Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of State and Local Governments' Obligations 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 CTIA

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CTIA respectfully submits these reply comments in support of the separate petitions filed by CTIA and the Wireless Infrastructure Association ("WIA"),[1] which address the Commission's rules implementing Section 6409(a) of the Spectrum Act of 2012 and Section 224 of the Communications Act.[2]

I. INTRODUCTION AND SUMMARY.

The cardinal purpose of Sections 6409(a) and 224 is to promote the deployment of communications services to the public by removing barriers to the use of existing infrastructure. The statutory language is clear and direct: state and local governments "may not deny, and *shall approve*" non-substantial modifications to existing facilities; utilities "*shall provide* . . .

[1] CTIA Petition for Declaratory Ruling (filed Sept. 6, 2019) ("CTIA Petition"); WIA Petition for Declaratory Ruling (filed Aug. 27, 2019) ("WIA Petition for Declaratory Ruling"). WIA also filed a Petition for Rulemaking, which CTIA generally supported in its initial comments. *See* Comments of CTIA, WT Docket No. 19-250, RM-11849 (filed Oct. 29, 2019) ("CTIA Comments"). However, CTIA focuses these Reply Comments solely on txhe issues raised in the CTIA Petition and, as appropriate, the WIA Petition for Declaratory Ruling.

[2] 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(a); 47 U.S.C. § 224.

nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it."[3] But the CTIA and WIA petitions and the record in these proceedings demonstrate that questions of interpretation have arisen in the implementation of these critical directives. Indeed, the record in this proceeding confirms that some localities and utilities are interpreting these statutes and the Commission's implementing rules in ways that conflict with the statutes' and rules' language and purpose. While some localities and utilities are partnering with wireless providers to enable deployment, others are delaying or outright denying access to existing infrastructure and frustrating Congress's intent to promote wireless deployment.

Many commenters agree with CTIA and WIA that the Commission should clarify its rules implementing Sections 6409(a) and 224 so wireless providers can fully achieve the statutes' and rules' objective to promote access to existing infrastructure. Localities and utilities oppose the petitions, disagreeing with the wireless industry as to how Section 6409(a), Section 224, and the Commission's rules apply to providers' access to existing structures and the meaning of numerous terms in those statutes and rules. Those disagreements are causing uncertainty, disputes, and delays that are impeding wireless and 5G deployment at a critical time for the United States. The Commission should act now to resolve this uncertainty and unleash the full potential of next-generation services across the country.

The Commission's declaratory ruling process exists to address precisely this type of situation—where clarity is needed for all stakeholders to effectuate the letter and spirit of the Commission's rules. Here, wireless providers and some localities have taken diverging interpretations over the meaning of Section 1.6100(b), which defines various terms and delineates applications for modifications that make a "substantial change" to a facility and thus

[3] 47 U.S.C. § 1455(a); 47 U.S.C. § 224(f)(1) (emphasis added).

do not qualify as an eligible facilities request ("EFR") under Section 6409(a)'s streamlined process. The record shows that there are also questions as to the meaning of the phrases "deemed granted" and "becomes effective" in Section 1.6100(c)(4), which implements Sections 6409(a)'s direction that localities "may not deny, and shall approve" an EFR. As demonstrated in the record and further explained below, the interpretations of these rules that CTIA and WIA advance are grounded in the rules' language and purpose and the Commission's *2014 Order* adopting them.[4] In contrast, interpretations taken by some localities conflict with the language and purpose of the rules as well as with the *2014 Order*. The Commission should therefore clarify that:

- "Concealment element" as used in Section 1.6100(b)(7) means only a stealth facility or those aspects of a facility's design that were specifically adopted to disguise its appearance;
- "Equipment cabinet" as used in Section 1.6100(b)(7) refers to equipment that is installed on the ground or premises;
- "Base station" as used in Section 1.6100(b)(1) means the entire structure that supports an antenna; and
- Section 1.6100(c)(4) encompasses all required permits and thus means that localities "shall approve" those permits within the 60-day timeframe the rules provide.

Additionally, the record shows there are divergent views on the meaning of Section 224 and the Commission's pole attachment framework. There are conflicting interpretations of the term "pole" in Section 224 and disagreements over the scope of utilities' obligations to make space available on poles under reasonable terms and conditions. As the initial comments demonstrate, a number of utilities make assertions that are not supported by the language or

[4] *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report and Order, 29 FCC Rcd 12865, 12956 ¶ 214 (2014) ("*2014 Order*"), *aff'd sub nom. Montgomery County v. FCC*, 811 F.3d 121 (4th Cir. 2015).

purpose of Section 224 or the rules implementing it, and such misinterpretation is impeding wireless deployment. The Commission accordingly should make the following rulings:

- The term "pole" includes a light pole that is owned by an investor-owned utility;
- Utilities may not impose blanket prohibitions on access to parts of a pole, but must, as Section 224 and the Commission's rules require, justify denial of access based on lack of capacity, safety, reliability, or engineering standards that are specific to the pole for which access is sought; and
- Utilities may not demand terms in pole attachment agreements that conflict with the Commission's rules.

Contrary to opponents' incorrect claims that CTIA and WIA are requesting changes to the rules via their petitions for declaratory ruling, these petitions in fact ask only for clarification of existing rules. Indeed, the opponents' own arguments assert different interpretations of those existing rules—which is exactly why clarification through a declaratory ruling is warranted. By issuing the requested rulings, the Commission will resolve uncertainty and disputes over the statutes and rules they administer. Moreover, taking actions consistent with those statutes and rules will advance the public interest in promoting the availability of advanced wireless services to consumers across the country.

II. THE COMMISSION SHOULD ISSUE A DECLARATORY RULING TO RESOLVE CONFLICTING INTERPRETATIONS OF SECTIONS 6409(A) AND 224 THAT ARE IMPEDING WIRELESS DEPLOYMENT.

A. The Record Demonstrates That There is Disagreement Among Stakeholders Regarding Key Terms in Sections 6409(a) and 224 and the Rules Effectuating Those Provisions.

Stakeholders from across the wireless ecosystem agree with CTIA and WIA that the Commission should clarify its regulatory framework implementing Sections 6409(a) and 224 to

remove uncertainty and resolve disputes.[5] Consistent with the CTIA and WIA petitions, these commenters warn that practices by certain localities and utilities are delaying or blocking wireless providers' ability to modify or upgrade existing wireless facilities to meet rapidly increasing demands for advanced services.[6]

Some communities are working with wireless providers to speed the deployment of modifications to existing facilities, and are implementing the Commission's rules as the Commission intended.[7] However, as discussed in more detail below, the record clearly reveals that other localities interpret the same Commission rules very differently, in ways that significantly impede wireless deployment. As T-Mobile notes, "some jurisdictions continue to

[5] *See, e.g.*, Comments of ACT | The App Association, WT Docket No. 19-250, RM-11849, WC Docket No. 17-84, at 5-6 (filed Oct. 29, 2019) ("ACT Comments); Comments of American Tower, WT Docket No. 19-250, RM-11849, at 2-3 (filed Oct. 29, 2019) ("American Tower Comments"); Comments of AT&T, WT Docket No. 19-250, RM-11849, WC Docket No. 17-84, at 1-4 (filed Oct. 29, 2019) ("AT&T Comments"); Comments of Competitive Carriers Association, WT Docket No. 19-250, RM-11849, at 2 (filed Oct. 29, 2019) ("CCA Comments"); Comments of Crown Castle International Corp., WT Docket No. 19-250, RM-11849, WC Docket No. 17-84, at 2-5 (filed Oct. 29, 2019) ("Crown Castle Comments"); Comments of ExteNet Systems, Inc., WT Docket No. 19-250, RM-11849, WC Docket No. 17-84, at 3-4 (filed Oct. 29, 2019) ("ExteNet Comments"); Comments of Free State Foundation, WT Docket No. 19-250, RM-11849, WC Docket No. 17-84, at 1-2 (filed Oct. 29, 2019) ("Free State Foundation Comments"); Comments of Nokia, WT Docket No. 19-250, RM-11849, at 1 (filed Oct. 29, 2019) ("Nokia Comments"); Comments of T-Mobile, WT Docket No. 19-250, RM-11849, WC Docket No. 17-84 (filed Oct. 29, 2019) ("T-Mobile Comments"); Comments of Verizon, WT Docket No. 19-250, RM-11849, WC Docket No. 17-84, at 1-2 (filed Oct. 29, 2019) ("Verizon Comments"); Comments of Wireless Internet Service Providers Association, WT Docket No. 19-250, RM-11849, at 1-4 (filed Oct. 29, 2019) ("WISPA Comments").

[6] *See, e.g.*, AT&T Comments at 4 ("These clearly erroneous misinterpretations of [Section 6409(a)] and rules are causing substantial delays in AT&T's deployment of 5G infrastructure."); CCA Comments at 6; WISPA Comments at 4 (explaining that its members "have encountered similar examples of localities that are not fully aware of Section 6409(a) or have adopted policies that frustrate the ability of fixed wireless providers to deploy" under Section 6409(a)); Verizon Comments at 7 (providing examples of instances where utilities deny access to pole-tops); *see also generally* Crown Castle Comments.

[7] *See, e.g.*, WISPA Comments at 4 ("Many localities have engaged in good faith efforts to follow Section 6409(a) and the Commission's rules by adopting laws and policies that encourage broadband entry and competition in a manner that is consistent with the needs of their communities.").

act in ways that undermine the protections afforded by the statute and the Commission's rules."[8] Verizon states that "some local authorities have tried to erode Section 6409's mandatory approval language by limiting how and when it applies."[9] Similarly, AT&T explains that "many localities are violating the Commission's rules and claiming that various types of [EFRs] fall outside the Section 6409(a) process and the 60-day shot clock."[10]

Industry stakeholders and utilities also disagree over the meaning of the term "pole" in Section 224 and on how the Commission's rules apply to several pole attachment issues.[11] As Verizon states, "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."[12] And AT&T states that some utilities' "practices are impeding deployment of 5G wireless infrastructure, which depends in significant part on reasonable and timely access to utility poles, including light poles, at reasonable rates."[13] Commission action

[8] T-Mobile Comments at 4. *See also* WISPA Comments at 4 ("WISPA's members have encountered . . . localities that are not fully aware of Section 6409(a) or have adopted policies that frustrate the ability of fixed wireless providers to deploy broadband facilities under the process envisioned by Congress in Section 6409(a)."); Crown Castle Comments at 3-5; Verizon Comments at 8-9 (stating that reforms "will serve the public interest by eliminating barriers to wireless broadband facility deployment and improving broadband service for consumers, as Congress intended in enacting Section 6409").

[9] Verizon Comments at 8.

[10] AT&T Comments at 3.

[11] *See, e.g.*, AT&T Comments at 21 (explaining that "many electric utilities assert that Section 224 does not apply to 'light poles' and thus deny access to those poles or allow access only on onerous terms, such as the payment of exorbitant access fees or the placement of dark fiber"); Verizon Comments at 3 (encouraging the Commission to "confirm that Section 224 applies to light poles and that utilities may not impose blanket prohibitions on access to poles or parts thereof"); Comments of ACA Connects – America's Communications Association, WC Docket No. 17-84, at 2-4 (filed Oct. 29, 2019).

[12] Verizon Comments at 4-5.

[13] AT&T Comments at 21.

will resolve these disputes, provide all parties with more certainty, and promote access to infrastructure, achieving the core purpose behind the federal pole attachment regime.

B. Clarifying the Rules Implementing Sections 6409(a) and 224 Will Accelerate Wireless Broadband Deployment.

The Commission has clear legal authority and a compelling public interest basis to clarify its regulatory framework. In particular, prompt action on the CTIA and WIA petitions will help achieve the national policy priority that Congress, the Administration, the Commission, and many stakeholders all support—to promote wireless and 5G by removing deployment barriers and driving investment in the nation's wireless networks. As the CTIA Petition noted, all five FCC commissioners have emphasized the clear public interest benefits of advanced wireless services, the need to make robust broadband available to all Americans, and the importance of deploying wireless infrastructure to reap the benefits of 5G.[14] The record establishes that 5G and other advanced services will deliver enormous benefits to the public, bolster the U.S. economy, and enable the nation's global technological leadership to flourish—but only if providers are able to build the robust, densified wireless networks they seek to deploy.[15] Sections 6409(a) and 224 and the rules implementing them play a major role in advancing this national priority because

[14] CTIA Petition at 3.

[15] ACT Comments at 2 ("[T]he relief sought in each of the petitions will ensure that our members have access to improved broadband infrastructure needed to create mobile apps that revolutionize the consumer and enterprise experiences for all Americans."); Crown Castle Comments at 34 ("In order to foster the deployment necessary to meet our country's growing demand and the challenges of the 5G buildout, this Commission should act to amend its 6409 Rules."); Free State Foundation Comments at 1 ("Removal of local regulatory barriers to infrastructure upgrades is essential to enabling speedy deployment of next-generation wireless networks, especially 5G networks."); AT&T Comments at 2-4; CCA Comments at 3 (stating that by making the clarifications requested by CTIA and WIA, "the Commission will provide additional, important guardrails that will ensure certain local rules, regulations, and practices do not impede 5G deployment"); American Tower Comments at 3; T-Mobile Comments at 3 ("Effective and timely deployment of upgrades to existing macro sites will be a key part of the race to 5G."); Nokia Comments at 4; WISPA Comments at 4-5.

their purpose is to facilitate deployment of services using existing poles, buildings, and other structures by removing barriers to accessing that infrastructure. However, the record demonstrates that uncertainty and disputes over the meaning of these provisions are interfering with their ability to fulfill their purpose. A declaratory ruling clarifying how they apply will serve the public interest by removing barriers and expediting access to wireless deployment.

Granting the CTIA and WIA petitions will also advance longstanding federal policy to promote more intense utilization of *existing* infrastructure. That policy is based on the Commission's finding that existing towers, poles, and other structures are well suited for infrastructure deployment, and that using these structures results in favorable visual and other effects.[16] Opposing commenters fail to confront the fact that their interpretations of Section 6409(a), Section 224, and the Commission's rules are frustrating the important policy objective of driving more robust use of existing infrastructure.

C. Localities Make Strawman Arguments That Can Be Quickly Dismissed.

In their opposing comments, most localities do not acknowledge the fact, borne out by initial record, that there are conflicting interpretations of the rules implementing Section 6409(a) that warrant a declaratory ruling. Instead, they make several arguments that misstate what the CTIA and WIA petitions actually seek and seem intended to distract the Commission from quickly acting to resolve the uncertainty over its rules that is impeding deployment of advanced wireless services. The Commission should not be sidetracked by these pleadings.

[16] *2014 Order*, 29 FCC Rcd 12865, 12867-68 ¶ 5.

For example, localities wrongly argue that CTIA and WIA seek changes to the Commission's rules through their petitions for declaratory ruling.[17] One locality claims that the petitions seek "further preemption," making local authority "moot and creating a lawless atmosphere."[18] To the contrary, the petitions for declaratory ruling do not ask for new rules, only that terms in the existing rules be clarified. As Verizon notes, "experience in implementing [Section 6409(a)] over the last several years has revealed some areas where further Commission definition or clarification would help ensure that Section 6409 provides the maximum public interest benefits by speeding wireless broadband deployment."[19] The record reveals that some localities have adopted disparate interpretations of the same terms (for example, "concealment element" and "equipment cabinet"),[20] demonstrating that clarifications are needed through the proper vehicle of a declaratory ruling.[21]

Additionally, some opponents inaccurately claim that granting the CTIA and WIA petitions would threaten public safety by precluding localities from enforcing building codes and

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[17] *See, e.g.*, Comments of the National League of Cities, et al., WT Docket Nos. 19-250, 17-79, WC Docket No. 17-84, RM-11849, at 3 (filed Oct. 29, 2019) ("NLC Comments") (arguing that "the petitions demand significant rewrites" to the rules"); Comments of the National Association of Telecommunications Officers and Advisors et al., WT Docket Nos. 19-250, 17-79, WC Docket No. 17-84, RM-11849, at 2 (filed Oct. 29, 2019) ("NATOA Comments") ("[T]he suggested 'clarifications' are in fact significant changes.").

[18] Comments of the City of Austin, Texas, WT Docket No. 19-250, WC Docket No. 17-84, RM-11849, at 1 (filed Oct. 29, 2019) ("City of Austin Comments").

[19] Verizon Comments at 8.

[20] *See, e.g.*, American Tower Comments at 7-9; Nokia Comments at 6-8 (stating that CTIA and WIA "provide ample evidence of localities undermining Commission intent by broadly defining what a 'concealment element' is, as a means to claim an application is outside the scope of an EFR"); Verizon Comments at 8-9; WISPA Comments at 6-7; Crown Castle Comments at 8-10.

[21] Because the petitions do not seek changes to the rules, there is no reason for the Commission to grant the NATOA proposal that it refer development of recommended changes to the Broadband Deployment Advisory Committee. *See* NATOA Comments at 4.

other safety-related requirements or forcing them to issue permits even when the application would violate health or safety codes.[22] In fact, nowhere in the petitions do CTIA or WIA seek to exempt providers from those requirements or divest localities of the authority to enforce them. Indeed, the *2014 Order* stated that localities "may continue to enforce and condition approval on compliance with non-discretionary codes reasonably related to health and safety."[23]

Further, the National League of Cities ("NLC") et al. inaptly argue that it is premature to consider further actions so soon after the September 2018 declaratory ruling on state and local regulation took effect.[24] But that ruling interpreted different statutory provisions—Sections 253 and 332 of the Communications Act—and did not address Section 6409(a) of the Spectrum Act. Another group of localities incorrectly alleges that their due process rights are impaired because some examples in the record do not identify the specific local requirement.[25] However, many examples do in fact identify the locality.[26] More importantly, however, the identity of any particular locality is not relevant because this is not an adjudicatory proceeding where the Commission is being asked to preempt a specific locality's regulations; instead, the Commission is being asked to clarify the meaning of its existing rules that apply to localities generally.

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[22] NATOA Comments at 3; City of Austin Comments at 4-5 (stating that industry is "seeking blanket preemption of local building codes" and "one size-fits-all national standards overriding all state and local authorizations"); Comments of City of San Diego, California, et al., WT Docket Nos. 19-250, 17-79, WC Docket No. 17-84, RM-11849, at 15 (filed Oct. 29, 2019) ("San Diego Comments") (stating that petitions seek a rule "that replaces local expertise with a Commission mandate").

[23] *2014 Order*, 29 FCC Rcd 12865, 12956 ¶ 214.

[24] NLC Comments at 5.

[25] San Diego Comments at 1-2.

[26] *See, e.g.*, WIA Petition for Declaratory Ruling at 10, 11, 13, 15 (citing specific localities); CTIA Petition at 11 (citing specific localities' practices that were discussed in an ex parte letter filed by an infrastructure provider).

Finally, some localities try to obfuscate CTIA's and WIA's straightforward requests for clarification by filing extensive yet irrelevant exhibits with their comments. For example, NLC and the City of San Diego filed more than 1,200 pages of exhibits, including lengthy documents that are not discussed in their comments at all or were submitted in previous Commission proceedings. Hundreds of pages are from localities' filings in the rulemaking that resulted in the *2014 Order*—which was affirmed on appeal and has long been final. Hundreds more pages are from the proceeding that led to the September 2018 order on small wireless facilities, which did not address Section 6409(a) at all.[27]

The Commission should ignore localities' attempts to sidetrack the Commission at this crucial time for wireless deployment. The Commission should move quickly to resolve the uncertainty over its rules to unleash the continued investment and roll-out of the advanced wireless services providers stand ready to deploy.

III. THE COMMISSION SHOULD CLARIFY ITS RULES IMPLEMENTING SECTION 6409(A) ADDRESSING "SUBSTANTIAL CHANGES" AND "BASE STATIONS."

The record shows that the Commission should issue a common sense declaratory ruling that corrects some localities' misinterpretations of the Commission's rules implementing Section 6409(a), which have obstructed deployment to the detriment of wireless consumers across the country. One significant area of uncertainty and disagreement concerns localities' application of the rules that define when a modification to an existing facility would be a "substantial change" and thus

[27] The exhibits attached to NLC's and San Diego's comments include numerous filings made to the Commission in its "Improving Wireless Facilities Siting Policies" proceeding (WT Docket No. 13-238), its "Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting" proceeding (WC Docket No. 11-59), its "Removing Barriers to Infrastructure Investment" proceedings (WT Docket No. 17-79, WC Docket No. 17-84), and its "Streamlining Deployment of Small Cell Infrastructure" proceeding (WT Docket No. 16-421).

would not qualify for streamlined review under Section 6409(a). Industry commenters demonstrate that many localities are incorrectly interpreting these rules to deny streamlined review, resulting in "substantial delays or cessation" of deployments.[28] Commenters, like CTIA and WIA, do not ask the Commission to change these rules, only to clarify their meaning.[29] As the Competitive Carriers Association notes:

> As the Commission has seen, rules that appear clear and straightforward on paper can prove malleable and divisive in practice, particularly when the rules govern interactions with numerous and diverse localities and stakeholders. Those interactions can become more streamlined and less contentious when all stakeholders clearly understand the rules that frame them. Additional clarity and certainty from the Commission should enable private parties and municipalities to work together most effectively to serve their customers and constituents.[30]

Specifically, the Commission should clarify that:

- "Concealment element" as used in Section 1.6100(b)(7) means only a stealth facility or those aspects of a facility's design that were specifically adopted to disguise its appearance;
- "Equipment cabinet" as used in Section 1.6100(b)(7) refers to equipment that is installed on the ground or premises; and

[28] *See* AT&T Comments at 4-11 (explaining that "a number of localities have adopted various strategies to thwart this requirement, resulting in substantial delays or cessation of much needed infrastructure deployments"); Verizon Comments at 8; Nokia Comments at 6-8; WISPA Comments at 6-8; Crown Castle Comments at 7-13.

[29] *See, e.g.*, CTIA Comments at 7 (stating that the petitions "do not ask the Commission to adopt new rules, but merely to clarify the agency's existing rules to effectuate the language and purpose of those provisions, and to promote collocations and upgrades to existing facilities"); AT&T Comments at 5 ("AT&T agrees with CTIA and WIA that the Commission should promptly confirm these localities are misinterpreting Section 6409(a) and the Commission's implementing rules."); T-Mobile Comments at 26 ("It is well-settled that agencies are authorized to interpret ambiguous provisions in the statutes they administer, and agencies may likewise clarify ambiguities in their own rules and provide additional guidance via declaratory ruling."); Verizon Comments at 8 (stating "clarification is needed to prevent localities from evading the law").

[30] CCA Comments at 2.

- "Base station" as used in Section 1.6100(b)(1) means the entire structure that supports an antenna.

The Commission's rules implementing Section 6409(a) are the law, and localities must abide by them. The Commission should affirm this fact and clarify the meaning of disputed terms to prevent localities from misinterpreting the Commission's rules and erecting barriers to wireless deployment.

A. "Concealment Element" Means a Stealth Facility or Those Aspects of a Facility's Design That Were Specifically Adopted to Disguise its Appearance.

Section 1.6100(b)(7)(iv) states that a modification is a substantial change if it defeats a "concealment element." CTIA and WIA demonstrated in their petitions that when the Commission adopted this rule in the *2014 Order*, it explicitly described such an element as a stealth design (such as a monopine) or a stealth element such as tree branches or a paint color that would help to camouflage the tower.[31] Other commenters agree.[32] But some localities have radically broadened that term to include any aspect of a structure, including its dimensions. This cannot be correct because the Commission has already specified in Sections 1.6100(b)(7)(i) and (ii) what changes in a structure's dimensions would constitute a substantial change. CTIA and WIA noted that localities' expansion of "concealment element" to include any aspects of a

[31] CTIA Comments at 8-9; *see also* CTIA Petition at 12; WIA Petition for Declaratory Ruling at 11-12.

[32] *See, e.g.*, CCA Comments at 7-8 (noting that there are "examples in the record in which wireless providers or other private stakeholders have faced municipalities with overly broad views of what aspects of wireless facilities qualify as concealment elements" and explaining that "CCA members have encountered similar situations"); WISPA Comments at 7; Crown Castle Comments at 8-10 ("[M]any local governments have taken [the "defeating concealment element" of substantial change] beyond its logical limit by labeling certain elements of the original siting approval as concealment factors in order to deny an EFR."); AT&T Comments at 6-8.

structure would render Sections 1.6100(b)(7)(i) and (ii) meaningless.[33] They thus asked that the Commission clarify that a concealment element includes only a stealth facility or those aspects of design that were specifically intended to disguise the appearance of the facility.

NLC and NATOA oppose this clarification, but ignore the *2014 Order*'s limitation of the scope of what is considered a concealment element.[34] NLC thus wrongly asserts that CTIA and WIA seek to "significantly curtail the scope of concealment elements." In fact, it is NLC that seeks to incorrectly alter the meaning of "concealment elements" to be far broader than the *2014 Order* allows. For example, NLC poses a situation where a locality limits a structure's height specifically to conceal its appearance,[35] and incorrectly suggests that the relief sought in the CTIA Petition would not acknowledge the impact of size on concealment in any context. To the contrary, the CTIA Petition acknowledged that where a design element was "intended to disguise the appearance of a facility," that element could be a concealment element.[36]

The record makes clear that some localities incorrectly use height *per se* as a concealment element and thus treat any increase in height as "defeating" that element, and thus as a substantial change. This practice reads out of the rules the existing provisions that determine when a height increase or other changes in a structure's physical dimensions constitute a substantial change. The Commission should thus declare that height in and of itself is not a concealment element, but may defeat concealment when height is limited specifically to conceal

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[33] *See* CTIA Comments at 8-9; *see also* Comments of WIA, WT Docket No. 19-250, RM-11849, WC Docket No. 17-84, at 10-11 (filed Oct. 29, 2019) ("WIA Comments"); WIA Petition for Declaratory Ruling at 10-12.

[34] *See* NLC Comments at 16-17; NATOA Comments at 8-9.

[35] NLC Comments at 17-18.

[36] CTIA Petition at 9-11.

the structure from being visible from particular locations. CTIA's requested interpretation of the meaning of a concealment element is consistent with the Commission's prior reasoning.[37]

Similarly, NATOA argues that limiting a concealment element to those elements specifically intended to hide a structure would be a "much narrower" meaning of that term than the Commission's rules allow, but identifies no basis for its argument in the rule or the *2014 Order*.[38] To the contrary, CTIA's request for clarification is entirely consistent with that *Order,* which determined that a concealment element was a stealth design or element. Again, the problem is that localities have read the rule far too broadly to encompass *any* of the conditions they impose, which improperly expands Section 1.6100(b)(7)(iv) beyond its limited scope, and also conflicts with the other subsections in Section 1.6100(b)(7) that delineate modifications that constitute a substantial change.

Some localities base their opposition on their flawed belief that they should have discretion to determine when to permit modifications—in other words, to apply subjective, site-by-site considerations to evaluate whether a proposed modification will be a substantial change. For example, NLC justifies its opposition to CTIA's and WIA's proposals by arguing that "many facilities are approved as 'minimally obtrusive' because of their size, shape and appearance." But that claim is not supported by the language and purpose of Section 6409(a), the Commission's rules, or the Commission's *2014 Order* adopting them. Moreover, the Fourth

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[37] San Diego references the *2014 Order*'s discussion of height as it related to concealment elements, and NLC cites to the Commission's brief to the Fourth Circuit supporting the *2014 Order*. *See* San Diego Comments at 34-35; NLC Comments at 5-6 and n.18. But the Commission addressed height not as a concealment element *per se*, merely noting that increases in height could defeat concealment based on the location of the structure compared to nearby buildings and other structures. *See* Brief of Respondent Federal Communications Commission, *Montgomery County v. FCC*, Nos. 15-1240 & 15-1284, Docket No. 61, at 41 (4th Cir. 2015).

[38] NATOA Comments at 8.

Circuit rejected this same argument in upholding the standards for determining a substantial change:

> Petitioners challenge these standards on several grounds, but they have a common theme: Petitioners believe that municipalities should be able to review each facility application to determine whether the proposal would represent a "substantial" modification of the original structure. This argument, at its core, takes issue with the fact that the Spectrum Act displaces discretionary municipal control over certain facility modification requests. But that is exactly what Congress intended by forbidding localities from denying qualifying applications. The FCC's objective criteria are entirely consistent with this purpose, because the concrete standards in the Order eliminate the need for protracted review.[39]

Thus, the case-by-case determination that NLC seeks must be rejected, as it would conflict with the Commission's decision to adopt objective standards for determining when modifications of facilities do not constitute substantial changes and thus must be approved.

CTIA and WIA also asked the Commission to clarify that the term "concealment element" applies to elements that were identified as such when the structure was built.[40] NLC and NATOA object, stating that identifying concealment elements would add additional time and expense to the review process, but they supply no facts as to why that would be the case.[41] To the contrary, this reasonable and modest clarification would provide more certainty to localities and applicants as to whether such an element was present on a structure and enable them to more easily determine whether a modification would "defeat" that element, thus helping to speed deployment, consistent with the objectives of Section 6409(a).

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[39] *Montgomery County v. FCC*, 811 F.3 121, 130 (4th Cir. 2015).

[40] CTIA Petition at 12; WIA Petition for Declaratory Ruling at 12.

[41] NATOA Comments at 9; NLC Comments at 18.

Finally, San Diego criticizes CTIA for not discussing a federal district court decision upholding a decision by Douglas County, Colorado that a proposed modification to a structure would defeat the structure's concealment elements.[42] However, the opinion was not issued until after CTIA filed its petition. In any event, the decision supports CTIA's showing that Commission action is necessary because both this jurisdiction and the court are incorrectly construing the Commission's rule. For example, the court admits that it is reading subsection 1.6100(b)(7)(i) and (ii) (setting forth size parameters that constitute substantial increases) out of the Commission's rule in certain circumstances.[43] This patent admission that Commission rules are ignored in certain contexts further underscores the urgent need for a Commission ruling to clarify what constitutes a concealment element.

B. "Equipment Cabinet" Means Equipment That is Installed on the Ground or Premises.

Commenters agree with CTIA and WIA that some localities have misread Section 1.6100(b)(7)(iii)'s limit on the number of equipment cabinets by applying it to equipment installed on structures.[44] As CTIA and WIA explained in their petitions, a *different* subsection

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[42] San Diego Comments at 32.

[43] *Board of County Commissioners for Douglas County v. Crown Castle USA, Inc.*, Case No. 17-cv-03171-DDD-NRN, 2019 WL 4257109 (D. Colo. Sept. 9, 2019) ("It is true that in cases such as this, where the concealment elements include specific height and width limits, that means that the Rule's more general size limits carry no weight, and it also means that Crown Castle is right that no material changes to the physical dimensions of the pole can be made under this expedited, mandatory-approval process.").

[44] CTIA Comments at 13-15; Verizon Comments at 8-9; Nokia Comments at 7-8 (stating it "strains credulity, for example, for a base station installed on a tower to be considered a 'cabinet' simply because it is enclosed in plastic or metal housing that conceal or protect the electronics inside"); T-Mobile Comments at 19-20 (noting the definition should include only enclosed equipment installed "on the ground, underground, or elsewhere on the premises," consistent with the limits that apply for towers in the public rights-of-way and base stations, and also with the fact that the rule contains separate sized-based limitations for equipment mounted on the support structure"); Free State Foundation Comments at 3; WISPA Comments at 7; Crown Castle Comments at 10-11 (stating "multiple applicants have been forced into a discretionary conditional use permit process based on excessive equipment cabinets even

that applies to equipment that *is* attached to structures exists in the same rule that covers equipment on the ground or premises in another subsection. The presence of these two distinct subsections within the same rule confirms that the numerical limit in Section 1.6100(b)(7)(iii) applies only to equipment installed on the ground or premises.[45] The Commission should therefore confirm that Section 1.6100(b)(7)(iii) does not apply to equipment that is attached to structures. Few localities opposed this change, and one appears to support it.[46]

Rather than attempt to demonstrate that Section 1.6100(b)(7)(iii) applies to equipment cabinets installed on structures, NLC makes the *non sequitur* complaint that the existing rules "underscore the flaws in the test for substantiality" because they allow too many modifications to facilities, and the Commission "must reconsider its rules to avoid the sorts of placement improperly sought under Section 6409(a)."[47] NLC is free to file a petition for rulemaking to change the rules, but it fails to supply any reason why the Commission should not grant CTIA's and WIA's requests to clarify that Section 1.6100(b)(7)(iii)'s numerical limit applies to equipment cabinets that are installed on the ground or premises.

San Diego argues that CTIA's interpretation would result in no limit on the number of facilities on a structure.[48] But in fact, if the Commission grants CTIA's clarification request, there would still be several constraints on the number of facilities on a structure, including loading requirements, space availability on the structure, separation requirements between

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when the scope of work does not actually include the addition of any actual equipment cabinets"); AT&T Comments at 8-10.

[45] *See* CTIA Comments at 13.

[46] City of Austin Comments at 3 (stating that "[t]he City agrees that an equipment cabinet should not include antennas, electrical or transport facilities points of demarcation").

[47] NLC Comments at 21.

[48] San Diego Comments at 44.

equipment, and safety requirements (*e.g.*, local building codes or industry-adopted safety standards). San Diego also contends that it is the equipment's functionality (and not placement) that determines whether it constitutes an equipment cabinet and thus is subject to Section 1.6100(b)(7)(iii). But the functionality of equipment is irrelevant under 6409(a) and the Commission's rules, which delineate substantial changes in terms of visual impact. The Commission should dismiss these arguments and grant the clarification that CTIA and WIA seek.

C. "Base Station" Means the Entire Structure That Supports an Antenna.

Section 1.6100(b)(1) defines the term "base station" to mean a structure that is not a "tower." CTIA and WIA demonstrated that the language and purpose of this rule make it evident that a base station is the entire structure.[49] Nonetheless, some localities are misinterpreting the rule to apply only to part of the structure such as the roof. Localities' opposing comments attempting to justify their actions ignore the plain language of Section 1.6100(b)(1). NLC, for instance, incorrectly argues that "the definition of 'base station' currently includes *the portion* of the building or support structure …."[50] But that is not what Section 1.6100(b)(1) says. To the contrary, it describes a base station as the *structure itself*. In addition, Section 1.6100(b)(7) defines a substantial change as that which "increase[s] the height of the structure by more than 10% or more than ten feet, whichever is greater." Like Section 1.6100(b)(1), it identifies the *structure* as the relevant area, not a portion of the structure.

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[49] *See* CTIA Comments at 15-16; *see also* AT&T Comments at 10-11 (explaining that "some localities are predetermining that a modification constitutes a substantial change in a base station's physical dimensions, and hence falls outside of Section 6409(a), by narrowly (and selectively) defining the term 'base station'").

[50] NLC Comments at 15.

NLC also makes the irrelevant point that only the structure as it was "originally reviewed to support a wireless facility," not subsequent modifications, is to be used in calculating whether the "more than 10% or more than ten feet" test is exceeded.[51] In the *2014 Order*, the Commission determined that the structure the locality reviewed is the proper metric. But *when* the structure was approved is a different question that has no bearing on the issue of what is used to calculate whether the modification meets the "more than 10% or more than ten feet" test. And on that issue, the *2014 Order* expressly supports CTIA's and WIA's interpretation because it concludes that "substantial change is more appropriately reviewed from the *height of the original structure*, rather than the height of a previously approved antenna."[52] Put another way, the relevant comparison is the structure, not only part of it.

Moreover, Section 1.6100(b)(7) makes sense only if it applies to the entire structure. If a locality could unilaterally define the structure as any part of it, then it could easily designate a small area as the "base station" to make any subsequent modification exceed the "more than 10% or more than ten feet" limitation, effectively erasing Section 6409(a)'s streamlined process and undermining the bright-line rule the Commission adopted.

The disagreement between industry and opposing commenters underscores the need for the Commission to clarify Section 1.6100(b)(1) to resolve this dispute.[53] To the extent the Commission finds that its rules are already clear on this point, the localities' objection is an untimely challenge to the rules adopted in 2014 and upheld on appeal.

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[51] *Id*. at 16-17.

[52] *2014 Order*, 29 FCC Rcd at 12948-49 ¶ 197 (emphasis added).

[53] *See, e.g.*, Crown Castle Comments at 15-16 (noting the uncertainty that exists).

IV. THE COMMISSION SHOULD GIVE EFFECT TO CONGRESS'S DIRECTION IN SECTION 6409(A) THAT LOCALITIES "SHALL APPROVE" QUALIFYING APPLICATIONS.

CTIA and WIA demonstrated that there is disagreement among providers and localities as to the meaning of the phrases "deemed granted" and "becomes effective" in Section 1.6100(c)(4)—the rule that implements Section 6409(a)'s direction that localities "may not deny, and shall approve" an EFR.[54] For example, they showed that some localities require multiple approvals and permits but do not timely issue them, leaving providers unclear whether they may perform the work on the existing facility. This disagreement in interpretation of Section 6409(a) and Section 1.6100(c)(4) warrants a declaratory ruling to resolve it. Specifically, the Commission should rule that Section 1.6100(c)(4) encompasses all required permits and thus that localities "shall approve" those permits within the 60-day time frame the rules provide—if the locality fails to act within the 60-day shot clock on all permits, the applicant may do the work upon notice to the locality.[55]

Many commenters supported this clarification, explaining that some localities subvert Section 1.6100(c)(4) by unilaterally refusing to consider other required permits related to the facility as subject to the rule.[56] Those localities then assert that an applicant may not proceed

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[54] *See* CTIA Petition at 19; *see also* WIA Comments at 12.

[55] CTIA Petition at 19.

[56] T-Mobile Comments at 12-14 (noting applicants "are forced to litigate to enforce their deemed granted rights, which extends the time period before they can construct" leading to additional delays); CCA Comments at 5-7 (stating "CCA members have encountered some jurisdictions that have sought to delay members' deployments even when their applications have been deemed granted by operation of the Commission's rules"); WISPA Comments at 5-6 (stating "all state or local government authorizations that are required for a covered request (*e.g.*, any associated building, structural, electrical, road closure, zoning or other permit required for deployment of a covered request) should be subject to the same 60-day shot clock"); Verizon Comments at 8-9; ExteNet Comments at 21-22; Crown Castle Comments at 21-23; AT&T Comments at 11-16 (explaining that "[w]ithout such a clarification, a locality could effectively nullify the deemed grant by simply withholding some other permit from the applicant").

after 60 days, even where the locality has failed to act on the application or has not denied the application. Clarifying that the rule applies to all permits related to eligible facilities will correct this problem and achieve Section 6409(a)'s objective to promote streamlined review.

The Commission should dismiss unsupported oppositions to this ruling. Some localities misunderstand and overstate the relief CTIA and WIA seek, wrongly claiming that it would "require governments to accept applications by the applicant's method of choice,"[57] or that it would threaten public safety by allowing providers to modify existing facilities without complying with substantive building codes or other safety requirements.[58] But nothing in the CTIA or WIA petitions would exempt wireless providers from their obligations to comply with lawfully adopted application procedures, or with building codes and safety requirements. CTIA and WIA do not ask to be excused from obtaining required permits, but only that the Commission clarify that Section 1.6100(c)(4)'s 60-day time frame applies to all of them. In short, localities' argument that this ruling will jeopardize public safety is a red herring because applicants will continue to be subject to all safety laws, and localities will continue to have the authority to enforce those laws. Rather, the problem is that localities treat these permits to be outside of the Section 6409(a) process, effectively ignoring the 60-day shot clock and the deemed granted remedy in the rules. Their position draws no support from Section 6409(a) or the Commission's rules and undermines the streamlined process Congress intended. Localities' real objection is that they feel 60 days is insufficient for them to issue all permits they require, but their arguments are untimely challenges to the Commission's *2014 Order*, which adopted that time period, and are outside the scope of this proceeding.

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[57] *See* San Diego Comments at 7.

[58] *See* NLC Comments at 29.

The problem CTIA and WIA identify in their petitions—that some localities are interpreting Section 1.6100(c)(4) not to cover building and other required permits—is also evident from NLC's comments, which assert that Section 1.6100(c)(4) does not apply to such permits.[59] However, NLC cites nothing in the rule or the *2014 Order* to support this claim, and offers no answer to why excluding all of these permits would not vitiate the shot clock and Congress's direction that localities "shall approve" EFRs, because a jurisdiction could sit on building permits or other required authorizations interminably. NLC also asserts that the rule should "treat wireless providers the same as all others seeking building permits after siting approval is received."[60] But the short answer is that Congress granted a special remedy to wireless providers, directing that localities "shall grant" their applications for non-substantial modifications. And as the Fourth Circuit held, the Commission's deemed granted rule properly implements Congress's direction.[61]

One group of localities asserts that because "Section 6409(a) contains no deadline for localities to act before an application will be deemed granted, the Commission cannot clarify that the shot clock applies to all permits."[62] But this is an untimely challenge to the Commission's rules that set a deadline to implement the statute's direction that localities "shall approve" an EFR, which were upheld on appeal. Localities' position that they can take as long as they like to act on required permits conflicts with those rules.

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[59] *Id*. at 28.

[60] *Id*. at 28-29; *see also* City of Austin Comments at 2-3 (arguing that other permit applicants do not have similar rights).

[61] *Montgomery County v. FCC*, 811 F.3d 121, 128 (4th Cir. 2015) ("[T]he point of the 'deemed granted' provision is to ensure that collocation applications are not mired in the type of protracted approval processes that the Spectrum Act was designed to avoid.").

[62] San Diego Comments at 14.

This same group of localities resurrects the same invalid Tenth Amendment argument that localities unsuccessfully made in their appeal of the *2014 Order*, arguing that localities cannot be constitutionally compelled to grant an application that qualifies under Section 6409(a).[63] But the Fourth Circuit summarily rejected that argument. It held:

> We readily conclude that the Commission's deemed granted procedure comports with the Tenth Amendment. As a practical matter, the Order implementing Section 6409(a) does not require the states to take any action at all because the 'deemed granted' remedy obviates the need for the state to affirmatively approve applications. . . . The applications are granted only by operation of federal law.[64]

As discussed above, localities' opposition to the clarification CTIA and WIA seek finds no basis in fact or law, or is otherwise not applicable or time barred. Accordingly, the Commission should dismiss these arguments and clarify that Section 1.6100(c)(4) encompasses all required permits and thus that localities "shall approve" those permits within the 60-day time frame the rules provide. Doing so is consistent with the language of the statute and the Commission's current rule and will make both more effective in achieving their intended purpose to promote wireless deployment. This clarification also aligns with the Commission's prior determination that the time periods it adopted in its rules to implement Section 332 of the Act applies to the entire process and to all required interim or final permits.[65]

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[63] *Id*. at 15-16.

[64] *Montgomery County*, 811 F.3d at 128-29.

[65] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, 33 FCC Rcd 9088, 9162 ¶ 144 (2018) ("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.").

V. THE COMMISSION SHOULD CLARIFY ITS RULES IMPLEMENTING SECTION 224 TO PROMOTE ACCESS TO ALL UTILITY-OWNED POLES FOR 5G DEPLOYMENT.

The initial comments also demonstrate that there is disagreement between wireless providers and utilities regarding Section 224 and the Commission's pole attachment framework. In particular, providers and utilities differ in their interpretation of the term "pole" and whether it applies to utility-owned light poles. The Commission should clarify those rules to prevent misinterpretations by utilities and to remove barriers to deployment for wireless providers by making the following findings:

- The term "pole" includes a light pole that is owned by an investor-owned utility;
- Utilities may not impose blanket prohibitions on access to parts of a pole, but must, as Section 224 and the Commission's rules require, justify denial of access based on lack of capacity, safety, reliability, or engineering standards that are specific to the pole for which access is sought; and
- Utilities may not demand terms in pole attachment agreements that conflict with the Commission's rules.

Clarifying that the term "poles" includes light poles is consistent with the language and purpose of Section 224. Section 224 does not define "pole," and in the absence of a statutory definition, the term is to be given its ordinary meaning.[66] A light pole is clearly a pole, particularly when Section 224 applies to "any" pole. Contrary to utilities' incorrect assertion that the Eleventh Circuit limited the term pole to distribution networks, that court's limited holding created a carve-out solely for transmission poles; it did not carve out light poles or any other facility. The Commission should forcefully reject utilities' threat that a Commission ruling requiring access to light poles will cause them to cease allowing such access.

[66] CTIA Petition at 23.

Moreover, utilities' claims that requiring access to all parts of a pole would require rejection of safety standards and violate their code of ethics are red herrings. CTIA is only asking that, if a utility refuses access to a pole, then it must explain the basis of its concern with specificity.

Finally, utilities incorrectly argue that attachers and utilities have equal bargaining power, and agreements therefore should not be bound by the Commission's rules, and that CTIA is asking to prohibit negotiations. However, evidence in the record demonstrates that attachers do not have the same bargaining power as utilities—and that reality is the underlying basis for the Commission's pole attachment rules. Further, CTIA is not seeking to preclude negotiation of agreeable terms; it is asking only that the Commission declare that pole owners may not unilaterally demand terms that are inconsistent with the Commission's rules. The requested clarifications will serve the public interest by preventing confusion and disputes with utilities, thereby removing barriers to deployment and facilitating the deployment of wireless networks.

A. The Term "Pole" in Section 224 Includes Light Poles.

Many commenters support CTIA's request that the Commission clarify that the term "pole" in Section 224 includes a light pole, and that interpreting the term to include light poles is consistent with its plain meaning and advances Section 224's purpose.[67] These commenters

[67] *See* CTIA Petition at 21; T-Mobile Comments at 20-25; ACT Comments at 10 (stating that "clarification will promote the widespread deployment of small cells in cities by providing clarity to state and local authorities, and promoting predictability and certainty in their processes"); Verizon Comments at 3-6 (explaining that "[b]ecause Congress did not specifically define 'pole' for purposes of Section 224, that word should be given its ordinary meaning" but that "[e]ven if the plain language of Section 224 did not compel interpreting 'pole' to include light poles, this interpretation is reasonable and serves the purposes of Section 224"); ExteNet Comments at 5-7 (explaining that defining pole to include light poles does not expand the scope of 224, but "merely makes clear what is already implicit in the statute"); Crown Castle Comments at 38-41 (noting "although some utilities make their light poles available for wireline and wireless attachments, others only make light poles available if the streetlight is attached to a wooden electric distribution pole. … [And] others provide no access to any poles with streetlights

demonstrate that access to utility-owned poles, including light poles, will also accelerate wireless broadband deployment.[68] Light poles are prevalent throughout the nation and can serve as infrastructure to support small cells, microcells, and other equipment needed to deliver next-generation wireless networks.

Utilities' Legal Arguments are Unavailing. The utilities that oppose CTIA's request do not meaningfully contest the value or importance of light poles for broadband deployment. Some incorrectly allege that CTIA has not shown that attaching to light poles is "necessary" and claim that CTIA merely seeks such access because it would be "convenient."[69] But CTIA has shown that light poles are often the "only" option for attaching.[70] In any event, as a legal matter, nothing in Section 224 requires that a pole be "necessary" in order to be covered. To the contrary, Section 224(f)(1) flatly states that "a utility shall provide . . . nondiscriminatory access to any pole, duct, conduit or right-of-way owned or controlled by it," and can only deny access "where there is insufficient capacity and for reasons of safety, reliability, and generally applicable engineering purposes."[71] The Commission's rules similarly do not allow a utility to condition access on the attacher's proof of need for the pole.[72]

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attached"); AT&T Comments at 21-26 (stating "the utilities lack any legitimate basis for continuing to impede 5G deployment by denying access to light poles pursuant to Section 224").

[68] *See* T-Mobile Comments at 22 (encouraging the Commission to declare that the term "pole" as used in Section 224 includes light poles, noting that such poles "are ideal locations to support broadband and 5G-enhancing small cells"); Crown Castle Comments at 39 (explaining that "[u]tility light poles are located in the same locations in the public right-of-way where small wireless facilities must be installed . . . [making] the light poles excellent candidates for location and attachment of telecommunications facilities").

[69] Opposition to Petition for Declaratory Ruling of Edison Electric Institute, et al., WC Docket No. 17-84, at ii, 5-7, 10 (filed Oct. 29, 2019) ("Edison Comments").

[70] CTIA Petition at 21, 25.

[71] 47 U.S.C. § 224(f)(1).

[72] 47 C.F.R. § 1.1403(a), (b).

Utilities' assertion that light poles are inappropriate for attachments because they "lack the public purpose characteristic of distribution poles" is also meritless.[73] Light poles serve an obvious public purpose when they illuminate a busy street or a private, secluded property and thereby enhance public safety. Other utilities assert that some light poles may not be sufficiently structurally sound to hold an antenna or because they lack the requisite power source,[74] but this is not pertinent to the Commission's statutory interpretation that CTIA seeks because in the event utilities make that individualized showing, the attacher can replace the pole.[75] Moreover, these are not insurmountable challenges, as shown by the fact that some utilities acknowledge they do allow attachments on some light poles.[76] And this argument would not apply to streetlights that already have been modified to host attachments.

Utilities further assert that the Eleventh Circuit's *Southern Co.* decision established the distribution network as the limited universe of poles covered by Section 224, thereby excluding light poles from the definition of "pole." But that is not what the court did and is not even what it was asked to do. As the decision states, "[t]he specific language of the Commission guideline to which petitioners object is the following: 'electric transmission facilities are not exempted

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[73] Comments of Ameren Service Company et al., WC Docket No. 17-84, WT Docket No. 19-250, RM-11849, at 11 (filed Oct. 29, 2019) ("Ameren Comments").

[74] Comments of Coalition of Concerned Utilities, WC Docket No. 17-84, WT Docket No. 19-250, RM-11849, at 13-14 (filed Oct. 29, 2019) ("Concerned Utilities Comments"); Comments of Xcel Energy Services, WC Docket No. 17-84, WT Docket No. 19-250, RM-11849, at 2, 7 (filed Oct. 29, 2019) ("Xcel Comments").

[75] Utilities may provide an individualized showing with respect to a particularized pole and based on that showing may deny access, but in that event the attacher has the right to replace the pole and pay for it. *Amendment of Commission's Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103 ¶ 24 (2001) ("If a utility is required to replace a pole in order to provide space for an attacher, the attacher pays the full cost of the replacement pole.").

[76] Concerned Utilities Comments at 17; Xcel Comments at 8.

from the pole attachment provisions of Section 224.'"[77] The court's limited holding was to reverse that statement and create a carve-out solely for transmission poles; it did not carve out light poles or any other facility. Moreover, the reasons it provided to justify this carve-out do not apply to light poles. The court exempted transmission facilities because the primary physical unit for providing transmission—a tower—is absent from the definition of "pole attachment." In contrast, the primary unit for holding a streetlight—a pole—is in the text of the statute. It also relied on the fact that transmission facilities are regulated by the Federal Energy Regulatory Commission, but that fact does not apply to light poles.[78] The court also observed that the reverse preemption clause does not work in connection with transmission facilities, since states could not reserve any authority over interstate transmission facilities. But a state could readily preserve its authority over light poles.

Utilities seize on the court's observation that Section 224 grants access to "regular components of local distribution system[s]," but overstate that observation to argue that *only* such components are accessible under Section 224. Utilities take the court's language out of context. A fair reading of the opinion makes clear that the court referenced the components of a *local* distribution systems solely in order to distinguish them from the components of an *interstate transmission* system, which was the issue before the court. While Section 224 may not grant access to towers and other components of an interstate transmission system, its grant of

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[77] *See Southern Co. v. FCC*, 293 F.3d 1338 (11th Cir. 2002); *see also* AT&T Comments at 25 ("[T]he utilities' reliance on *Southern Company v. FCC* is misplaced because that decision actually confirms that light poles are covered by Section 224.").

[78] *See* Verizon Comments at 5 ("The Eleventh Circuit held only that interstate transmission towers, which are regulated by the Federal Energy Regulatory Commission (FERC), are not 'poles' within the meaning of Section 224. That holding does not imply that Section 224 excludes light poles, which are quintessentially local structures that FERC does not regulate.").

access to poles is unconditional. Put another way, if the utility engages in wire communication, then all of its poles are subject to Section 224.

Thus, far from defining the distribution network to exclude light poles, the court clearly and specifically focused on transmission, concluding by stating: "[t]o the extent that the FCC guideline suggests that the Act covers interstate transmission towers and facilities, it must be struck down, as it fails to effect the unambiguous intent of Congress." Critically, it continued:

> However, the FCC is correct that the text of the Act clearly indicates that its coverage extends to *any* of a utility's "poles, ducts, conduits, or rights-of-way," so long as the utility (1) uses *any* of its "poles, ducts, conduits, or rights-of-way" for wire communications; and (2) the facility does not fall within one of the exceptions indicated in section 224(f)(2).[79]

Finally, utilities mischaracterize the Commission's *1996 Local Competition Order* as supporting its position that light poles are not poles. But in fact, the Commission did not limit Section 224's scope to distribution facilities or even purport to interpret Congress's intent in that order.[80] Rather, the Commission referred to "distribution networks" only in the course of rejecting the argument that Section 224 required access to the rooftop of a utility's corporate

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[79] *Southern*, 293 F.3d at 1345 (emphasis added). One group of utilities argues that the Commission is bound by the Eleventh Circuit's interpretation because it based its ruling on the plain meaning of the statute to find that transmission facilities were not included. Comments of CenterPoint Energy et al, WC Docket No. 17-84, WT Docket No. 19-250, RM-11849, at 6 (filed Oct. 29, 2019). While CTIA disagrees with the premise that the Commission is precluded from applying its expertise to interpret a statute it is charged with implementing, the point is immaterial because the Eleventh Circuit did not interpret the term "pole."

[80] Ameren Comments at 9-10, *citing Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd. 15499, 16084-85 ¶ 1185 (1996).

office, and it did that not based on a narrow reading of Section 224, but on the fact that such access was separately mandated by Section 251(c)(6).[81]

Contrary to Ameren's alternative argument that the legislative history shows that utilities' light poles were not to be subject to Section 224,[82] references in the legislative history to "utility poles" do not mean that Congress was focused only on distribution poles. A "utility pole" is not synonymous with a "distribution pole"; the more obvious reading is that it simply refers to "a pole owned by a utility." And the fact that a Senate report does not mention "lighting"[83] does not convey an intent to exclude light poles—indeed, the same report also includes no mention of "distribution."

Utilities' Policy Arguments are Unavailing. The utilities fall back on a policy argument that rests on a "heads we win, tails you lose" syllogism: (i) attaching equipment to light poles is difficult and costly, but (ii) utilities are doing it anyway in an unregulated environment, and therefore (iii) regulating these arrangements would cause utilities to cease offering them.[84] The Commission should forcefully reject this transparent effort to threaten that if the agency appropriately declares that the term "pole" includes light poles, utilities will block attachments to those poles.

Moreover, none of utilities' underlying positions pass muster. Utilities' first point is irrelevant. Eligibility to attach on a pole does not turn, on a categorical level, on the level of difficulty. To the extent a utility can prove in an individual case that the costs and/or the risks

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[81] The sentence Ameren quotes cites only to one utility's comments, which did not even address poles but instead argued that the term "rights of way" does not encompass a utility's rooftop.

[82] *See* Ameren Comments at 5-6.

[83] *Id*. at 5-6 (citing S. Rep. 95-580).

[84] *See, e.g.*, Edison Comments at i.

are extremely high, it may demonstrate as much pursuant to Section 224(f)(2). If anything, the utilities' protestations about the difficulty of attaching to light poles only prove how disincentivized utilities are to allow attachers access, lending more support for a Commission ruling that utilities cannot flatly deny access to poles.

Utilities' second point is incorrect. To the extent utilities have consented to grant access to light poles for wireless attachments on reasonable terms, they should be commended. But as CTIA and others have shown, some utilities are not regularly granting access—showing that the marketplace is not working and that regulatory intervention is needed.

Utilities' third point is illogical. They claim that regulating attachment arrangements would cause utilities to cease offering them. But the utilities have it backwards: requiring access will not halt light pole attachments, since for those who are already providing access, it will merely validate them, and for those who are not, it will require them.

Utilities' policy argument typifies their resistance to regulation in the face of the Commission's longstanding finding that utilities' superior bargaining power necessitates rules.[85] In effect, utilities threaten that if the Commission clarifies that Section 224 applies to light poles, the few utilities that have been offering access will stop doing so. As noted above, this threat in and of itself justifies the backstop of a ruling that utilities cannot deny access to their poles merely because some hold streetlights.

Finally, the utilities cite other administrative issues as barriers to clarifying Section 224's applicability to light poles. But these are irrelevant to the statutory interpretation question that CTIA has raised. These are not obstacles, but instead are typical issues that the Commission can if necessary, use a rulemaking or further clarifications to resolve. The fact that third-party

[85] *See* infra at Sec. V.C and n. 102.

consents may be required is no barrier—that is precisely the case in virtually all pole attachment scenarios, and the Commission and other actors have ample experience in obtaining those consents.[86] The fact that applying Section 224 might require subsequent adjustments to other rules, such as the make-ready rules or the rate formula (*e.g.*, capturing the account that streetlight costs are recorded in), is also not a reason to avoid this outcome.[87] These are precisely the type of consequences that the Commission can resolve in a rulemaking or with further clarifications. Moreover, attachment rates are not set for each individual pole, but are determined based on a utility's overall cost, average pole height, and other factors that make irrelevant the specific treatment of each individual pole.

Localities' Objections Mischaracterize CTIA's Request. NATOA and NLC briefly object to the pole attachment requests in the CTIA Petition, but only by mischaracterizing and overstating what CTIA actually seeks. They assert that granting the CTIA Petition would threaten unspecified "contractual rights" and "financial interests," prevent localities from controlling aesthetics of light poles, and create safety hazards for workers.[88] None of these assertions are correct. All CTIA seeks is a determination that Section 224 encompasses utilities' light poles. It asks for changes neither to the rules that were established to protect the interests of pole owners and other attachers, including localities, nor to the rules or standards governing safety-related obligations.

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[86] *See, e.g.*, Edison Comments at 4; Xcel Comments at 6-7.

[87] Concerned Utilities Comments at 20-21.

[88] NATOA Comments at 14; NLC Comments at 7-8.

B. Blanket Prohibitions on Access to Portions of Poles are Unlawful.

Utilities also oppose CTIA's reasonable request that the Commission reaffirm that blanket prohibitions on access to portions of poles are unlawful. The Commission has warned utilities that they cannot adopt practices that effectively deny access without evaluating a specific attachment request. CTIA and other commenters demonstrate that utilities are ignoring the Commission's ruling by flatly refusing to grant access to parts of poles.[89] For example, Crown Castle explained that "it is still common for utilities to broadly allege safety and climbing concerns as rationale for blanket prohibitions of any equipment attached in the unusable space on utility poles."[90] CTIA is merely asking that the Commission reaffirm its prior ruling in response to evidence that utilities are disregarding it.

Notably, utilities do not appear to defend blanket bans on pole tops, largely declining to address the issue—and for good reason, given the Commission's previous specific admonitions on this point.[91] Utilities' silence indicates that there is no obstacle to the Commission

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[89] *See* CTIA Petition at 25-27; T-Mobile Comments at 23-24 (encouraging the FCC to "strongly reiterate that such blanket denials violate the right of wireless attachers to access pole tops or any other part of the pole, in the absence of pole-specific showing of risks to safety or reliability"); Verizon Comments at 6-7 (explaining that utilities in Connecticut and New York refuse to allow pole-top attachments to any of their poles, a Wisconsin utility refuses to allow pole-top attachments to metal poles, and that another utility in New York has deployed its own wireless antennas on pole tops but refuses attachers' requests for pole-top access"); ExteNet Comments at 7-8; Crown Castle Comments at 41-46 (stating that "contrary to the blanket bans by some utilities, nearly two-thirds of the utilities to which Crown Castle attaches its facilities permit the attachment of some equipment in the unusable space of a pole"); AT&T Comments at 26-28.

[90] Crown Castle Comments at 42.

[91] CTIA Petition at 26 (quoting *Implementation of Section 224 of the Act*, Report and Order, 26 FCC Rcd 5240, 5276 ¶ 77 (2011) ("Pole Attachment Order")). *See also Pole Attachment Order*, 26 FCC Rcd 5240, 5275 ¶ 76 ("It is not sufficient for a utility to dismiss a request with a written description of blanket concerns about a type of access or technology, or a generalized citation to Section 224. Instead, we find that a utility must explain in writing its precise concerns – and how they relate to lack of capacity, safety, reliability, or engineering purpose – in a way that s specific with respect to both the particular attachment(s) and the particular pole(s) at issue.").

reaffirming attachers' right to access pole tops. Instead, they focus their efforts on defending the practice of prohibiting access to lower parts of the pole.

In an effort to make the practice of blanket bans sound less nefarious, some utilities refer to their blanket bans as "standards of general applicability" or "system-wide restrictions."[92] But the Commission should not be fooled by such wordplay. In practice, as CTIA and commenters explained, wireless providers are being denied access to some utilities' poles altogether.[93]

Furthermore, utilities mischaracterize the scope of CTIA's request. CTIA is not asking the Commission to "ignore" utilities' safety standards or asking engineers to "violate their code of ethics."[94] Rather, CTIA simply asks that if a utility refuses access to a pole, it must explain the basis of its concern with specificity, rather than being allowed to hide behind a broadly stated pretext that is not specific to a particular attachment.[95] If a utility's standard is legitimate, it should have nothing to fear by articulating it and subjecting it to scrutiny.

Additionally, and contrary to some utilities' assertions,[96] the Commission's 2018 ruling addressing unusable space does not preclude CTIA's requested relief to apply the Commission's longstanding prohibition against blanket bans on pole access to these portions of poles. In fact, as CTIA already pointed out, that ruling opened the door to the requested relief.[97] The Commission did not reject that request on policy or legal grounds, but based it on a concern about the "paucity" of record evidence on the issue—which is why it stated it "would be open to

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[92] *See* Ameren Comments at 19; Edison Comments at 15-16.

[93] CTIA Petition at 32; Crown Castle Comments at 38-41; AT&T Comments at 21-26.

[94] Concerned Utilities Comments at 27.

[95] CTIA Petition at 27.

[96] Ameren Comments at 21-22.

[97] CTIA Petition at 27, n.66.

revisiting this issue in the future."[98] That is all CTIA is asking the Commission to do. In light of the additional record evidence in these dockets about the continued use of blanket bans, the Commission should reaffirm that such flat prohibitions on access to any portions of poles, including unusable space, are unlawful.[99]

C. Unilateral Demands for Contract Terms in Conflict with the Commission's Rules Are Not Permitted.

Utilities attack CTIA's equally reasonable request that the Commission clarify that utilities cannot unilaterally demand terms that conflict with the Commission's rules.[100] Utilities' rationale is that in negotiating pole attachment agreements, utilities and attachers have similar bargaining positions and engage in give-and-take that may result in provisions at variance with the rules. But the reality is that pole attachment negotiations are not arms-length.[101] As the Commission has repeatedly held over the course of several decades, utilities hold a superior

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[98] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705, 7773 ¶ 134 (2018).

[99] Edison claims that the Commission rejected a similar request in 2010, Edison Comments at 15-16, but that ruling focused on bracketing and boxing rather than categorical restrictions generally, and even then, the Commission emphasized that utilities must be transparent in how they communicate such restrictions. *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Order and Further Notice of Proposed Rulemaking, 25 FCC Rcd 11864, 11870-71 ¶¶ 11-13 (2010).

[100] *See, e.g.*, Concerned Utilities Comments at 29 (stating that there is a "longstanding rule that parties to a pole attachment agreement may agree to terms and conditions that differ from published Commission rules"); Edison Comments at 23 (arguing that CTIA's requested relief would "violate Section 224 and reverse decades of Commission precedent that favors privately negotiated solutions between utility pole owners and attachers").

[101] Other commenters agree. For example, ExteNet explains "a utility's regulatory obligations under Section 224 and the pole attachment rules have little meaning if the utility is permitted to use its negotiating leverage to ignore the statute and the rules via private contract." ExteNet Comments at 8-9. Crown Castle notes that it "has encountered situations where the utility refuses to accept the Commission's rules as a baseline" and that "[s]uch a 'negotiating' position has created a significant hardship on Crown Castle's ability to timely deploy its networks and in many cases results in exposing Crown Castle to significant economic risk in order to contract for pole attachment access." Crown Castle Comments at 46.

bargaining position over attachers.[102] That is precisely why the Commission adopted rules: to "backstop" negotiations. Utilities must not be allowed to make unilateral demands for terms that violate those rules.

Utilities offer several theories to justify the brazen position that they should be free to ignore binding Commission rules without consequence, none of which have merit. Their assertion that CTIA's request is a dramatic "reversal" of precedent turns a blind eye to years of Commission rulemaking and to the 1996 amendments to Section 224. Although Congress initially focused on the complaint process as the primary means of regulation, that complaint process was never as sacrosanct as utilities suggest. Rather, utilities' consistent abuses of the system demonstrated over time that this approach was inadequate. The 1996 amendments thus gave the Commission broader authority to enact rules to ensure that rates, terms, and conditions are just and reasonable, and the Commission increasingly has seen fit to use these tools. In any event, confirming that utilities cannot unilaterally demand unlawful terms will not reverse any preference for negotiated solutions. Rather, it will preserve the Commission's preference for solutions that are negotiated in good faith by preventing parties from unilaterally insisting on terms that clearly violate Commission rules.

Utilities' invocation of the retention of the "sign and sue" rule as further evidence of a preference for negotiation is both ironic and irrelevant.[103] It is ironic because the basis for that rule was the monopoly power and resulting bargaining power that utilities now claim does not

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[102] *See, e.g.*, *Amendment of Commission's Rules and Policies Governing Pole Attachments; Implementation of Section 703(e) of the Telecommunications Act of 1996*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12112-13 ¶ 13 (2001); *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Order and Further Notice of Proposed Rulemaking, 25 FCC Rcd 11864, 11905 ¶ 99 (2010).

[103] Edison Comments at 26; Ameren Comments at 30.

exist. It is irrelevant because the sign-and-sue rule applies to situations where, "despite good faith efforts to reach agreement, an attacher may be forced to execute a pole attachment agreement containing what it believes to be unjust and unreasonable terms in order to gain timely access to the utility's poles."[104] In contrast, where a utility insists that an attacher agree to a term that is flatly prohibited by the Commission's rules, it cannot be said to be negotiating in good faith in the first place, as the rules require it to do.[105]

Finally, utilities also overstate the effect of the requested clarification. Confirming that utilities must obey the law would not preclude "innovative and mutually beneficial solutions" and thereby halt broadband deployment.[106] To the contrary, it would simply prohibit unlawful solutions and prevent the improper demands by utilities that the record demonstrates are occurring regularly, to the detriment of wireless deployment.

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[104] *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5294-95 ¶ 123 (2011).

[105] *Id.* ¶ 100.

[106] Ameren Comments at 27.

VI. CONCLUSION.

The record establishes that uncertainty and disputes over the scope and meaning of the Commission's rules implementing Sections 6409(a) and 224 are impeding the use of existing structures needed to densify wireless networks and make 5G widely available to the public. By granting the CTIA and WIA petitions, the Commission will help effectuate Congress's objective to drive more intensive use of existing infrastructure, and will advance the national policy objective to promote the availability of 5G and other advanced wireless services.

Respectfully submitted,

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