Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20544

In the Matter of	)	
	)	
Implementation of State and Local Governments' Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012	)	WT Docket No. 19-250
	)	
Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WC Docket No. 17-84
	)	
Wireless Telecommunications Bureau and Wireline Competition Bureau Seek Comment on WIA Petition for Rulemaking, WIA Petition for Declaratory Ruling and CTIA Petition for Declaratory Ruling	)	RM-11849

COMMENTS OF VERIZON

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The FCC has taken important steps to accelerate wireless and wireline broadband deployment by removing barriers to infrastructure investment. For example, the 2018 *Small Cell Ruling/Order* addressed state and local barriers to small wireless facility deployment by finding that state and local fees that exceed cost are an "effective prohibition of service" in violation of federal law, adopting presumptively reasonable limits on non-recurring and recurring fees, and adopting new shot clock rules for small cells.[2] The 2018 *OTMR/Moratoria Order* streamlined infrastructure deployment by finding that federal law bars state and local moratoria on

[1] The Verizon companies participating in this filing are the regulated, wholly owned subsidiaries of Verizon Communications Inc.

[2] *See Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment et al.*, Declaratory Ruling and Third Report and Order, 33 FCC Rcd 9088, ¶ 11 n.9 (2018) ("*Small Cell Ruling/Order*") (defining "small wireless facilities")

deployment and by reforming the Commission's pole attachment rules.[3] But there is still more to be done.

The Commission can further promote infrastructure deployment by granting CTIA's and WIA's recent petitions seeking clarification of the Commission's rules implementing Section 224 of the Communications Act and Section 6409(a) of the Spectrum Act of 2012 ("Section 6409"), and seeking a rulemaking regarding Section 6409.[4] Regarding Section 224, the Commission should confirm that a light pole is a "pole" and that utilities cannot make blanket denials of access to poles or portions of poles. With respect to Section 6409, CTIA and WIA correctly explain that further relief is needed to prevent localities from eroding Section 6409's mandatory approval language and to help ensure that Section 6409 provides the maximum public interest benefits by speeding wireless broadband deployment.

The Commission should move forward promptly on the clarifications and reforms sought by CTIA's and WIA's petitions.

I. THE COMMISSION SHOULD ADOPT CTIA'S PROPOSED CLARIFICATIONS REGARDING SECTION 224 POLE ATTACHMENT ISSUES.

The *OTMR/Moratoria Order* continued the Commission's important efforts to promote broadband deployment by making the pole attachment process faster and more efficient,

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[3] *See Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705 (2018) ("*OTMR/Moratoria Order*").

[4] CTIA Pet. for Decl. Ruling, *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment et al.*, WT Docket No. 19-250 (Sept. 19, 2019) ("CTIA Petition"); Wireless Infrastructure Ass'n (WIA) Pet. for Decl. Ruling, *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment et al.*, WT Docket No. 17-79 (Aug. 27, 2019) ("WIA Declaratory Ruling Petition"); WIA, *Petition for Rulemaking to Accelerate Wireless Broadband Deployment by Amending the Rules Implementing Section 6409 of the Spectrum Act*, RM-11849 (Aug. 27, 2019) ("WIA Rulemaking Petition").

including by adopting a new one-touch make-ready (OTMR) pole attachment process, codifying the Commission's overlashing precedent, and confirming that new attachers are not responsible for preexisting violations. But the CTIA Petition shows that further action is needed to remove additional barriers that wireless providers encounter when seeking to attach to utility poles. In particular, the Commission should confirm that Section 224 applies to light poles and that utilities may not impose blanket prohibitions on access to poles or parts thereof.[5]

A. The Commission Should Clarify That a Light Pole is a "Pole."

Congress required utilities to provide "nondiscriminatory access to *any* pole" they own or control.[6] The Commission should confirm the plain language of the statute and declare that "any pole" includes utility-owned light poles. Because Congress did not specifically define "pole" for purposes of Section 224, that word should be given its ordinary meaning.[7] The ordinary meaning of pole is generic – "a long slender usually cylindrical object"[8] or a "long, relatively slender, generally rounded piece of wood or other material"[9] – and inclusive, covering both distribution and light poles. Congress's decision to use the word "any" to modify "pole" in Section 224(f)(1) further supports interpreting "pole" broadly, since courts consistently read

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[5] *See* CTIA Petition at 20-27.

[6] 47 U.S.C. § 224(f)(1) (emphasis added). *See also* 47 U.S.C. § 224(a)(1) ("The term 'utility' means any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications. Such term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State.").

[7] *See, e.g.*, *Taniguchi v. Kan Pacific Saipan, Ltd.*, 566 U.S. 560, 566 (2012) ("When a term goes undefined in a statute, we give the term its ordinary meaning.").

[8] "Pole," Merriam-Webster Online, merriam-webster.com/dictionary/pole (last visited Oct. 18, 2019).

[9] "Pole," American Heritage Dictionary Online, https://ahdictionary.com/word/search.html?q=pole (last visited Oct. 18, 2019).

"any" to emphasize the wide scope of the words it modifies.[10] Moreover, there is no countervailing language in Section 224 to suggest a narrower interpretation was intended.

Even if the plain language of Section 224 did not compel interpreting "pole" to include light poles, this interpretation is reasonable and serves the purposes of Section 224. The Commission and its Broadband Deployment Advisory Committee have recognized the importance of ensuring access to light poles for broadband infrastructure.[11] Light poles are a prevalent type of infrastructure that can host the small cells necessary to support 5G.[12] As CTIA explains, light poles "are likely to be the *only* feasible location for small cells along rights-of-way where electric lines are buried underground."[13] Thus, light poles are precisely the kind of "bottleneck" that Section 224 was designed to clear to ensure nondiscriminatory access for attachers.[14]

As we have previously explained, many utilities charge a premium for access to utility-owned light poles or deny access altogether, taking the position that the pole attachment statute

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[10] *See, e.g.*, *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 220-21 (2008) (noting that "the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind'") (internal quotation marks and citations omitted).

[11] CTIA Petition at 21 (citing *Small Cell Ruling/Order*, ¶¶ 50, 92; Broadband Deployment Advisory Committee, State Model Code for Accelerating Broadband Infrastructure Deployment and Investment, § 2(51), https://www.fcc.gov/sites/default/files/bdac-12-06- 2018-model-code-for-states-approved-rec.pdf; State Model Code for Accelerating Broadband Infrastructure Deployment and Investment, § 2(51), https://www.fcc.gov/sites/default/files/bdac-12-06-2018-model-code-for-states-approved-rec.pdf).

[12] CTIA Petition at 21.

[13] *Id*. (emphasis retained).

[14] *Alabama Cable Telecommunications Ass'n et al.*, Order, 16 FCC Rcd 12,209, ¶ 54 (2001) ("The rates, terms and conditions of pole attachments are regulated because of the bottleneck monopoly status of the utilities' poles.").

requires access only to electric distribution poles.[15] For example, in our efforts to deploy broadband infrastructure, we have encountered a utility in Massachusetts that refuses access to any of its metal light poles and a utility in Wisconsin that does not allow attachments to any of its light poles. When utilities do allow access, they often impose rates that are far higher than the rates available under the FCC's pole attachment formula. For example, a midwestern utility requires an annual fee of $500 per light-pole attachment, while utilities in California have sought $1,500 or even as much as $6,000 per light-pole attachment.

When denying access or seeking exorbitant rates for light pole attachments, utilities often claim that light poles are not "poles" covered by Section 224, sometimes citing the Eleventh Circuit's decision in *Southern Co. v. FCC*, 293 F.3d 1338 (11th Cir. 2002), as justification. But, as CTIA explains, nothing in *Southern Co.* compels such a narrow reading of "pole" in Section 224.[16] In that case, the Eleventh Circuit held only that interstate transmission towers, which are regulated by the Federal Energy Regulatory Commission (FERC), are not "poles" within the meaning of Section 224.[17] That holding does not imply that Section 224 excludes light poles, which are quintessentially local structures that FERC does not regulate. In addition, even as the court excluded interstate transmission towers from the scope of the word "pole," the court emphasized the statute's wide scope.[18]

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[15] *See* Letter from Katharine R. Saunders, Verizon, to Marlene H. Dortch, FCC, *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment et al.*, WT Docket No. 17-79 & WC Docket No. 17-84, at 2 (June 21, 2018).

[16] CTIA Petition at 24.

[17] *Southern Co.*, 293 F.3d at 1345.

[18] *Id.* (declining to read in a limitation to the Act's plain language that it "generally covers all 'poles'").

Congress expressly extended Section 224's coverage to "any poles" a utility owns or controls. The Commission has broad authority to read the statute as written, in order to "encourage the deployment of broadband Internet capability" within the wide "ambit of the Act," even if that means regulating infrastructure Congress "could not anticipate."[19] More generally, where a statutory scheme has "broad language and purpose," the Commission has authority "to extend beyond the specific manifestations" that led Congress to enact the statute in the first instance.[20] For these reasons, the Commission should declare that Section 224 applies to light poles.

B. The Commission Should Affirm That Utilities Cannot Make Blanket Denials of Access to Poles or Portions of Poles.

The Commission has already forbidden utilities from denying pole access to providers on a blanket basis.[21] Instead, any denial must state the "precise concerns" regarding the "particular attachment(s) and the particular pole(s) at issue":

> 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.[22]

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[19] *Nat'l Cable & Telecommunications Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 339 (2002) (citations omitted).

[20] *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 707 (D.C. Cir. 2011).

[21] *See Implementation of Section 224 of the Act*, Report and Order, 26 FCC Rcd 5240, ¶ 76 (2011) ("*2011 Pole Attachment Order*").

[22] *2011 Pole Attachment Order* ¶ 76. *See* also 47 C.F.R. § 1.1403(b) ("The utility's denial of access shall be specific, shall include all relevant evidence and information supporting its denial, and shall explain how such evidence and information relate to a denial of access for reasons of lack of capacity, safety, reliability or engineering standards.").

Yet despite the Commission's clear statement, utilities continue to deny access by making blanket claims about areas of poles, such as the top and lower areas. For example, some utilities in Connecticut and New York refuse to allow pole-top attachments to any of their poles as a blanket matter. Verizon has tried to negotiate with a Wisconsin utility that refuses to allow pole-top attachments to metal poles. And worse, one utility in New York has deployed its wireless antennas on pole tops but refuses attachers' requests for pole-top access. These utilities have made blanket denials without providing any detailed concerns specific to the poles at issue.

To help prevent such conduct, the Commission should re-affirm its prior ruling prohibiting blanket denials of access to poles and requiring that a utility explain the "precise concerns" for a denial in a way that is tailored to the attachments and poles at issue.[23] The Commission should also clarify that its pole attachment rules apply to all portions of a pole and therefore a utility cannot issue a blanket ban regarding any portion of a pole.[24] Finally, the Commission "should make clear that it will promptly rule on complaints regarding access refusals, overcharges, or other such obstructive practices."[25]

II. THE COMMISSION SHOULD ADOPT CTIA'S AND WIA'S PROPOSED CLARIFICATIONS AND REFORMS REGARDING SECTION 6409 OF THE SPECTRUM ACT.

The Commission should adopt the clarifications and reforms regarding Section 6409(a) of the Spectrum Act proposed in the CTIA and WIA petitions. Section 6409 requires siting authorities to approve certain applications for adding new facilities or modifying existing

[23] *See 2011 Pole Attachment Order* ¶ 76.

[24] *See* CTIA Petition at 27.

[25] *Id.*

facilities on existing structures.[26] The Commission adopted rules interpreting Section 6409 in its *2014 Infrastructure Order*, for example, by defining the terms "substantial change" and "existing tower or base station."[27] The Commission also adopted a 60-day shot clock for Section 6409 applications and a "deemed granted" remedy for applications not acted upon within 60 days.[28] But some local authorities have tried to erode Section 6409's mandatory approval language by limiting how and when it applies. Further clarification is needed to prevent localities from evading the law. In addition, experience in implementing the provision over the last several years has revealed some areas where further Commission definition or clarification would help ensure that Section 6409 provides the maximum public interest benefits by speeding wireless broadband deployment.

CTIA and WIA request a number of rulings, clarifications, and rule changes to accomplish these purposes. Among the actions they request are:

- Confirming that the 60-day shot clock applies to all approvals required by the siting authority;[29]
- Clarifying that the shot clock period starts upon the filing of an application, or, in cases where pre-application processes are required, upon a good faith attempt by the applicant to seek the necessary approvals;[30]

[26] Section 6409(a)(1) (stating that "a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station").

[27] *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, 29 FCC Rcd 12865, ¶¶ 188-204 (2014) ("*2014 Infrastructure Order*"), *aff'd sub nom. Montgomery County v. FCC*, 811 F.3d 121 (4th Cir. 2015).

[28] *2014 Infrastructure Order*, ¶¶ 211-215.

[29] *See* WIA Declaratory Ruling Petition at 5-7.

[30] *Id.* at 7-9.

- Clarifying that if a siting authority fails to act on an application within 60 days resulting in the application being deemed granted, then the applicant may lawfully construct even if the locality has not issued related permits;[31]

- Clarifying that mandatory approval does not mean approval conditioned on complying with additional requirements imposed by the siting authority;[32]

- Clarifying that the number of equipment cabinets that can be installed without substantially changing the physical dimensions of the structure means equipment cabinets placed on the ground or elsewhere on the premises, and does not include equipment attached to the structure itself.[33]

These and the other reforms requested in the CTIA and WIA petitions will serve the public interest by eliminating barriers to wireless broadband facility deployment and improving broadband service for consumers, as Congress intended in enacting Section 6409. The Commission should move quickly to grant the petitions.

The Commission clearly has authority to adopt rules and issue interpretive rulings to implement Section 6409. Section 6003 of the Spectrum Act authorized the Commission to "implement and enforce this title as if this title is a part of the Communications Act of 1934."[34] The Commission relied on that authority to adopt rules and make interpretive rulings to implement Section 6409 in 2014.[35] Just as it did then, the Commission should invoke that authority to adopt the rulings requested in the CTIA and WIA petitions.

[31] CTIA Petition at 17-20

[32] *See* WIA Declaratory Ruling Petition at 20-21.

[33] *See id.* at 13-14; CTIA Petition at 13-15.

[34] Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96 § 6003, 126 Stat. 156 (2012).

[35] *2014 Infrastructure Order* ¶ 144.

III. CONCLUSION

As discussed above, the Commission should grant CTIA's Petition, WIA's Declaratory Ruling Petition, and WIA's Rulemaking Petition.

Respectfully submitted,

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