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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
RM-11849

Accelerating Wireline Broadband)
Deployment by Removing Barriers to)
Infrastructure Investment)

WC Docket No. 17-84

Reply Comments of R Street Institute¹

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¹ The R Street Institute ("R Street") is a nonprofit, nonpartisan, public-policy research organization. R Street's mission is to engage in policy research and educational outreach that promotes free markets as well as limited yet effective government, including properly calibrated legal and regulatory frameworks that support economic growth and individual liberty.

I. Introduction

Even with the great work accomplished thus far by the Federal Communications Commission (“FCC” or “Commission”),² the deployment of fifth generation wireless networks (“5G”) remains a challenge for carriers across the country due to the barriers imposed by local governments.³ Indeed, the record indicates numerous examples of situations where unreasonable terms or unresponsive local regulators led to significant added costs and delays to private infrastructure deployment.⁴ The petitions from CTIA and WIA seeking to address these scenarios present an excellent opportunity for the FCC to clarify ambiguities and promote broadband deployment, and we encourage it to do so.⁵

Specifically, these reply comments urge the Commission to continue its work streamlining broadband deployment reviews at the local level by clarifying when “good faith attempts” begin the shot clock for application review, by clarifying that light poles are within the definition of “pole” in Section 224, and by clarifying a narrow definition of

² Declaratory Ruling and Third Report and Order, In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment et al., WT Docket No. 17-79 et al. (Sept. 27, 2018) [hereinafter Small Cell Order], <https://bit.ly/2PQNmFk>; Second Report and Order, In the Matter of Accelerating Wireless Broadband Deployment by Removing to Infrastructure Investment, WTB Docket No. 17-79 (Mar. 30, 2018), <https://bit.ly/2WNpYKk>, *remanded in part by* United Keetoowah Band of Cherokee Indians in Okla. v. Fed. Comms. Comm’n, No. 18-1129 (D.C. Cir. 2019).

³ Comments of CTIA, WT Docket No. 19-250 et al. (Oct. 29, 2019), <https://bit.ly/2NJTix6>.

⁴ WIA Petition for Declaratory Ruling at 10–11, 13, 15, In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WT Docket No. 17-79 (Aug. 27, 2019) [hereinafter WIA Petition for Declaratory Ruling], <https://bit.ly/34udCZS>; WIA Petition for Rulemaking at 12–13, In the Matter of Petition for Rulemaking to Accelerate Wireless Broadband Deployment by Amending the Rules Implementing Section 6409 of the Spectrum Act, File No. RM-11849 (Aug. 27, 2019), <https://bit.ly/2oS8YG2>; CTIA Petition for Declaratory Ruling at 10–11, 14, 16, 18, 22, 26–27, In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WT Docket No. 17-79 (Sept. 6, 2019) [hereinafter CTIA Petition], <https://bit.ly/2JNZK51>.

⁵ See *supra* note 4.

“concealment elements.” We think that collectively, these actions will go a long way toward promoting broadband deployment and fulfilling the Commission’s duties to the American public. We encourage the Commission to adopt them as soon as possible.

II. The Commission Should Continue Its Work to Streamline Broadband Deployment Reviews at the Local Level

Promoting the deployment of broadband infrastructure is a key responsibility of the Commission, and for good reason.⁶ Connectivity drives economic growth, allows for the development of new products and services, and connects communities across the globe.⁷ Even relatively simple activities, like sharing image-based memes, can change entire communities thanks to the connectivity that high-speed broadband provides.⁸ 5G networks promise to take the benefits of the Internet and expand them exponentially, allowing for vastly improved mobile broadband service—with much greater download speeds and much lower latency—as well as increased competition and substitution among fixed and mobile broadband providers.⁹

To promote the deployment of these 5G networks, the Commission has already taken significant steps to eliminate deployment barriers. Most importantly, the Commission issued a Declaratory Ruling and Report and Order establishing shot clocks and fee caps for

⁶ 47 U.S.C. § 1302(a).

⁷ *Accelerating Future Economic Value From the Wireless Industry*, Accenture Strategy (2018), <https://bit.ly/2WYTuNj>.

⁸ *Fostering a Healthier Internet to Protect Consumers Section 230 of the Communications Decency Act: Hearing Before the Subcomm. on Commc’ns & Tech. and the Subcomm. on Consumer Prot. & Commerce*, 116th Cong. (2019) (statement of Jeffrey Westling, Technology and Innovation Fellow, R Street Institute, et al.), <https://bit.ly/2rk0Krb>.

⁹ Jeffrey Westling, *Don’t Let Regulations Slow Down Your Internet*, Morning Consult (July 30, 2018), <https://bit.ly/2NqOFZX>.

regulatory review of the construction permits needed to install small wireless facilities.¹⁰

These protections are designed to prevent localities from overcharging carriers as a means of raising money and from ignoring applications when they are received. However, there is still more work to be done.

Despite the efforts of the Commission, localities can still impede the deployment of broadband infrastructure in several ways. R Street demonstrated this with its 2018 Broadband Scorecard, which established rankings for every state based on its laws regarding access to public rights of way, construction permits, zoning review, and franchises.¹¹ While many states have made and continue to make significant strides in reducing barriers to deployment, many other states allow localities to take unfair advantage of broadband providers by abusing the regulatory process. Indeed, the record in this proceeding is rife with examples of localities doing just that.¹²

Ideally, more states will recognize the importance of promoting broadband deployment and amend their laws accordingly. In fact, since the release of last year's Broadband Scorecard, many states have moved forward with "small cell bills" and other legislation that limit the barriers that localities can erect while still allowing them to safely manage and oversee their public rights of way.¹³ Like the Commission's 2018 Wireless Infrastructure Order, these state laws seek to establish shot clocks and fee caps on the reviews of small cell permitting and right-of-way access.

¹⁰ Small Cell Order, *supra* note 2.

¹¹ Joe Kane, Jeffrey Westling & Tom Struble, *2018 Broadband Scorecard Report*, R Street Inst. (Nov. 29, 2018), <https://bit.ly/2NK7k1L>.

¹² *See supra* note 4.

¹³ *See* Heather Morton, *Mobile 5G and Small Cell 2019 Legislation*, Nat'l Conference of State Legislatures (July 17, 2019), <https://bit.ly/2qockB3>.

Yet despite the work of the Commission and state legislatures, many aspects of the broadband deployment process remain open to regulatory mischief. It is vital that the Commission continue its work to remove these barriers and promote deployment of next-generation broadband services. The proposals laid out by CTIA and WIA present a valuable opportunity for the Commission to expand on its previous efforts to promote broadband deployment.

III. The Commission Should Clarify When “Good Faith” Attempts Begin the Shot Clock for Application Review

WIA proposes that the shot clocks governing eligible facilities requests (“EFRs”) begin tolling after an applicant has made a “good faith” attempt to submit the application.¹⁴ This solution is critical as a means of limiting the intake delays that have been detailed in the record. Most notably, some localities have delayed the approval process by simply transferring the paperwork for EFRs to different departments and failing to start the shot clock during these initial phases.¹⁵

Some commenters argue that this “good faith” standard adds more ambiguity to the process, as the reviewing entity may never see the application and yet it would still be deemed granted after the shot clock has expired.¹⁶ However, ambiguity and uncertainty are not good for business, either. Rather than risking future litigation by waiting in silence and then beginning construction after the shot clock has expired, companies would likely follow

¹⁴ WIA Petition for Declaratory Ruling, *supra* note 4, at 7.

¹⁵ *Id.* at 8; Comments of AT&T at 13, WT Docket No. 19-250 et al. (Oct. 29, 2019), <https://bit.ly/34c652t>.

¹⁶ Comments of the National Association of Telecommunications Officers and Advisors et al. at 6–7, WT Docket No. 19-250 et al. (Oct. 29, 2019), <https://bit.ly/34Eiqfg>.

up with local regulators to seek certainty that their applications were received and are under review. This makes the concern about applications slipping through the regulatory cracks seem negligible.

To the extent there is concern about a misunderstanding or confusion during this initial stage in the review process, one solution could be simply to require localities to provide the determination regarding the completeness of an application within the 30-day deadline provided in the Commission's rules for wireless facility modifications.¹⁷ Currently, the rule only requires a locality to provide written notice when an application is incomplete.¹⁸ Expanding that to require a locality to provide notice for complete applications, perhaps even under the same "good faith" standard, could help increase transparency and certainty in the process. In other words, if the applicant does not receive a determination regarding the completeness of the application, it will have some indication that the locality may not be processing the application and could follow up with the regulator before beginning construction rather than pressing ahead with construction and risking potential litigation down the road.

Another solution the Commission could explore, perhaps in a separate rulemaking, is to adopt a brief, one-week period for application completeness review that begins prior to the start of the 60-day shot clock. Similar provisions have been implemented at the state level for permitting review.¹⁹ This approach would give localities a brief window in which to determine whether an application is complete while still allowing the locality the full 60-day

¹⁷ 47 U.S.C. § 1.6100(c)(3)(i).

¹⁸ *Id.*

¹⁹ See, e.g., Ariz. Rev. Stat. § 9-593(F)(2); Ga. Code Ann. § 36-66C-7(b)(3).

period to review the merits of the application itself. Like the suggestion above, if the applicant receives no confirmation or rejection after the week expires, the applicant can follow up to discover why the completeness determination had not been made, even though the 60-day shot clock would have commenced. The Commission should avoid adding any delays to the application review process, but if it is concerned about ambiguity, a brief period for completeness review could alleviate those concerns.

IV. The Commission Should Clarify That Light Poles Are Included Within the Definition of “Pole” in Section 224

The CTIA Petition requests that the Commission clarify that the term “pole” in Section 224 includes utility-owned light poles. Clarifying this terminology presents a golden opportunity for the Commission to help facilitate broadband deployment due to the size and location of these poles. As CTIA explains in its petition, light poles are often the only viable structures for collocations in areas with underground electrical lines, a situation that is especially common in urban areas.²⁰

Some commenters try to distinguish light poles from utility poles,²¹ but their arguments are ultimately unpersuasive. These commenters point to the distinction some courts have drawn between electricity distribution and electricity transmission lines as justification for their arguments.²² However, electricity transmission lines are normally supported by much larger towers located in areas farther away from where carriers would be deploying small

²⁰ CTIA Petition, *supra* note 4, at 21.

²¹ Initial Comments of the Electric Utilities in Opposition to CTIA’s Petition for Declaratory Ruling on Pole Attachment Issues at 5–10, WT Docket No. 17-84 et al. (Oct. 29, 2019) [hereinafter Electric Utilities Comments], <https://bit.ly/2rcOB7c>.

²² *Id.* at 8.

cells, and therefore are not the structures Congress had in mind in passing Section 224.

Distribution lines, on the other hand, are strung from smaller utility poles that are normally located throughout cities to deliver service to consumers. Light poles are much more akin to these facilities because they are of similar size and purpose—i.e., providing a service directly to the consumer. And indeed, Section 224 makes this distinction clear by using the word “pole” generally but not including words like “tower,” which are more akin to the structures used to support electricity transmission facilities.²³ Therefore, even if electricity transmission facilities are not covered by Section 224, light poles would still fit the definition of “pole” in Section 224.

To the extent this approach could encompass too broad a range of support structures, the Commission’s clarification could be limited in scope so that it applies only to poles providing some type of electricity-based service to consumers. This clarification would address some commenters’ worries about “flag poles, totem poles or any other type of pole owned by a utility, regardless of its function or service”²⁴ being used for collocation. Moreover, the fact that non-electricity poles are not suited to small-cell deployment means that few applicants, if any, would seek collocation on these types of poles regardless of the legal right to do so. By contrast, light poles already have electrical connectivity on site and are placed in locations near consumers. Other poles, like those supporting traffic lights, could likewise be included in this definition while limiting it to exclude other poles, like flagpoles, that are neither designed nor suitable for delivering commercial services to consumers.

²³ 47 U.S.C. § 224(a)(4).

²⁴ Electric Utilities Comments, *supra* note 21, at 7.

V. The Commission Should Clarify a Narrow Definition for “Concealment Elements”

Finally, both CTIA and WIA ask the Commission to clarify that “concealment elements” are limited to those elements used specifically to conceal the visual impact of a wireless facility.²⁵ Both petitions provide examples of localities expanding this language to encompass additional elements that have nothing to do with concealment. Indeed, some commenters argue that despite the commonly understood definition of “concealment elements,” any change that could make a tower even slightly more visible would disqualify an application as an EFR.²⁶

The Commission should reject these broad interpretations. If the term “concealment elements” is defined too broadly, it could undermine the entire regime and dramatically slow the process of broadband deployment by rendering almost any tower modification a substantial change, thereby triggering a needless review process. This would be contrary to the intent expressed by Congress in the 2012 Spectrum Act,²⁷ the 1996 Telecommunications Act,²⁸ and the 1934 Communications Act,²⁹ so it should be rejected.

²⁵ WIA Petition for Declaratory Ruling, *supra* note 4, at 10; CTIA Petition, *supra* note 4, at 12.

²⁶ Joint Comments of City of San Diego et al. at 34, WT Docket No. 19-250 et al. (Oct. 29, 2019), <https://bit.ly/2CiVC95>.

²⁷ Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6409, 126 Stat. 232 (Feb. 22, 2012) (codified at 47 U.S.C. § 1455).

²⁸ Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 153 (Feb. 8, 1996) (codified at 47 U.S.C. § 1302).

²⁹ Communications Act of 1934, Pub. L. No. 73-416, § 1, 48 Stat. 1064 (June 19, 1934) (codified at 47 U.S.C. § 151).

VI. Conclusion

While the Commission has done great work on promoting the deployment of broadband infrastructure, there is still more that can and should be done. The record in this proceeding indicates numerous ways that local review processes still pose costly barriers to the deployment of next-generation 5G wireless services. Therefore, the Commission should use its authority to adopt the recommendations in the petitions and continue its important work in promoting broadband deployment.

Respectfully submitted,

_____/s/_____

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