

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment)	WT Docket No. 17-79
)	
Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment)	WC Docket No. 17-84
)	

PETITION FOR DECLARATORY RULING

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SUMMARY

5G is the future of wireless and will deliver significant benefits to consumers across nearly every sector of the economy through the deployment of ultra-fast, highly reliable, scalable, and very low latency networks. As President Trump noted in April 2019, “[T]he wireless industry plans to invest \$275 billion in 5G networks, creating 3 million American jobs quickly ... and adding \$5 billion to our economy.” Indeed, U.S. wireless providers have already made significant investments as 5G deployment is well underway across the nation. Providers are leveraging existing deployments and rapidly building out new infrastructure to densify networks, expand capacity, and extend access to more Americans.

Both Congress and the Commission have taken a number of actions intended to streamline the relevant siting processes, and those actions are helping to unlock the massive capital investments necessary to accelerate access to broadband and 5G across America. Specifically, Congress enacted two statutory provisions that explicitly grant access to certain existing structures. First, in Section 6409 of the 2012 Spectrum Act, Congress required siting authorities to approve applications for non-substantial collocations, removals, or modifications of wireless facilities on existing structures. Second, in Section 224 of the Communications Act, Congress gave providers access to poles owned by utilities on reasonable and nondiscriminatory rates, terms, and conditions. The Commission adopted rules implementing both provisions, echoing Congress’s desire for common-sense policies promoting the use of existing structures and eliminating unnecessary delays and disputes.

While the Commission’s rules implementing Sections 6409 and 224 have played a vital role in promoting wireless infrastructure deployment, experience with these rules in the years since their adoption has identified areas of uncertainty and inconsistent application that slow

down deployment and undermine Congressional and Commission intent. In this Petition, CTIA identifies specific actions the Commission can take in a Declaratory Ruling to clarify the existing rules and unleash the continued rapid investment that will be necessary to fully realize the potential of 5G in the United States.

First, CTIA requests that the Commission take the following actions to clarify which deployments qualify for streamlined processing and the remedies available under 6409(a):

- **Concealment Requirements.** The Commission should clarify that the term “concealment element” in its rules applies only to a stealth facility or design element, such as an artificial tree limb or screen, and that concealment requirements may not be used to disqualify an application as an eligible facilities request (“EFR”).
- **Equipment Cabinets.** The Commission should clarify that the term “equipment cabinet” in its rules means cabinets that are placed on the ground or elsewhere on the premises, and does not include equipment attached to the structure itself, which is covered by other parts of the rule.
- **Modifications to Non-Tower Structures.** The Commission should clarify that the entire structure or building is the “base station” being modified, and thus that the size of the structure determines if a modification qualifies as an EFR.
- **Failure to Act.** The Commission should clarify that if a siting authority fails to timely act on an application for an EFR under 6409(a), and the application is thus deemed granted, applicants may lawfully construct even if the locality has not issued related permits

Second, CTIA requests that the Commission take the following actions to remove uncertainty about access to utility poles under Section 224:

- **Access to Light Poles.** The Commission should declare that the term “pole” includes light poles, and that utilities thus must afford nondiscriminatory access to light poles at rates, terms, and conditions consistent with the requirements of Section 224 and the Commission’s implementing pole attachment rules.
- **Access to Space on Poles.** The Commission should reaffirm that utilities may not impose blanket prohibitions on access to any portions of the poles they own.
- **Pole Attachment Agreements.** The Commission should declare that utilities cannot ask providers to accept terms and conditions that are inconsistent with the Commission’s rules.

The clarifications proposed in this Petition will serve the public interest consistent with Congressional intent, facilitating the expansion and densification of wireless networks necessary to expand broadband access and realize the full potential of 5G networks in the United States.

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PETITION FOR DECLARATORY RULING

In this Petition, CTIA¹ respectfully requests that the Commission issue a declaratory ruling pursuant to Section 1.2 of its rules² to eliminate specific barriers to the use of existing infrastructure. Specifically, CTIA requests that the Commission take action to clarify Section 6409(a) of the 2012 Spectrum Act and Section 224 of the Communications Act of 1934 and the Commission’s rules implementing both statutory provisions.

I. INTRODUCTION

Fifth Generation wireless networks will bring enormous benefits to the American public and the economy, and present an opportunity to further enhance U.S. global technology

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

² 47 CFR § 1.2.

leadership.³ To deploy these next-generation 5G services, U.S. wireless providers have begun investing a projected \$275 billion and are rapidly building out new wireless infrastructure to densify networks, expand capacity, and extend reach. As Federal Communications Commission (“FCC”) Chairman Pai recently explained, “When it comes to 5G policy, infrastructure is essential. We need to install hundreds of thousands of small cells—an exponential increase in the number of antenna locations for our current networks.”⁴ Wireless providers are already rapidly rolling out new 5G services across the country, but they continue to encounter unnecessary roadblocks to deploying wireless facilities on existing structures, despite Congressional and Commission actions intended to streamline the relevant siting processes.

The Commission addressed a number of regulatory barriers impeding the urgently needed expansion of wireless networks in earlier rulings and orders implementing Congressional legislation to speed deployment.⁵ CTIA commends the actions of Congress and the Commission, which are serving the public interest by helping to unlock the massive capital

³ See, e.g., *Accelerating Future Economic Value from the Wireless Industry*, Accenture Strategy (July 2018), *attached to* Letter from Scott K. Bergmann, CTIA, to Marlene H. Dortch, FCC, WT Docket Nos. 17-79 and 16-421, WC Docket No. 17-84 (filed July 19, 2018).

⁴ See Remarks of FCC Chairman Ajit Pai, at the New York State Wireless Association, New York, NY (June 21, 2019). See also Remarks of FCC Chairman Ajit Pai at the 7th Congreso Latinoamericano de Telecomunicaciones Workshop on 5G, Cordoba, Argentina (July 4, 2019) (“5G could be one of the great moonshots of this generation. Think about a world in which speed, capacity, and lag times are effectively no longer constraints on wireless innovation. This could enable new services and applications that could revolutionize ... our economy and society.”); Remarks of FCC Commissioner Brendan Carr at the Transatlantic Policy Dialogue-Barcelona (Feb. 25, 2019) (“To meet the needs of the people we serve, we need next-gen networks. We need 5G.”).

⁵ *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, *Accelerating Wireline Broadband Deployment Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, 33 FCC Rcd 9088 (2018) (“*State/Local Infrastructure Order*”); *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*”); *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Second Report and Order, 33 FCC Rcd 3102 (2018), *aff’d in part and vacated in part sub nom. United Keetoowah Band of Cherokee Indians of Oklahoma, et al. v. FCC*, No. 18-1129 (D.C. Cir. Aug. 9, 2019).

investments necessary to accelerate the availability of advanced wireless services. Continued rapid investment in wireless networks is essential for consumers, businesses and governments to realize the full benefits of mobile broadband and 5G. However, some localities and utilities are misinterpreting the existing rules, undermining the intent of Congress and hampering wireless deployment.

All five FCC commissioners have unanimously emphasized the clear public interest benefits of advanced wireless networks, the need to make robust and reliable broadband available to all Americans, and the importance to the U.S. economy of leading the world on 5G. In September 2018, for example, Chairman Pai announced the 5G FAST Plan, which includes removing barriers to deploying communications infrastructure to support the public’s rapidly growing use of advanced wireless services.⁶ The four other commissioners similarly have supported actions to expand the availability of broadband across the nation.⁷ The time is right

⁶ *The FCC’s 5G FAST Plan*, available at <https://www.fcc.gov/5G> (describing the Commission’s comprehensive strategy to facilitate America’s superiority in 5G technology) (“5G Fast Plan”); *see also* Ajit Pai, *A Giant Leap for 5G* (June 18, 2019), <https://www.fcc.gov/news-events/blog/2019/06/18/giant-leap-5g> (“This plan calls for freeing up spectrum, making it easier to install wireless infrastructure like ‘small cells,’ and modernizing our regulations to encourage the deployment of fiber, which is necessary for carrying wireless traffic.”)

⁷ *See, e.g.*, Keynote Remarks of FCC Commissioner Brendan Carr at the WISPAmerica Convention, “Grain Elevators, Water Towers, and Other Ways to Connect to America,” Cincinnati, Ohio (Mar. 20, 2019) (“[W]’re not going to slow down in our efforts to modernize our infrastructure rules. This year, I am taking another look at the federal rules governing wireless infrastructure deployment. We will look to fully and faithfully implement the decisions Congress has made to streamline the deployment of next-generation technologies. We will push the government to be more pro-infrastructure by eliminating needless restrictions on siting wireless facilities.”); *State/Local Infrastructure Order*, Statement of Commissioner Michael O’Rielly (“Collectively, these provisions will help facilitate the deployment of 5G and enable providers to expand services throughout our nation, with ultimate beneficiaries being the American people.”); *id.*, Statement of Commissioner Jessica Rosenworcel, Approving in Part and Dissenting in Part (advocating that the OTARD rule be modified to “create more opportunities for rural deployment by giving providers more siting and backhaul options and creating new use cases for signal boosters. Add this up and you get more competitive, more ubiquitous and less costly 5G deployment.”); Statement of Geoffrey Starks, Commissioner, Federal Communications Commission, Before the Subcommittee on Communications and Technology, Committee on Energy & Commerce, United States House of Representatives (May 15, 2019) (“While I am committed to ‘winning the race to 5G,’ I am

for the Commission to take additional action to clarify its existing rules to eliminate barriers to installing wireless facilities on existing structures.

II. BACKGROUND AND SUMMARY

To promote the rapid and widespread availability of wireless communications services, Congress has enacted two provisions that explicitly grant access rights to existing structures. First, Section 6409(a) of the 2012 Spectrum Act requires siting authorities to approve applications for non-substantial collocations, removals, or modifications (referred to herein as “modifications”) of wireless facilities on existing structures.⁸ Second, Section 224 of the Communications Act of 1934 (“Act”) gives providers access to poles owned by utilities on reasonable and nondiscriminatory rates, terms, and conditions.⁹ The Commission has adopted rules to implement both Congressional directives, echoing Congress’s desire for common sense policies promoting the use of existing structures.

Although Congress enacted Sections 6409(a) and 224 to streamline deployment and thereby avoid time-wasting disputes and economic uncertainty, localities’ and utilities’ uneven application of these statutory provisions and the Commission’s implementing rules is impeding the rapid upgrade and expansion of wireless networks, contrary to the Congressional mandates. The existing record in this proceeding demonstrates that some localities and utilities are misinterpreting the rules to deny or condition access to existing structures through practices that conflict with the language and purpose of these statutory provisions and rules. The additional

equally committed to the far too many communities with ‘no-G.’ ... It is absolutely imperative that we make sure that quality, affordable broadband is available to all Americans.”).

⁸ Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, Title VI, § 6409(a), codified at 47 U.S.C. § 1455.

⁹ 47 U.S.C. § 224.

examples in this Petition underscore that these practices continue to frustrate wireless broadband deployment and threaten the public's rapid access to robust 5G.¹⁰

CTIA thus respectfully requests that the Commission issue a declaratory ruling pursuant to Section 1.2 of its rules to eliminate specific barriers to the use of existing infrastructure. As discussed in this Petition, CTIA requests that the Commission take action to clarify Sections 6409(a) and 224 and their implementing rules. First, CTIA requests that the Commission take the following actions to clarify which deployments qualify for streamlined processing and the remedies available under 6409(a):

- **Concealment Requirements.** The Commission should clarify that the term “concealment element” in its rules applies only to a stealth facility or design element and that concealment requirements may not be used to disqualify an application as an eligible facilities request (“EFR”).
- **Equipment Cabinets.** The Commission should clarify that the term “equipment cabinet” in its rules means cabinets that are placed on the ground or elsewhere on the premises, and does not include equipment attached to the structure itself, which is covered by other parts of the rule.
- **Modifications to Non-Tower Structures.** The Commission should clarify that the entire structure or building is the “base station” being modified, and that the structure's size determines if the modification qualifies as an EFR.
- **Failure to Act.** The Commission should clarify that if a siting authority fails to timely act on an application for an EFR under 6409(a), and the application is thus deemed granted, applicants may lawfully construct even if the locality has not issued related permits.

Second, CTIA requests that the Commission take the following actions to remove uncertainty about access to utility poles under Section 224:

- **Access to Light Poles.** The Commission should declare that the term “pole” in Section 224 includes light poles and that utilities must afford nondiscriminatory access to light poles on rates, terms and conditions

¹⁰ See also Wireless Infrastructure Association, Petition for Declaratory Ruling, WT Docket No. 17-79 (filed Aug. 27, 2019) (“WIA Petition”).

consistent with Section 224 and the Commission’s implementing pole attachment rules.

- **Access to Space on Poles.** The Commission should affirm that utilities may not impose blanket prohibitions on access to any portions of their poles.
- **Pole Attachment Agreements.** The Commission should declare that utilities cannot ask providers to accept terms and conditions that are inconsistent with its rules.

The Commission has the authority to issue a declaratory ruling interpreting and applying the Communications Act and its rules. The requested clarifications will serve the public interest by facilitating the expansion and densification of wireless networks required to deliver broadband and 5G to all Americans.

III. THE COMMISSION SHOULD ADVANCE 5G BY CLARIFYING ITS INFRASTRUCTURE POLICIES TO PROMOTE ACCESS TO EXISTING STRUCTURES.

Congress has enacted numerous statutory provisions in furtherance of the Act’s objective to “promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.”¹¹ Two statutory provisions—Sections 6409(a) and 224— specifically address access to *existing* facilities. The Commission has found that placing facilities on existing poles, towers, and other structures offers advantages over building new structures, including by enabling faster deployment:

First, a shared use approach leverages existing resources and thus facilitates provider efforts to expand both coverage and capacity more quickly. Second, sharing wireless infrastructure – whether towers, other support structures, or

¹¹ Preamble, Telecommunications Act of 1996, Pub. L. 104-104, 100 Stat. 56 (1996).

transmission equipment – reduces costs and promotes access to such infrastructure, and this may reduce a notable barrier to deployment.¹²

The Commission has continued to emphasize the public interest benefits of using existing infrastructure to support broadband.¹³ Deployments on existing infrastructure benefit providers, consumers, and local communities alike. They are significantly less expensive than new construction, freeing up precious capital for faster construction or more facilities to serve those communities, and do not generate the same local land use concerns that new towers might.

Some localities and utilities, however, have taken actions that contradict the language and underlying purposes of Sections 6409(a) and 224 and the Commission’s implementing rules. Uncertainty and disputes regarding application of these provisions are frustrating deployment. For example, upgrades to existing structures to add new frequencies for expanding network capacity that should be approved quickly end up sitting in limbo for months or years. Utility poles, which are optimal locations for small cells, particularly in congested urban areas where network densification is necessary, sit vacant.

The Commission should take further action here to address these issues, alleviating barriers to deployment and thus driving more intensive use of the nation’s existing infrastructure. Taking the actions identified in this Petition is consistent with the statutory language and purposes of Sections 6409(a) and 224 and Commission rules implementing those provisions. And these actions will speed access to existing structures, enabling them to be used in supplying additional network capacity, which will in turn support accelerating the use of advanced wireless

¹² *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*; Report and Order, 29 FCC Rcd 12865, 12868 ¶ 5 (2014) (“*2014 Report and Order*”), *aff’d sub nom. Montgomery County v. FCC*, 811 F.3d 121 (4th Cir. 2015).

¹³ *See, e.g.*, Nationwide Programmatic Agreement for the Collocation of Wireless Antennas (“[T]he FCC encourages collocation of antennas where technically and economically feasible in order to reduce the need for new tower construction”).

services, all consistent with clear national policy. Finally, addressing these barriers will reduce deployment costs and the need for new construction, making that capital available to support even more investment in upgrading facilities needed for broadband and 5G.

IV. THE COMMISSION SHOULD CLARIFY ITS RULES IMPLEMENTING SECTION 6409(A) TO ADVANCE THE CONGRESSIONAL DIRECTIVE TO SPEED NON-SUBSTANTIAL MODIFICATIONS TO EXISTING STRUCTURES.

The time is right for the Commission to issue a common sense declaratory ruling that corrects some localities' misapplication of the Commission's rules implementing Section 6409(a), which has obstructed deployment to the detriment of wireless consumers across the country. The Commission adopted these rules in 2014 on a bipartisan basis, finding that they "will serve the public interest by providing guidance to all stakeholders on their rights and responsibilities under the provision, reducing delays in the review process for wireless infrastructure modifications, and facilitating the rapid deployment of wireless infrastructure, thereby promoting advanced wireless broadband services."¹⁴ The Chairman and each commissioner strongly supported the new rules.¹⁵ Despite the Commission's effort to provide clear rules, some localities have misinterpreted them, erected unjustified barriers that undermine

¹⁴ *2014 Report and Order*, 29 FCC Rcd 12865, 12872 ¶ 15.

¹⁵ *Id.*, Statement of Chairman Tom Wheeler ("This Order builds on previous Commission efforts to make the regulatory approval processes for wireless infrastructure more efficient and effective."); Statement of Commissioner Mignon Clyburn ("Too often, the process of obtaining the necessary approvals from federal, state, and local governments to deploy can be both expensive and time-consuming. Today's Order seeks to address these shortcomings by bringing about more efficiency to the process of approving wireless facilities."); Statement of Commissioner Jessica Rosenworcel ("If you want a wireless revolution, you need an evolution – in infrastructure. Mindful of that truth, today the Commission significantly evolves its policies for wireless facilities siting."); Statement of Commissioner Ajit Pai ("American consumers stand to benefit in a big way. Today's Order will make it easier for carriers both large and small to maintain, upgrade and expand their coverage and capacity."); Statement of Commissioner Michael O'Rielly ("By removing specific practices that are unnecessary obstacles, simplifying numerous provisions in our rules and providing clarity on exactly how the Commission will implement the statutory provisions, we set the stage for an easier wireless antenna siting process.").

them, or ignored the rules altogether.¹⁶ CTIA asks the Commission to address these issues by clarifying its wireless deployment rules as set forth below. Making these clarifications will further the Commission’s commitment to ensuring that infrastructure is available to deliver the next-generation networks to consumers that they deserve.

A. The Commission Should Declare That Concealment Requirements May Not Be Used to Disqualify an Application as an Eligible Facilities Request.

In Section 6409(a), Congress mandated that state or local governments “*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.”¹⁷ To implement Section 6409(a), the Commission adopted rules to more specifically define what constitutes an eligible facilities request (“EFR”), which are now set forth in Section 1.6100.¹⁸ Section 1.6100(b)(3) of the Commission’s rules defines an EFR as “any request for modification of an existing tower or base station that does not substantially change the physical dimensions of such tower or base station.” Section 1.6100(b)(7) defines which modifications constitute a “substantial change,” and provides, at paragraph (v), that a modification is a substantial change if “it would defeat the concealment elements of the eligible support structure.”

¹⁶ See, e.g., *Ex Parte* Letter from Cathleen A. Massey, T-Mobile, to Marlene H. Dortch, FCC, WT Docket Nos. 17-79 and 16-421, at 2 (filed Aug. 30, 2019) (“The record shows that certain jurisdictions continue to act in ways that undermine the protections afforded by the statute and the Commission’s Rules”).

¹⁷ 47 U.S.C. § 6409(a)(1) (emphasis added). Under the statute, an EFR is “any request for modification of an existing wireless tower or base station that involves—(A) collocation of new transmission equipment; (B) removal of transmission equipment; or (C) replacement of transmission equipment.” 47 U.S.C. § 6409(a)(2).

¹⁸ 47 C.F.R. § 1.6100.

When the Commission adopted these rules in the *2014 Report and Order*, it narrowly defined “concealment elements.” The Commission explained that concealment elements are features of a “stealth” facility, meaning a facility “designed to look like some feature other than a wireless tower or base station.”¹⁹ The Commission cited “painting to match the supporting façade or artificial tree branches” as examples of concealment elements.²⁰ Nowhere did it suggest that all elements of a design, the size or height of a structure, or elements of a non-stealth structure, qualify as concealment elements. The Commission said its decision “is widely supported by both wireless industry and municipal commenters”:

”[Commenters] generally agree that a modification that undermines the concealment elements of a stealth wireless facility, such as painting to match the supporting façade or artificial tree branches, should be considered substantial under Section 6409(a). We agree with commenters that in the context of a modification request related to concealed or “stealth”-designed facilities—*i.e.*, facilities designed to look like some feature other than a wireless tower or base station—any change that defeats the concealment elements of such facilities would be considered a “substantial change” under Section 6409(a).²¹

Despite the Commission’s narrow description of “concealment elements” as confined to those used in stealth facilities, some localities are broadly interpreting that term to deny streamlined treatment of modifications that qualify as non-substantial. For example:

- Some localities have asserted that *all* elements of a structure’s design, such as the structure’s approved height and attachments to it, are “concealment elements,” and then assert that any subsequent modification to the structure defeats these so-

¹⁹ *2014 Report and Order*, 29 FCC Rcd 12865, 12950 ¶ 200 (2014).

²⁰ *2014 Report and Order* at ¶ 200.

²¹ *2014 Report and Order* at ¶ 200 (footnotes omitted). The Commission approvingly cited to comments that emphasized that concealment elements relate to stealth facilities. *Id.* at n. 545 (“*see also* PCIA Comments at 46 (arguing that for an eligible facilities request involving previously concealed or “stealth” facilities, the modification should qualify as an insubstantial increase as long as the concealment elements are maintained).”).

called “concealment elements.” For example, a California locality treats the dimensions of “every aspect” of the project as a concealment element, meaning that any proposed increase in size would defeat concealment and thus not qualify as an EFR.²²

- Two California localities took the position that changes to antennas on faux trees defeat the concealment elements even if the appearance of the faux tree would remain the same.²³
- Other jurisdictions have stated that any change in the size of a concealment element, such as increasing the height of a rooftop screen or shroud, does not qualify as an EFR, even when an observer on the ground level would not perceive the change. For example:
 - A Colorado locality failed to act on an EFR because it claimed that an expansion of the shroud well within the size limits set by the Commission “defeated the concealment elements.”²⁴
 - Another Colorado jurisdiction failed to act on a wireless provider’s request for slight relocation of and additional screening for sectors on a rooftop by seeking a “lease” for the airspace above the street where one sector is being façade mounted.
 - Another jurisdiction rejected an application for antenna upgrades from the EFR process because it required a slight change to the shape of the concealment canister, but not its size or color.
- Other localities have calculated the size of the modification by counting all concealment elements. Under this approach, the locality declares that a modification is substantial because it exceeds the size limitations in Section 1.6100(b)(7)—a practice that completely erases the incentives afforded by Congress.

Localities’ overbroad interpretations of the term “concealment elements” undermine Congress’ intent to streamline application approvals under Section 6409(a) as well as Section 1.6100(b)(7)(v) of the Commission’s rules, and frustrate the Commission’s policy to promote

²² Crown Castle August 2018 Letter at 12; *see also* WIA Petition at 3, 10.

²³*Id.*

²⁴ *Id.*

deployment on existing structures.²⁵ Indeed, Commissioner O’Rielly called on the Commission nearly a year ago to act to prevent localities from misinterpreting Section 6409(a):

The Commission needs to close loopholes in section 6409 that some localities have been exploiting. While these rules pertaining to the modification of existing structures are clear, some localities are trying to undermine Congress’s intent and our actions. For instance, localities are refusing ancillary permissions, such as building or highway permits, to slow down or prevent siting; using the localities’ concealment and aesthetic additions to increase the size of the facility or requiring that poles be replaced with stealth infrastructure for the purpose of excluding facilities from section 6409; placing improper conditions on permits; and forcing providers to sign agreements that waive their rights under section 6409. And, I have been told that some are claiming that section 6409 does not apply to their siting processes. This must stop. I appreciate the Chairman’s firm commitment to my request for an additional item to address such matters, and I expect that it will be coming in the very near future.²⁶

CTIA urges the Commission to act now to issue a declaratory ruling that clarifies this rule as follows:

- A “concealment element” means only a stealth facility or those aspects of a design that were specifically intended to disguise the appearance of a facility, such as faux tree branches or paint color. Only those elements that were specifically identified as concealment elements when the structure was built count as concealment elements that may not be defeated by a subsequent modification.²⁷
- Concealment elements are excluded from size calculations when determining whether a facility qualifies as an EFR.
- Relatedly, requirements that future modifications must comply with “blanket” concealment specifications cannot be used to prevent future applications from

²⁵ As the Competitive Carriers Association recently stated, “uncertainty regarding the meaning of ‘concealment requirements’ in the Commission’s regulations, and the types of modifications that ‘defeat’ them, is exacerbating deployment barriers.” CCA July 2019 Letter at 2.

²⁶ *State/Local Infrastructure Order*, Statement of Commissioner Michael O’Rielly.

²⁷ Minor expansions of existing concealment elements – e.g., increasing the height or length of the screen walls or width of a canister – should be permitted as long as the overarching concealment approach and perception of the site are maintained.

qualifying as EFRs. For example, localities cannot issue a blanket requirement that applicants must install large concealment elements, and then use the size of those concealment elements to determine that a proposed modification (which would have to include the large concealment element) does not qualify as an EFR.

B. The Commission Should Clarify That Distinct Rules Apply to Enclosed Equipment on the Ground as Opposed to Equipment on Structures.

Section 1.6100(b)(7)(iii) of the Commission’s Rules provides that the installation of equipment cabinets at a site constitutes a “substantial change” if the number of cabinets is “more than the standard number of new equipment cabinets for the technology involved, but not to exceed four cabinets.”²⁸ This provision applies to equipment cabinets that are installed on the ground, underground, or elsewhere on the premises (such as on the rooftop), and *not* to equipment that is attached to the structure itself, because such equipment is covered by *other* parts of the same rule. Specifically, subsection (b)(7)(i) limits how much the equipment can increase the height of the structure, and subsection (b)(7)(ii) limits how much equipment can protrude horizontally from the structure. In contrast, the numerical limit in subsection (b)(7)(iii) applies to equipment cabinets which are not located on the structure, and instead, are located elsewhere on the site’s premises.

Some localities have misinterpreted this provision by applying it to small, ancillary equipment installed on the structure near existing antennas. By counting those additional pieces of equipment as “cabinets,” the localities claim that the requested modifications exceed the rule’s numerical limits on cabinets and are thus not eligible for the streamlined Section 6409(a) process.²⁹ For example:

²⁸ 47 CFR 1.6100(b)(7)(iii).

²⁹ *Ex Parte* Letter from Matthew H. Mandel, Wireless Infrastructure Association, to Marlene H. Dortch, FCC, WT Docket No. 17-79, WC Docket No. 17-84 (filed May 20, 2019).

- Various California jurisdictions treated remote radio units as equipment “cabinets” and thus refused to consider installation of these units on the pole as an EFR, even though the installation complied with the subsection (b)(7)(i) and (ii) size limits for pole-mounted equipment, and did not alter the existing equipment cabinets.
- A city in Tennessee interpreted Section 1.6100(b)(7)(iii) as setting a cumulative limit, rather than a limit on the number of cabinets associated with a particular EFR.³⁰

Localities’ reading of the term “equipment cabinet” to apply to equipment that is installed on the tower itself cannot be correct, because that interpretation would subject the equipment to inconsistent restrictions.

To correct misinterpretation of Section 1.6100(b)(7)(iii), the Commission should clarify that its numerical limits on cabinets do not apply to equipment that is installed on structures, including equipment in encasements. Instead, that equipment is subject to the size limitations in Sections 1.6100(b)(7)(i) and (ii). Commission action on this issue will eliminate a disincentive for providers to encase equipment on structures and expedite access to existing facilities to support new or expanded wireless services, thus advancing Congress’s mandate in Section 6409(a). This action is also consistent with, and supported by, the Commission’s *2014 Report and Order* adopting this rule. There, the Commission defined types of substantial changes to physical dimensions of existing towers or base stations, including increases in the structure’s vertical dimensions or horizontal dimensions and “installation of more than the standard number of new equipment cabinets for the technology involved, but not to exceed four cabinets.”³¹ By placing equipment cabinets located on the ground or elsewhere on the premises (for which the rule imposes limits on the total number) in a separate category from additions to a structure

³⁰ See WIA Petition at 13.

³¹ *2014 Report and Order*, 29 FCC Rcd 12865, 12944-45 ¶ 188.

(which the rule subjects to size limitations), the Commission underscored the rule’s distinct treatment of equipment cabinets.

C. The Commission Should Confirm That When a Provider Proposes a Modification on a Non-Tower Structure, the Entire Structure Is the “Base Station” for Determining If the Modification Is an Eligible Facilities Request.

As discussed above, Section 6409(a) requires localities to approve any request to modify an existing wireless tower or “base station” that “does not substantially change the physical dimensions” of such tower or base station. The Commission’s implementing rules define a “tower” as a “structure built for the sole or primary purpose of supporting any Commission-licensed or authorized wireless communications service, while a “base station” is “a structure or equipment at a fixed location that enables Commission-licensed or authorized wireless communications between user equipment and a communication network. The term [base station] does not encompass a tower”³² The rules then provide that a modification to such a structure is substantial, and thus does not qualify as an EFR, only if “it increases the height of the structure by more than 10% or more than ten feet, whichever is greater.”³³ Under the Commission’s rules, buildings that hold antennas are considered base stations, and not towers, because they are structures that are not typically built solely or primarily to hold wireless antennas. And the “base station” in the context of a proposed deployment on a building is thus the entire building.

Yet some localities are interpreting the term “base station” to mean only that portion of the building hosting previously approved equipment, and only the other equipment that was previously installed. These localities then calculate the size limitation (*e.g.*, 10% height

³² 47 C.F.R. § 1.6100(b)(1) (defining “base station”); 47 C.F.R. § 1.6100(b)(9) (defining “tower”).

³³ 47 C.F.R. § 1.6100(b)(7)(i).

increase) based on only that area of the building, and refuse to consider a proposed modification an EFR because the equipment exceeds the improperly calculated size limitation. For example:

- Several localities in Minnesota and Wisconsin rejected a wireless provider's collocation applications by arguing that the term "base station" in the context of a proposed deployment on a building only includes the areas, such as existing antennas and roof top sleds, where existing antennas were already installed.

To address this misinterpretation of its rules, the Commission should clarify that:

- The "base station" in the context of a proposed modification under Section 6409(a) is the entire non-tower structure.
- The proposed modification may be located anywhere on the structure.
- The dimensions of the entire structure must be used in calculating whether a proposed modification would constitute a substantial change.

These clarifications are consistent with the FCC's rules, which define a base station as the structure. In addition, Section 1.6100(b)(7) defines a substantial change as one that, *inter alia*, "increase[s] the height of the structure by more than 10% or more than ten feet, whichever is greater."³⁴ The text of the rule itself identifies the structure, not a *portion of* the structure. The clarifications are also consistent with the Commission's *2014 Report and Order*, which discussed "base stations" as the structures that hold wireless equipment, repeatedly used the terms "base station" and "structure" interchangeably, and nowhere indicated that only *parts of* structures should be considered base stations.³⁵ Correcting localities' misreading of the rules will meaningfully expedite upgrades to existing structures and the delivery of next-generation networks to consumers across America.

³⁴ 47 C.F.R. § 1.6100(b)(7)(i).

³⁵ See, e.g., *2014 Report and Order*, 29 FCC Rcd 12865, 12993-95 ¶¶ 163-169.

D. The Commission Should Clarify the Remedies Available Under Section 6409(a).

As set forth above, Congress mandated that state or local governments “*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.”³⁶ The Commission further defined what constitutes an eligible facilities request in Section 1.6100 of its rules.³⁷ In Section 1.6100(c)(4), the Commission adopted a 60-day deadline for action on an application, and stated that a request shall be deemed granted if action does not occur by the deadline. Specifically, Section 1.6100(c)(4) states:

Failure to act. In the event the reviewing State or local government fails to approve or deny a request seeking approval under this section within the timeframe for review (accounting for any tolling), the request shall be deemed granted. The deemed grant does not become effective until the applicant notifies the applicable reviewing authority in writing after the review period has expired (accounting for any tolling) that the application has been deemed granted.

Then-Commissioner Pai noted that the Commission “adopts a bright-line test for determining which equipment modifications qualify for section 6409’s deemed granted remedy and makes clear that an applicant can start building on day 61 if a municipality doesn’t act on its application.”³⁸

Despite Congress’s clear command that local authorities “shall approve” each EFR and the Commission’s rule giving force to that command, some localities have misinterpreted their

³⁶ 47 U.S.C. § 6409(a)(1) (emphasis added).

³⁷ 47 C.F.R. § 1.6100.

³⁸ *2014 Report and Order*, Statement of Commissioner Ajit Pai.

obligation and refused to grant EFRs or issue building permits and other authorizations that they require before an applicant may modify the structure. For example:

- Some localities take the position that unless and until they issue permits or other authorizations, construction may not begin, even though they failed to act within the shot clock period and the application is thus deemed granted by operation of law. Many jurisdictions require providers to obtain a building permit or a highway permit for right of way work before work may commence. Municipal departments often will not issue these ministerial permits when an application has been deemed granted, apparently because it would be outside of their standard process.³⁹
- Other localities fail to respond at all, even after applicants notify them of the deemed grant, leaving applicants uncertain as to whether the locality may seek to block construction, notwithstanding the deemed grant.⁴⁰
- Some localities have required applicants to re-file previously approved building permits before considering their EFR application. For example, one Colorado jurisdiction rejected a wireless provider's EFR and required the provider to file a retroactive building permit application because the locality could not locate a building permit for the modifications that were zoned years before. Even after resubmitting the permit and EFR, the locality failed to act on the application.
- Other localities, including several jurisdictions in Texas, impose "sequential" approval regimes, under which they first issue a conditional use permit or other similar document approving the EFR, but then require the applicant to obtain a separate building permit or other authorization. These jurisdictions assert that the shot clock only applies to the approval of the EFR application itself and not to the issuance of other required permits, and then refuse to issue those permits to the applicant.⁴¹

³⁹ *Ex Parte* Letter from Kenneth J. Simon, Crown Castle, to Marlene H. Dortch, FCC, WT Docket No. 17-79, WC Docket No. 17-84, at 16 (filed Aug. 10, 2018) ("Crown Castle August 2018 Letter") (New Jersey locality refused to issue permits even after the shot clock had expired and Crown Castle had sent a deemed approved letter).

⁴⁰ *See, e.g., Ex Parte* Letter from Alexi Maltas, Competitive Carriers Association, to Marlene H. Dortch, FCC, WT Docket No. 17-79, WC Docket No. 17-84, at 1-2 (filed July 12, 2019) ("CCA July 2019 Letter") ("Despite complying with the Commission's requirement that an applicant notify the 'applicable reviewing authority' of the deemed grant, CCA members often cannot receive outstanding building permits or other certifications because they do not receive paperwork to establish the grant of their facilities modification request.").

⁴¹ *See, e.g., Ex Parte* Letter from Sade Dada, Wireless Infrastructure Association, to Marlene H. Dortch, FCC, WT Docket No. 17-79, WC Docket No. 17-84, at 3 (filed Aug. 30, 2018) (certain municipalities claim that "Section 6409 does not cover building permits or zoning. This effectively eliminates the benefit of deemed approved, putting the project in an unlawful state of limbo at odds with the intent of the law that the municipality 'may not deny, and shall approve.'").

- Some localities issue grants that contain conditions that are not included in the application or conflict with it, violating Congress’ mandate that they “shall approve” the application—not condition it.

Regardless of the rationale for failing to issue authorizations, these practices impede deployment and undermine Congress’s express direction that localities “shall approve” EFRs.

Congress required authorities to approve applications for non-substantial modifications to afford applicants the legal assurance necessary to efficiently construct deployments. To fully effectuate Congress’s directive, the Commission should clarify the meaning of Section 1.6100(c)(4) as follows:

- First, the Commission should clarify that the phrases “deemed granted” and “becomes effective” in Section 1.6100(c)(4) mean that if a local authority fails to timely grant an EFR application, the applicant may lawfully modify the tower or base station upon notice to the authority that an application is deemed granted.
- Second, the Commission should clarify that Section 1.6100(c)(4) applies to all approvals related to the modification, and that if the authority has failed to timely issue such approvals, those approvals are deemed granted. This action is consistent with the Commission’s previous ruling in the context of the Section 332(c)(7) shot clocks that the time periods apply to the locality’s entire process and to all required interim or final permits.⁴²

The Fourth Circuit’s decision affirming the Commission’s rules implementing Section 6409(a) supports Commission action here.⁴³ One of the reasons the court cited for upholding the deemed granted remedy was that “these applications are granted only by operation of federal law.”⁴⁴ The court explained that “the Order implementing Section 6409(a) does not require the

⁴² *State/Local Infrastructure Order* at ¶ 144 (“As noted above, multiple authorizations may be required before a deployment is allowed to move forward. For instance, a locality may require a zoning permit, a building permit, an electrical permit, a road closure permit, and an architectural or engineering permit for an applicant to place, construct, or modify its proposed personal wireless service facilities. All of these permits are subject to Section 332’s requirement to act within a reasonable period of time, and thus all are subject to the shot clocks we adopt or codify here.”).

⁴³ *Montgomery County v. FCC*, 811 F.3d 121 (4th Cir. 2015).

⁴⁴ *Id.* at 129.

states to take any action at all, because the ‘deemed granted’ remedy *obviates the need for the states to affirmatively approve applications.*”⁴⁵ Given that the source of the approval is federal law, there is no basis for localities to refuse additional permits once an application is deemed granted, because this federal remedy authorizes the applicant to modify the facility *without* local authorization. The Commission need not adopt a new rule or amend existing rules; the clarifications CTIA seeks are consistent with the language of the statute and the agency’s current rule and will make both more effective in achieving their intended purpose.

V. THE COMMISSION SHOULD ADVANCE CONGRESS’S MANDATE SET FORTH IN SECTION 224 OF THE ACT BY ENSURING TIMELY, FAIR ACCESS TO UTILITY POLES FOR WIRELESS COMMUNICATIONS FACILITIES.

Section 224 grants the Commission broad authority to regulate attachments to utility-owned and controlled poles, ducts, conduits, and rights-of-way.⁴⁶ The Commission has long held that Section 224 grants access rights to wireless providers,⁴⁷ and has adopted comprehensive rules to ensure that utilities’ rates, terms and conditions for attachments are just, reasonable, and non-discriminatory.⁴⁸ The Commission should leverage its authority to clarify and enforce those rules to prevent abuse by utilities and to remove barriers to deployment for wireless providers.

⁴⁵ *Id.* at 124 (emphasis added).

⁴⁶ 47 U.S.C. § 224(b).

⁴⁷ *See, e.g., Implementation of Section 703(e) of the Telecommunications Act of 1996*, Report and Order, 13 FCC Rcd 6777, 6798 ¶ 390 (1998) (“1998 Pole Attachment Order”) (“Wireless carriers are entitled to the benefits and protections of Section 224.”).

⁴⁸ 47 C.F.R. § 1.1401 *et seq.*

A. The Commission Should Define the Statutory Term “Pole” to Include Utility-Owned Light Poles.

The Commission should clarify that the term “pole” as used in Section 224 and the Commission’s rules includes utility-owned light poles. As a practical matter, light poles are optimal locations for the hundreds of thousands of small cells that will support broadband and 5G, given that they are existing infrastructure already prevalent along most rights-of-way. In fact, they are likely to be the *only* feasible location for small cells along rights-of-way where electric lines are buried underground. Further, electric lines are most commonly placed underground in urban areas, where the demands for mobile data and the small cells to support network densification are the greatest.

The Commission and the Broadband Deployment Advisory Committee have already recognized that light poles can, and should, be used for infrastructure deployment consistent with the Commission’s rules. For instance, the Commission found that preventing such use could be a barrier to entry when determining that the assessment of access fees for “light poles, traffic lights, utility poles, and other similar property” can violate Sections 253 or 332(c)(7), unless certain conditions are met.⁴⁹ And the Commission’s Broadband Deployment Advisory Committee recognized that light poles should be made available for communications facilities to promote deployment.⁵⁰ Both its Model State Code and its Model Code for Municipalities grant streamlined access rights to “poles” and define poles to include poles used for “lighting.”⁵¹

⁴⁹ *State/Local Infrastructure Order* at ¶¶ 50, 92.

⁵⁰ See 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>; Model Code for Municipalities, § 1.2(v), <https://www.fcc.gov/sites/default/files/bdac-07-2627-2018-model-code-for-municipalities-approved-rec.pdf>.

⁵¹ *Id.*

Nonetheless, the Commission needs to clarify that “poles” include “light poles” because utilities continue to deny access to light poles and impede deployment, as reflected in the record for the instant proceeding. As one wireless provider informed the Commission, “many utilities charge a premium for access to utility-owned light poles or deny access altogether, taking the position that the pole attachment statute requires access only to electric distribution poles. Access to light poles is crucial to wireless infrastructure deployment in some locations.”⁵² Some other utilities allow access but demand exorbitant fees that are orders of magnitude higher than the limits established under Section 224. For example:

- A Hawaii electric utility requested attachment fees of \$16-\$39 per linear foot for attachments on power distribution poles, *but nearly 100 times* that amount for attachments on street light poles.
- A Minnesota utility will only permit attachments to its light poles for a fee of \$500 per pole per year, many times larger than the permissible regulated pole attachment rate.
- Four electric utilities operating in Texas have refused access to a total of more than 100,000 poles that support street lights.
- An electric utility in Florida has refused a wireless provider’s request to access over 10,000 poles that support street lights unless the provider agreed to onerous commercial terms, arguing that the poles are not covered by Section 224.
- A Massachusetts utility refuses access to any of its metal light poles, effectively prohibiting small cell deployments in the cities they serve.
- A Kansas electric utility has refused access to any of its light poles.
- A Wisconsin utility does not allow attachments to any of its light poles.

These actions directly impede providers’ investment in, and deployment of, new facilities, particularly when there are no viable alternatives to light poles. Moreover, defining light poles out of the meaning of “pole” is inconsistent with the Commission’s rules and Congress’s intent.

⁵² *Ex Parte* Letter from Katherine R. Saunders, Verizon, to Marlene H. Dortch, FCC, WT Docket No. 17-79 and WC Docket No. 17-84, at 2 (filed June 21, 2018).

The Commission can satisfy Congress’s directive by declaring that:

- The term “pole” as used in Section 224 and the Commission’s implementing rules includes utility-owned light poles;
- Utilities must afford nondiscriminatory access to those poles; and
- Utilities must otherwise comply with Section 224 and the Commission’s pole attachment rules with respect to light poles.

Defining “pole” to include light poles is consistent with the language of the Act. Section 224(f)(1) mandates: “A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to *any* pole, duct, conduit, or right-of-way owned or controlled by it.”⁵³ Section 224 does not further define the term “pole.” In the absence of a statutory definition, terms are to be given their “ordinary meaning.”⁵⁴ The ordinary meaning of “pole” includes poles that host street lights. Put simply, a light pole is clearly a pole, particularly when Congress expressly chose to encompass “any” pole within Section 224.⁵⁵

Clarifying that Section 224 encompasses light poles is also consistent with the real-world practice of commingling street lights and communications attachments on the same poles. For example, the Commission has found that electric utilities use their poles to “attach[] their own facilities such as communications equipment, *street lights*, transformers, and grounded, shielded power conductors in the safety space.”⁵⁶

⁵³ 47 U.S.C. § 224(f)(1) (emphasis added).

⁵⁴ See, e.g., *Petit v. U.S. Department of Education*, 675 F.3d 769, 781 (D.C. Cir. 2012).

⁵⁵ See *Southern Co. v. FCC*, 293 F.3d 1338 (11th Cir. 2002) (citing *Lyes v. City of Riviera Beach*, 166 F.3d 1332, 1337 (11th Cir. 1999) (“Read naturally, the word ‘any’ has an expansive meaning.... [When] Congress [does] not add any language limiting the breadth of that word, ... ‘any’ means ‘all.’”).

⁵⁶ *Amendment of Rules and Policies Governing Pole Attachments*, Report and Order, 15 FCC Rcd 6453 ¶ 21 (2000) (emphasis added).

Applying Section 224 to light poles is not only consistent with the statute and a lawful exercise of the FCC’s authority to clarify and apply the Act; it is also sound public policy. This ruling will advance the pro-competition goals Congress established in Section 224, the goals established in the Act in general, and the Commission’s efforts to promote the deployment of communications infrastructure to support broadband and 5G. Further, this declaratory ruling will not harm utilities. They will retain all rights granted to them by Section 224, including those ensuring that deployments do not risk safety or operational reliability, and the Commission’s existing rate formula will allow them to recoup costs attributed to the space on the pole occupied by the attachment.

Some utilities have told providers seeking access to light poles that their denial of access is supported by one court decision,⁵⁷ but they misinterpret that case. The court did not address light poles at all; instead, it held that the FCC had incorrectly applied Section 224 to interstate transmission facilities. The court’s exclusion of interstate transmission facilities was based on its determinations that those facilities are subject solely to the jurisdiction of the Federal Energy Regulatory Commission, that the text and history of the statute indicate it was intended to cover “regular components of local distribution systems,” and the statute does not use the term “tower” even though transmission systems rely on towers. These reasons do not apply to light poles. The court concluded, “the scope of the Act, and of the FCC’s regulatory power, does not extend to utilities’ interstate electric transmission towers and facilities, which are regulated by the FERC and are outside the purview of the FCC’s authority.”⁵⁸ Moreover, the court also held that

⁵⁷ *Southern Co. v. FCC*, 293 F.3d 1338 (11th Cir. 2002).

⁵⁸ *Id.* at 1345.

Section 224’s reference to “any” pole meant that Congress intended to grant the right of access to *all* of a utilities’ poles, including those that were not being used for wire communications.⁵⁹

Citing cases that interpreted the statutory term “any” to mean all, the court concluded, “The lack of a limitation upon the adjective ‘any’ means that § 224(f)(1) expands the Act’s coverage to all ‘poles, ducts, conduits or rights-of-way owned or controlled by a utility.’”⁶⁰

B. The Commission Should Affirm That Utilities May Not Impose Blanket Prohibitions on Access to Any Portions of Their Poles.

The Commission should reiterate that Section 224 does not allow utilities to impose blanket prohibitions on installing wireless equipment, whether for parts of poles or the entirety of poles. Instead, the utility must demonstrate clearly and precisely why a specific attachment would raise safety and reliability concerns before denying access to such pole. A blanket ban obstructs the deployment of small cells needed to support broadband and 5G and is contrary to Section 224. It effectively denies wireless providers operating in the utilities’ service area access to these locations, even though poles may be the optimal, or only, structures available for small cell deployment.

The Commission’s *2011 Pole Attachments Order* concluded that before a utility may deny access to a pole, the 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.”⁶¹ The

⁵⁹ *Id.* at 1349.

⁶⁰ *Id.* at 1350.

⁶¹ *Implementation of Section 224 of the Act, Report and Order*, 26 FCC Rcd 5240, 5275 ¶ 75 (2011) (“*2011 Pole Attachments Order*”).

Commission rejected utilities' attempts to adopt blanket bans on antenna attachments under the guise of individual construction standards.⁶² Moreover, the Commission explicitly declared that wireless providers have the right to access the top of a pole, stating:

[W]ireless 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.... [W]e 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."⁶³

Despite this directive, utilities have continued to resist giving access to pole tops. They have also flatly denied access to lower portions of poles, below where utility and cable lines are typically attached—sometimes referring to this area as "unusable" space. Providers also continue to confront blanket restrictions on access to unusable space that do not comply with the requirement that they make a pole-specific showing of risks to safety or reliability.⁶⁴

For example:

- One commenter explained that it is often necessary to attach auxiliary equipment lower on the pole to support the antenna that is installed at the top, and that utilities themselves use these lower spaces to install equipment to support their operations. However, some utilities prohibit access to that space without making any location-specific showing of a safety or reliability risk.⁶⁵

⁶² *Id.* at 5275 ¶ 76.

⁶³ *Id.* at 5276 ¶ 77.

⁶⁴ Some utilities also continue to impose blanket prohibitions on access to pole tops, flouting the Commission's clear directive in the *2011 Pole Attachments Order* that such prohibitions are unlawful.

⁶⁵ Comments of Crown Castle International Corp., WC Docket No. 17-84 at 5-6 (filed June 15, 2017) ("But after the Commission explicitly rejected blanket bans on wireless equipment in its 2011 Order, utilities are trying a different approach by adopting new construction standards that prohibit attachment of any type of equipment, other than antennas, to poles At least in some cases, the new 'construction standards' prohibiting equipment attachment on poles are [enforced] despite the fact that the utility has allowed such equipment attachments on poles for many years.").

- Investor-owned utilities in New Jersey and Pennsylvania have prohibited use of lower parts of their poles to attach enclosed equipment.⁶⁶
- A Wisconsin utility has refused to allow pole-top access to metal poles but has provided no safety-related reason. Similarly, utilities in New York and Connecticut have not allowed pole-top attachments.
- A New York utility refused to allow wireless providers to access the tops of poles, but is installing its own wireless antennas in that same location.

The Commission has pledged to revisit these issues and should do so now. Access to all safe and structurally sound parts of poles will be crucial to expediting small cell deployment. To help achieve this top priority, the Commission should apply the *2011 Pole Attachment Order* to all portions of a pole. The Commission should also explicitly state that before a utility can refuse access to any part of a pole, the 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.”⁶⁷ Lastly, the Commission should make clear that it will promptly rule on complaints regarding access refusals, overcharges, or other such obstructive practices. Adopting this requested ruling will advance Section 224’s cardinal objective to remove barriers to accessing pole infrastructure for communications services, namely 5G.

⁶⁶ The Commission has also acknowledged that access to lower portions of poles could be safe, but declined to specifically address the barrier at the time given the state of the record at that time: “We recognize that there are likely to be circumstances in which using the lower portion of poles to install equipment associated with DAS and other small wireless facilities will be safe and efficient. However, given the paucity of the record, we are not in a position to be certain whether we should mandate that utilities permit certain uses. We would be open to revisiting this issue in the future.” *OMTR/Moratoria Order*, 33 FCC Rcd 7705, 7773 ¶ 134.

⁶⁷ *2011 Pole Attachments Order*, 22 FCC Rcd 5240, 5275 ¶ 76.

C. The Commission Should Clarify That Utilities Cannot Seek Terms That Conflict with the Pole Attachment Rules.

As a final clarification to its rules implementing Section 224, the Commission should affirm its prior holding that utilities are prohibited from seeking terms that conflict with the Commission's pole attachment rules. Wireless service and infrastructure providers seeking to negotiate pole attachment agreements sometimes face utility requests for terms that are inconsistent with the Commission's pole attachment rules. A utility may demand unlawful, unfavorable terms in return for agreeing to the regulated rate or other obligations that are already imposed by the rules, such as the timeline for reviewing applications. For example, it may request a longer period for determining when an attachment application is "complete" under the rules and thereby triggers the utility's obligation to conduct a survey.⁶⁸ Or it may condition its willingness to evaluate an application by seeking rates, terms and conditions that deviate from those the rules require.⁶⁹ In short, utilities have been able to water down or sidestep Commission requirements through what they term a "negotiation."

The pole owner usually has far more leverage to secure favorable terms due to its sole control over access to its poles. Indeed, Congress adopted Section 224 in recognition of and to remedy the unequal bargaining power between pole owners and attachers, which the Commission has repeatedly acknowledged. For example, in 1998, the Commission addressed the unequal negotiating positions of pole owners and attachers, holding that "all parties must negotiate in good faith for non-discriminatory access at just and reasonable pole attachment

⁶⁸ 47 C.F.R. § 1.4111(c) (setting forth deadlines for utility to determine that an attachment application is complete).

⁶⁹ *Ex Parte* Letter from Kenneth J. Simon, Crown Castle, to Marlene H. Dortch, FCC, WC Docket No. 17-894, WT Docket No. 17-79, at 4 (filed July 25, 2018).

rates. . . . We find that a utility’s demand for a clause waiving the [attacher’s] right to federal, state or local regulatory relief would be per se unreasonable and an act of bad faith in negotiation.”⁷⁰ And in 2011, the Commission stated:

When Congress granted the Commission authority to regulate pole attachments, it recognized the unique economic characteristics that shape relationships between pole owners and attachers. Congress concluded that “[o]wing to a variety of factors, including environmental or zoning restrictions” and the very significant costs of erecting a separate pole network or entrenching cable underground, “there is often no practical alternative [for network deployment] except to utilize available space on existing poles.” Congress recognized further that there is a “local monopoly in ownership or control of poles,” observing that, as found by a Commission staff report, “public utilities by virtue of their size and exclusive control over access to pole lines, are unquestionably in a position to extract monopoly rents . . . in the form of unreasonably high pole attachment rates.” Given the benefits of pole attachments to minimize “unnecessary and costly duplication of plant for all pole users,” Congress granted the Commission authority to ensure that pole attachments are provided on just and reasonable rates, terms, and conditions.⁷¹

This principle remains a cornerstone of the Commission’s regulatory framework—as envisioned by Congress—to redress the unequal bargaining positions of pole owners and attachers by ensuring that attachers can obtain just and reasonable rates and terms.

However, wireless service and infrastructure providers alike continue to face utilities that demand terms that are inconsistent with the Commission’s pole attachment rules. Indeed, utilities today are employing negotiating tactics that undermine the Commission’s longstanding policy in less direct but equally harmful ways. Rather than baldly demand that attachers waive legal rights granted under Section 224 and Commission rules, utilities condition their acceptance

⁷⁰ *1998 Pole Attachment Order*, 13 FCC Rcd 6777, 6789-90 ¶ 21.

⁷¹ *2011 Pole Attachments Order*, 26 FCC Rcd 5240, 5242 ¶ 4 (citations omitted).

of terms the attacher seeks on the attacher's acceptance of other agreement terms that alter and weaken those rights.

In the *OTMR/Moratoria Order*, the Commission twice discussed the application of its rules to pole attachment negotiations, but appeared to reach differing conclusions that leave the issue unsettled. The Commission first stated:

We emphasize that parties are welcome to reach bargained solutions that differ from our rules. Our rules provide processes that apply in the absence of a negotiated agreement, but we recognize that they cannot account for every distinct situation and encourage parties to seek superior solutions themselves through voluntary privately negotiated solutions. We therefore reject a clarification request by Crown Castle that would limit the scope of mutually bargained-for attachment solutions.⁷²

But the Commission also rejected a proposal that would require one-touch-make ready work to be performed by union contractors where the existing attacher is bound by a collective bargaining agreement with the union. In a second statement, it held:

Allowing private contracts to dictate our policy choice would subvert the supremacy of federal law over contracts. As the Supreme Court has made clear, “[i]f the regulatory statute is otherwise within the powers of Congress ... its application may not be defeated by private contractual provisions.”⁷³

The second statement is correct on the law and on policy. Section 224 and the Commission's implementing rules set out requirements for pole attachments, including deadlines for utilities to respond to requests for access and formulas for determining the maximum rates a utility can lawfully charge. Allowing utilities to negotiate terms that are at odds with those requirements would effectively nullify the effectiveness of the statute and the rules. In furtherance of Congress's directive, the rules establish a baseline of obligations that utilities must

⁷² *OTMR/Moratoria Order*, 33 FCC Rcd 7705, 7711 ¶ 13.

⁷³ *Id.* at 7731 ¶ 50.

meet. The utilities, therefore, must not be able to escape these obligations by requesting conflicting terms.

Conversely, the Commission's earlier statement fails to account for the reality that "bargained solutions" for pole attachments would rarely, if ever, occur absent the rules, given the uneven bargaining leverage. The utility is the "gatekeeper" to its poles, while the attacher lacks any gatekeeper position. Therefore, Congress rectified this inequity by passing Section 224. Paragraph 13's reliance on "mutually bargained-for attachment solutions" may be warranted only where the rules backstop those negotiations. Allowing the utility to "propose" terms that alter its regulatory obligations undercuts Congress's directive.

The Commission should thus clarify that its discussion of "bargained-for attachment solutions"⁷⁴ in the *OTMR/Moratoria Order* only permits parties to customize an agreement within the bounds of the Commission's rules. For example, the pole owner and prospective attacher can negotiate provisions regarding individual locations, types of poles, local rights-of-way policies, and variations in terrain. That said, such negotiation cannot result in an agreement that conflicts with the procedures, timelines, and requirements set forth in the Commission's rules. By issuing such clarification, the Commission will enable flexibility in negotiations, while at the same time satisfying Congress's directive that attachers have an effective backstop to pole owners' superior negotiating position.

⁷⁴ *Id.* at 7711 ¶ 13.

VI. THE COMMISSION HAS AMPLE AUTHORITY TO ISSUE THE REQUESTED DECLARATORY RULING.

The Commission has clear statutory authority to issue a declaratory ruling interpreting and applying the Communications Act and its rules,⁷⁵ and the courts have repeatedly affirmed that authority.⁷⁶ Indeed, the Commission has invoked that authority several times specifically to resolve disputes and uncertainty that were clouding the deployment of wireless facilities. In 2006, for example, the Commission granted a petition for declaratory ruling clarifying that an airport authority's restriction on wireless access points was preempted by the "OTARD" rule, which is designed to promote service to the public.⁷⁷ And in 2009, the Commission issued a declaratory ruling clarifying Section 332(c)(7) of the Act by imposing "shot clock" deadlines for local action on wireless siting applications, "to promote the deployment of broadband and other wireless services by reducing delays in the construction and improvement of wireless networks."⁷⁸

By issuing a ruling interpreting Sections 6409(a) and 224 and clarifying its own implementing rules, the Commission can resolve the disputes and uncertainty that are creating

⁷⁵ 5 U.S.C. § 554(e) ("The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty."); 47 C.F.R. § 1.2 ("The Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.").

⁷⁶ See, e.g., *City of Arlington v. FCC*, 668 F.3d 229, 243 (5th Cir. 2012) (Section 554 "empowers agencies to use declaratory rulings to 'remove uncertainty' by issuing statutory interpretations"); *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002); (citing precedent supporting FCC authority to issue declaratory ruling to interpret or clarify the Act); *Connect America Fund*, Declaratory Ruling, 30 FCC Rcd 1587, 1588 n.3 (2015) (issuing declaratory ruling to interpret the VoIP symmetry rule).

⁷⁷ *Continental Airlines*, Memorandum Opinion and Order, 21 FCC Rcd 13201 (2006).

⁷⁸ *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, Declaratory Ruling, 24 FCC Rcd 13994 (2009) (interpreting the statute's phrase "reasonable period of time."), *aff'd*, *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 569 U.S. 290 (2013).

unnecessary barriers to infrastructure deployment. The ruling does not involve the adoption or modification of any rules. The requested declaratory ruling will help achieve Congress' mandate to expedite infrastructure deployment and will serve the public interest by facilitating the expansion and densification of wireless networks required to deliver broadband and 5G to all Americans.

VII. CONCLUSION

Congress empowered the Commission to adopt rules to implement Sections 6409(a) and 224, streamline access to existing structures, and remove obstacles impeding infrastructure deployment needed to support broadband and 5G. The time is right for the Commission to take action to interpret and apply those statutory provisions and its own rules to eliminate barriers to installation of wireless facilities on existing structures. CTIA looks forward to working with the Commission in furtherance of this request.

Respectfully submitted,

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