹⁵ Such a reading of the statute would also render section 224(b)(2) meaningless.²⁹⁶

94. Similarly, we disagree with certain commenters that the statute precludes the Commission from regulating because there are joint use or joint ownership agreements between various entities mentioned in the statute²⁹⁷ or that the presence of non-regulated attachment (such as a municipality's traffic light) on poles somehow places these poles outside of Commission authority.²⁹⁸ As previously stated, the Commission has the authority to regulate, by rule, the terms and conditions of pole attachments;²⁹⁹ a utility cannot escape the Commission's jurisdiction simply by attaching attachments that are outside the reach of the statute or by entering into a joint use contract.³⁰⁰ A joint use contract gives the parties to the contract some degree of control over the pole, and "control" is the statutory floor for Commission jurisdiction, regardless of whether a non-regulated attachment is also located on the pole.³⁰¹

95. We also disagree that the location of the term "usable space" in the rates portion of the statute precludes the Commission from adopting rules regarding wireless attachments,³⁰² or that make-ready rules are merely capacity expansion under another name.³⁰³ Because section 224(a)(4) defines "pole attachment" as "any attachment" and does not contain a substantive spatial limitation, the Commission retains the authority to interpret the types of, and spatial requirements for, pole attachments under its broad authority in section 224(b).³⁰⁴ Nor is a rule regarding make-ready an attempt at mandating capacity expansion. As the court noted in *Southern Company*, mandating the construction of new capacity is beyond the Commission's authority.³⁰⁵ Here, however, we merely regulate the process by which a new attacher may gain access to existing capacity on a pole. The "terms and conditions" of pole attachment encompass the process by which new attachers gain access to a pole, and setting deadlines and remedies for that process in no way constitutes a mandate to expand capacity.³⁰⁶

²⁹⁴ See Oncor Comments at 18–19 ("The Commission should leave everyday access issues in the hands of the electric utility pole owners . . ."); Florida IOUs Reply at 40 (adopting a wireless rule would "unduly constrain an electric utility's right to implement and enforce non-discriminatory access standards").

²⁹⁵ 47 U.S.C. § 224(b)(1)–(2).

²⁹⁶ *United States v. Menasche*, 348 U.S. 528, 538–39 (1955) ("The cardinal principle of statutory construction is to save and not to destroy. It is our duty to give effect, if possible to every clause and word of a statute rather than to emasculate an entire section . . .").

²⁹⁷ Cf. Coalition Comments at 72–73 (arguing that FCC cannot designate managing utility on jointly owned poles).

²⁹⁸ Oncor Comments at 26.

²⁹⁹ See AT&T Comments at 2 (arguing that the FCC has authority to regulate pole attachments by incumbent LECs).

³⁰⁰ See 47 U.S.C. § 224(a)(1).

³⁰¹ See 47 U.S.C. § 224(a)(1) (requiring either ownership or "control" of a pole to fall within the ambit of the statute).

³⁰² See Florida IOUs Reply at 38–40.

³⁰³ See Florida IOUs Comments at 13; Oncor Comments at 16–19. See also *Further Notice*, 25 FCC Rcd at 11871–73, paras. 14–16.

³⁰⁴ See 47 U.S.C. § 224(a)(4), (b).

³⁰⁵ See *Southern Co. I*, 293 F.3d at 1346.

³⁰⁶ See 47 U.S.C. § 224(b)(1).

96. Finally, we reject contentions that the Commission has not developed a sufficient administrative record to support the instant rulemaking.³⁰⁷ We have engaged in significant record-building and information-gathering through a variety of means to ensure broad participation by the public and interested parties and to serve as a sound foundation for the conclusions we reach here. For example, the Commission has sought comment on these issues multiple times, reviewed tens of thousands of pages of comments, convened public workshops, and participated in many *ex parte* meetings.³⁰⁸ A wide variety of commenters have submitted evidence to the record frequently on all sides of the issues we address through these rules,³⁰⁹ and we believe we have gathered sufficient evidence to carry our burden of articulating a “rational connection between the facts found and the choice made.”³¹⁰

IV. IMPROVING THE ENFORCEMENT PROCESS

A. Revising Pole Attachment Dispute Resolution Procedures

97. In the *Further Notice*, we sought comment on whether the Commission should modify its existing procedural rules governing pole attachment complaints.³¹¹ Several commenters expressed the view that new procedures and processes are not needed or that existing procedures can be improved to address any problems.³¹² A number of commenters, however, maintained that the Commission should do more to encourage parties to resolve their disputes themselves prior to filing a complaint with the Commission.³¹³

98. We agree that parties ought to make every effort to settle their disputes informally before instituting formal processes at the Commission. Section 1.1404(k) of the Commission’s rules requires a complainant to “include a brief summary of all steps taken to resolve the problem before filing,” and, if no such steps were taken, to “state the reason(s) why it believed such steps were fruitless.”³¹⁴ In our view, however, that rule does not adequately ensure that the parties will engage in serious efforts to resolve disputes prior to the initiation of litigation. That may be because individuals with sufficient decision-making authority are not involved in the discussions; other times it is because parties prematurely forego such discussions with the thought that they would be futile.

99. One commenter suggested that the Commission consider adopting an “executive level negotiation” requirement similar to that imposed by the California Public Utility Commission

³⁰⁷ See, e.g., APPA Reply at 24 (arguing that there is an insufficient record to establish comprehensive access timelines); Verizon Reply at 32 (similar); Coalition Comments 26–28 (stating that the Commission lacks the extensive record generated by various state commissions).

³⁰⁸ See *supra* Parts I–II.

³⁰⁹ See, e.g., TWTC/COMPTEL Comments at 11–12 (noting that “pole owners take many months to complete make-ready work and often refuse to agree to any deadlines in pole attachment contracts”); DAS Forum Comments at 8–9 (stating that utilities have used section 224(f) to effect blanket denials for access to poles); Sunesys Comments at 25–26 (characterizing current section 224(f) practices by utilities as burdensome); Level 3 Comments at 8–11 (arguing that it is being overcharged).

³¹⁰ *City of Brookings Mun. Tel. Co. v. FCC*, 822 F.2d 1153, 1165 (D.C. Cir. 1987) (quoting *Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156, 168 (1962)).

³¹¹ *Further Notice*, 25 FCC Rcd at 11898, para. 79.

³¹² Coalition Comments at 88–92; Sunesys Comments at 21–22; AT&T Comments at 19–20; Florida IOUs Comments at 41; CTIA Comments at 11–13; Idaho Power Comments at 13; Alliant Comments at 6; Verizon Comments at 43–44; GEMC Reply at 12; EEI/UTC Reply at 38–39; APPA Reply at 35; Verizon Reply at 36–38.

³¹³ CPS Energy Comments at 14; NextG Comments at 26–27; Idaho Power Comments at 13; Alliant Comments at 6; TWTC/COMPTEL Reply at 42–43; Coalition Reply at 15.

³¹⁴ 47 C.F.R. § 1.1404(k).

("CPUC").³¹⁵ As a prerequisite to the CPUC's acceptance of a request for resolution of a pole attachment access dispute, the parties must escalate their dispute to the executive level within each company to attempt good faith efforts at negotiation.³¹⁶

100. We believe a similar requirement should be incorporated into the Commission's rules. Consequently, we are revising Commission rule 1.1404(k) to require that there be "executive-level discussions" (*i.e.*, discussions among individuals who have sufficient authority to make binding decisions on behalf of the company they represent) prior to the filing of a complaint at the Commission. In addition, we encourage parties to meet face-to-face for these executive-level discussions, because our experience shows that in-person meetings create an environment more conducive to reaching agreement than when communications occur only by telephone or written correspondence. The revised rule 1.1404(k) now states:

The complaint shall include a certification that the complainant has, in good faith, engaged or attempted to engage in executive-level discussions with the respondent to resolve the pole attachment dispute. Executive-level discussions are discussions among representatives of the parties who have sufficient authority to make binding decisions on behalf of the company they represent regarding the subject matter of the discussions. Such certification shall include a statement that, prior to the filing of the complaint, the complainant mailed a certified letter to the respondent outlining the allegations that form the basis of the complaint it anticipated filing with the Commission, inviting a response within a reasonable period of time, and offering to hold executive-level discussions regarding the dispute. A refusal by a respondent to engage in the discussions contemplated by this rule shall constitute an unreasonable practice under section 224 of the Act.

101. Further, in our desire to encourage pre-planning and coordination among pole owners and attachers to the greatest extent, and as early in the process, as possible, we will consider in any enforcement proceedings whether such coordination has taken place. Especially in the case of extremely large orders, or in a case of special circumstances (such as poles on tribal lands, environmental sensitivities, new or experimental or unconventional attachments, pendency of special permits), the question of whether attachers and pole owners have coordinated at an early stage will be material in our consideration of whether terms and conditions are just and reasonable.

102. In addition, a number of commenters expressed concern about the length of time it takes for the Commission to resolve pole attachment complaints,³¹⁷ and some advocated the creation of new processes for handling pole attachment complaints.³¹⁸ Although we do not believe that the current record warrants creation of new pole attachment complaint rules, we acknowledge the commenters' concern. We believe that the new processes adopted elsewhere in this Order will have the effect of expediting the pole access process. And, to the extent that access disputes remain a problem, we will make every effort

³¹⁵ NextG Comments at 26–27. *See* Coalition Reply at 15 ("the ability to take the dispute to the next level in the [other party's] organization would be useful").

³¹⁶ CPUC Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service, Dec. No. 98-10-058 (Oct. 22, 1998).

³¹⁷ *See, e.g.*, Level 3 Comments at 17; Comcast Comments at 30–32; Charter Comments at 23; Florida IOUs Comments at 41; NCTA Comments at 50–52; Ohio Comments at 2–3; TWTC/COMPTEL Comments at 35–37; TWTC/COMPTEL Reply at 42–43; TWC Reply at 21–23.

³¹⁸ CTIA Comments at 11–13; TWTC/COMPTEL Comments at 35–37; T-Mobile Comments at 14; Level 3 Comments at 17–18; MetroPCS Comments at 20–22; TWTC/COMPTEL Reply at 42–43; Verizon Reply at 6. *But see* EEI/UTC Reply at 39–40 (no "rocket docket" for pole attachment complaints).

to resolve them expeditiously. Toward that end, whenever possible, the Enforcement Bureau will resolve pole attachment complaints itself, to the extent permitted by its delegated authority.³¹⁹

103. Finally, the *Further Notice* invited comment on numerous issues surrounding the possible formation of specialized forums to handle pole attachment disputes.³²⁰ We received limited commentary about these issues, all indicating that such forums are unnecessary.³²¹ As a result, we do not believe that changes of this sort are justified at this time. If future events warrant, however, we will reexamine the issues at a later date.

B. Efficient Informal Dispute Resolution Process

104. The *Further Notice* sought comment on whether the Commission should attempt to encourage “local dispute resolution” (*i.e.*, dispute resolution processes outside the Commission’s auspices) by enacting a set of “best practices” and, if so, what the contours and impact of those best practices should be.³²² Several commenters endorsed the notion that local dispute resolution is beneficial in the first instance,³²³ and others supported Commission efforts to formulate best practices.³²⁴

105. We agree with the commenters who support encouragement of local dispute resolution. Thus, we believe it is desirable for parties to include dispute resolution procedures in their pole attachment agreements. Any refusal to enter into an agreement because it contains a dispute resolution provision would be considered unreasonable. We suggest that one issue to be addressed specifically in a dispute resolution provision is the requirement (codified in new rule 1.1404(k)) of executive-level settlement negotiations preceding the filing of a complaint with the Commission. Further, we believe it would be reasonable for parties to agree to a forum other than the Commission (*e.g.*, an arbitrator or expert panel) to resolve disputes. That said, it would be unreasonable for a party to *insist*, over the other party’s objection, that a forum other than the Commission is the only appropriate forum for resolving disputes that otherwise fall within the Commission’s jurisdiction under section 224. We also note that the Commission’s pre-complaint mediation process has had marked success in helping parties resolve pole attachment disputes, and we encourage parties to utilize that process.³²⁵

106. The *Further Notice* tentatively concluded that the portion of rule 1.1404(m) that provides that potential attachers who are denied access to a pole, duct, or conduit must file a complaint “within 30 days of such denial” should be eliminated.³²⁶ Specifically, the *Further Notice* observed that the existence of that language has deterred attachers from pursuing pre-complaint mediation and has prompted the premature filing of complaints.³²⁷ A number of commenters agreed that the 30-day rule should be eliminated.³²⁸ Other commenters felt that the rule should be retained, but all but one of those commenters also supported an exception to the rule for parties that are engaged in good-faith negotiations to resolve

³¹⁹ See, *e.g.*, 47 C.F.R. § 0.311.

³²⁰ *Further Notice*, 25 FCC Rcd at 11898, para. 80.

³²¹ AT&T Comments at 21–23; Florida IOUs Comments at 41; Comcast Comments at 32 n.96.

³²² *Further Notice*, 25 FCC Rcd at 11899, para. 81.

³²³ Idaho Power Comments at 13; Alliant Comments at 6; ITTA Comments at 9.

³²⁴ AT&T Comments at 20; NCTA Comments at 50–52. *But see* CenturyLink Comments at 49 (the cases and issues before the FCC are so idiosyncratic that it is unlikely a helpful set of general best practices could be developed).

³²⁵ See *Further Notice*, 25 FCC Rcd at 11875, para. 23 & n.73.

³²⁶ *Id.* at 11899–900, para. 82 (citing 47 C.F.R. § 1.1404(m)).

³²⁷ *Id.*

³²⁸ NCTA Comments at 53; Comcast Comments at 33; Charter Comments at 24; Sunesys Comments at 22.

their dispute.³²⁹ We believe the 30-day rule no longer serves a useful purpose, and is actually counterproductive at times, for the reasons explained in the *Further Notice*. Any concern about stale complaints is addressed by our modifications of rule 1.1410, which state that remedies must be “consistent with the applicable statute of limitations.” We therefore eliminate the portion of rule 1.1404(m) requiring that denial of access complaints be filed within 30 days.

C. Remedies

107. The *Further Notice* proposed to amend section 1.1410 of the Commission’s pole attachment complaint rules to enumerate the remedies available to an attachers that proves a utility has unlawfully delayed or denied access to its poles.³³⁰ No comments were received on this proposal, which, as noted, would simply codify the existing authority and practice, and we accordingly adopt the rule change as proposed.³³¹ The *Further Notice* also proposed to amend rule 1.1410 to specify that compensatory damages may be awarded where an unlawful denial or delay of access is established, or a rate, term, or condition is found to be unjust and unreasonable.³³² We stated that doing so might be appropriate to deter unlawful conduct by utilities and to fully compensate attachers harmed by utilities’ unlawful conduct.³³³

108. The comments contain sharp disagreements about our proposal regarding compensatory damages. Many utilities argue that (i) the Commission lacks authority under section 224 of the Act to award compensatory damages,³³⁴ (ii) allowing compensatory damages would make the complaint process unduly cumbersome,³³⁵ and (iii) utilities have no competitive reason to obstruct, delay, or burden pole access.³³⁶ By contrast, many attachers argue that (i) the Commission does have authority under section 224 of the Act to award compensatory damages,³³⁷ and (ii) allowing compensatory damages will encourage utilities to comply promptly and fully with their pole access obligations under section 224 of the Act and the Commission’s implementing rules.³³⁸

109. Based on our review of the record and on the other actions we take in this Order, we decline at this time to amend rule 1.1410 to allow compensatory damages. Given all of the rules designed to improve and expedite pole access that we adopt herein, we anticipate that attachers will experience far fewer difficulties than they have to date. Consequently, this does not appear to be a propitious time to add the potential for compensatory damages. Of course, we will continue to monitor the pole attachment

³²⁹ Florida IOUs Comments at 42; EEI/UTC Comments at 52; Verizon Comments at 42–44; T-Mobile Comments at 14–15; Verizon Reply at 39–41. *But see* Alliance Comments at 69 (proposing retention without modification).

³³⁰ *Further Notice*, 25 FCC Rcd at 11901, para. 85, and 11932–33, App. B, para. 6.

³³¹ Section 1.1410, as amended, would thus include the following provision: (2) If the Commission determines that access to a pole, duct, conduit, or right-of-way has been unlawfully denied or unreasonably delayed, it may order that access be permitted within a specified time frame and in accordance with specified rates, terms and conditions.

³³² *Further Notice*, 25 FCC Rcd at 11901, paras. 86–87.

³³³ *Id.*

³³⁴ *See, e.g.*, EEI/UTC Comments at 42–49; NRECA Comments at 20; Alliance Comments at 69–71.

³³⁵ *See, e.g.*, EEI/UTC Comments at 48–49; Florida IOUs Comments at 50–51; APPA Reply at 35.

³³⁶ EEI/UTC Comments at 49–50.

³³⁷ *See, e.g.*, TWTC/COMPTEL Reply at 35–38; TWC Reply at 25–29; Sunesys Reply at 20.

³³⁸ *See, e.g.*, ACA Comments at 9–10; Coalition Comments at 92; Charter Comments at 24; Comcast Comments at 32; EEI/UTC Comments at 42–51; MetroPCS Comments at 22; TWC Comments at 26–28; CTIA Comments at 13–15; Sunesys Comments at 22–23; TWC Reply at 24.

processes experienced by attachers, and if our expectations regarding improvements are unmet, we may revisit the propriety of amending rule 1.1410 to allow compensatory damages.

110. In the *Further Notice*, the Commission proposed to modify rule 1.1410(c), which permits a monetary award in the form of a “refund or payment,” measured “from the date that the complaint, as acceptable, was filed, plus interest.”³³⁹ The proposed modification to the rule would allow monetary recovery in a pole attachment action to extend back as far as the applicable statute of limitations allows.³⁴⁰ We reasoned that the current rule fails to make injured attachers whole, and is inconsistent with the way that claims for monetary recovery are generally treated under the law.³⁴¹ The Commission expressed a concern that, by allowing monetary recovery *only* from the date the complaint is filed, the current rule discourages pre-complaint negotiations between the parties to resolve disputes about rates, terms and conditions of attachment.³⁴²

111. A number of commenters favored the proposed modification, and generally supported the rationale for the rule change described in the order.³⁴³ Several commenters, however, oppose the rule modification. We find the arguments offered by these opponents to be unpersuasive. Specifically, we reject the contention that the proposed rule change creates an incentive for attaching entities to attempt to maximize their monetary recovery by waiting until shortly before the statute of limitations has expired to bring a dispute over rates to the Commission.³⁴⁴ We see no basis to conclude that an attacher injured by pole attachment rate over-charges would be any more likely than any other injured plaintiff to wait the full length of the limitations period before bringing a claim. An injured pole attacher has no more incentive than any other plaintiff to delay filing a complaint in order to make additional over-payments that will later need to be refunded.³⁴⁵

³³⁹ *Further Notice*, 25 FCC Rcd at 11901–02, para. 88 (quoting 47 C.F.R. § 1.1410(C)).

³⁴⁰ *Id.* at 11901–02, para. 88, 11932–33, App. B, para. 6 (proposed amendment to rule 1.1410). Elsewhere in this Order, we address a proposal to expand the relief available under rule 1.1410 to include the recovery of compensatory damages in pole attachment complaint proceedings. *See supra* paras. 107–109.

³⁴¹ *Further Notice*, 25 FCC Rcd at 11901–02, para. 88.

³⁴² *Id.*

³⁴³ *See, e.g.*, TWC Comments at 26–28 (allowing recovery consistent with the applicable statute of limitations, rather than from the date a complaint is filed, will facilitate informal dispute resolution and reduce litigation before the Commission, because attachers will not be compelled immediately to file a complaint in order to preserve their claims); Charter Comments at 25 (the existing refund rule provides no incentive for pole owners to charge just and reasonable rates because even when an attacher prevails in a complaint proceeding, the current remedy—a refund back to the day of the complaint—rarely makes the complainant whole); NCTA Comments at 53 (attachers typically are reimbursed only to the date on which an error is discovered and reported to the utility—or, if a complaint is filed, to the date of the complaint; requiring pole owners to compensate attachers from the date of wrongful conduct would encourage pole owners to comply with the Commission’s rules).

³⁴⁴ *See* EEI/UTC comments at 50–52. *See also* Alliance Comments at 67–69 (the proposed rule change would discourage timely filing of complaints); Coalition Comments at 93 (permitting attachers to recover refunds dating back years before a complaint is filed would eliminate any incentive for them to resolve rate issues in a timely manner. Rate disputes would drag on indefinitely, and the amount potentially to be refunded will grow proportionately). EEI/UTC also complained that our order “does not specify exactly what statute of limitations it believes may be relevant.” EEI/UTC Comments at 51.

³⁴⁵ One commenter noted that, in the 1978 *First Report and Order*, the Commission specifically rejected a suggestion that refunds be calculated from the date the disputed rate was first paid, and expressed the view that allowing refunds from the date of complaint is “entirely appropriate in a complainant form of regulation” in order to “avoid abuse and encourage early filing when rates are considered objectionable.” Alliance Comments at 68 (citing the *First Report and Order*). In the more than 30 years since that order issued, we have had the opportunity to weigh this concern about potential abuse against our experience that the rule, as currently written, creates a (continued....)

112. At the same time, we encourage attachers to provide early notice to utilities of any alleged overcharges so that the parties can attempt to resolve such issues through negotiation rather than litigation before the Commission. However, we decline the invitation of one commenter to modify our rules to preclude monetary recovery for any period prior to the time a utility receives actual notice of a disputed charge.³⁴⁶ Such a rule modification runs counter to the very idea of a statute of limitations, which permits complaints to be filed up until the last day of the limitations period. We therefore modify rule 1.1410(c) to allow monetary recovery in a pole attachment action to extend as far back in time as the applicable statute of limitations allows.

D. Unauthorized Attachments

113. Another issue addressed by the *Further Notice* was attachments installed on poles without a lawful agreement with or permit from the pole owner—so-called “unauthorized attachments.”³⁴⁷ The *Further Notice* explained that, under current precedent (*i.e.*, the *Mile Hi* decisions),³⁴⁸ penalties for unauthorized attachments may not “exceed an amount approximately equal to the annual pole attachment fee for the number of years since the most recent inventory or five years, whichever is less, plus interest.”³⁴⁹ This standard, the *Further Notice* observed, amounted to “little more than back rent” and may be insufficient to encourage compliance with proper authorization processes.³⁵⁰ Consequently, the *Further Notice* asked a series of questions about alternatives to the Commission’s penalty regime, including the system adopted by the Oregon Public Utilities Commission (“Oregon PUC”).³⁵¹

114. Commenters continue to disagree about the scope of the problem posed by unauthorized attachments, with attachers arguing that utilities vastly overstate the numbers,³⁵² and utilities arguing that the problem is widespread and serious.³⁵³ Although the record is insufficient for us to make specific findings regarding the scope and severity of non-compliance, there appears to be a well-founded concern that an unauthorized attachment payment amounting to no more than back rent provides little incentive for attachers to follow authorization processes, and that competitive pressure to bring services to market

(Continued from previous page)

disincentive to engage in pre-complaint negotiation. We find that the benefits of encouraging negotiated resolution of disputes outweighs any concern that attachers will “abuse” the process by unduly delaying the filing of overcharge complaints.

³⁴⁶ See Verizon Comments at 45.

³⁴⁷ *Further Notice*, 25 FCC Rcd at 11902–05, paras. 89–98.

³⁴⁸ *Mile Hi Cable Partners v. Public Service Company of Colorado*, Order, 15 FCC Rcd 11450 (Cable Serv. Bur. 2000) (“*Mile Hi Order*”), review denied, 17 FCC Rcd 6268 (2002) (“*Mile Hi Recon Order*”), review denied *sub nom. Public Serv. Co. of Colorado v. FCC*, 328 F.3d 675 (D.C. Cir. 2003). In the *Mile Hi Order*, the Cable Services Bureau concluded that a penalty payment for each unauthorized attachment limited to not more than five times the annual attachment rent was a sufficient incentive for the attacher to comply with a reasonable application process. *Mile Hi Order*, 15 FCC Rcd at 11458, para. 14. On appeal, the Commission declined to adopt the *Mile Hi Order* as a standard of general applicability, but found that the record supported the Bureau’s determination. *Mile Hi Recon Order*, 17 FCC Rcd at 6273, para. 11.

³⁴⁹ *Further Notice*, 25 FCC Rcd at 11903, para. 92.

³⁵⁰ *Id.* at 11904, para. 94.

³⁵¹ *Id.* at 11904–05, paras. 95–98.

³⁵² Bright House Comments at 28; NCTA Comments at 42–50; Sunesys Comments at 27–28; Comcast Comments at 33–34; Charter Comments at 26–32; TWC at 30–36; Verizon Reply at 43–44.

³⁵³ See, *e.g.*, Coalition Comments at 97.

overwhelms any deterrent effect.³⁵⁴ That said, we take seriously the arguments by attachers that utilities may deem attachments to be unauthorized because of poor record keeping or changes in pole ownership, rather than because of the attacher's failure to follow proper protocol.³⁵⁵ Consequently, the policy we enunciate today applies on a prospective basis only -- i.e., to new agreements, or amendments to existing agreements, executed after the effective date of this Order.

115. To address the concerns implicated by unauthorized attachments, we explicitly abandon the *Mile Hi* limitation on penalties and instead create a safe harbor for more substantial penalties. Specifically, going forward, we will consider contract-based penalties for unauthorized attachments to be presumptively reasonable if they do not exceed those implemented by the Oregon PUC.³⁵⁶ Oregon has established a multifaceted system that contains, among others, the following provisions:

- An unauthorized attachment fee of \$500 per pole for pole occupants without a contract (i.e., when there is no pole attachment agreement between the parties);³⁵⁷
- An unauthorized attachment fee of five times the current annual rental fee per pole if the pole occupant does not have a permit and the violation is self-reported or discovered through a joint inspection, with an additional sanction of \$100 per pole if the violation is found by the pole owner in an inspection in which the pole occupant has declined to participate.³⁵⁸
- A requirement that the pole owner provide specific notice of a violation (including pole number and location) before seeking relief against a pole occupant.³⁵⁹
- An opportunity for attachers to avoid sanctions by submitting plans of correction within 60 calendar days of receipt of notification of a violation or by correcting the violation and providing notice of the correction to the owner within 180 calendar days of receipt of notification of the violation.³⁶⁰
- A mutual obligation of pole owners and pole occupants to correct immediately violations that pose imminent danger to life or property. If a party corrects another party's violation, the party responsible for the violation must reimburse the correcting party for the actual cost of corrections.³⁶¹

³⁵⁴ Alliant Comments at 7; ITTA Comments at 10; Idaho Power Comments at 15; Florida IOUs Comments at 49–52; Verizon Comments at 45–46; Alliance Comments at 72–75; APPA Comments at 30–31; Oncor Comments at 51–52; Verizon Reply at 43–44.

³⁵⁵ Florida IOUs Reply at 15; APPA Reply at 36.

³⁵⁶ See Oregon Administrative Rules, Division 28, Pole and Conduit Attachments, 860-028-0130 – 0220; http://arcweb.sos.state.or.us/rules/OARS_800/OAR_860/860_028.html.

³⁵⁷ Oregon Administrative Rules, Division 28, Pole and Conduit Attachments, 860-028-0130. “To facilitate the joint use of poles,” the Oregon regulations provide that “entities must execute contracts establishing the rates, terms, and conditions of pole use.” *Id.* 860-028-0060(2).

³⁵⁸ Oregon Administrative Rules, Division 28, Pole and Conduit Attachments, 860-028-0140.

³⁵⁹ Oregon Administrative Rules, Division 28, Pole and Conduit Attachments, 860-028-0190.

³⁶⁰ Oregon Administrative Rules, Division 28, Pole and Conduit Attachments, 860-028-0150.

³⁶¹ Oregon Administrative Rules, Division 28, Pole and Conduit Attachments, 860-028-0115, 860-028-0120.