Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

REPLY COMMENTS IN OPPOSITION TO PETITION FOR DECLARATORY RULING

BY:
EDISON ELECTRIC INSTITUTE
UTILITIES TECHNOLOGY COUNCIL
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION

Aryeh B. Fishman
Associate General Counsel, Regulatory Legal Affairs
EDISON ELECTRIC INSTITUTE
701 Pennsylvania Avenue NW
Washington, D.C. 20004
afishman@eei.org

Brett Kilbourne
Vice President, Policy, and General Counsel
UTILITIES TECHNOLOGY COUNCIL
2550 South Clark Street, Suite 960
Arlington, VA 22202
brett.kilbourne@utc.org

Brett Heather Freedson
Robert James Gastner
Eckert Seamans Cherin & Mellott, LLC
U.S. Steel Tower – 44th Floor
600 Grant Street
Pittsburgh, PA 15219
bfreedson@eckertseamans.com
rgastner@eckertseamans.com

Brian O'Hara
Sr. Director Regulatory Affairs – Telecom & Broadband
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION
4301 Wilson Boulevard
Arlington, VA 22203
brian.ohara@nreca.coop

Dated: November 20, 2019

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EXECUTIVE SUMMARY

In their initial Opposition to the Petition for Declaratory Ruling of CTIA, the Edison Electric Institute ("EEI"), the National Rural Electric Cooperative Association ('NRECA"), and the Utilities Technology Council ("UTC") (together, the "Utility Associations") demonstrated that the specific requests for declaratory relief made by CTIA with respect to Section 224 of the Communications Act, 47 U.S.C. § 224, are contrary to the history and purpose of the statute, the interpretation of the statute by the Commission and Federal appeals courts, and the Commission's well-established pole attachment policy directives. The initial comments submitted in support of Petition, like the Petition itself, offer no evidence that a broad expansion of the Commission's pole attachment jurisdiction, to the extent advocated by CTIA, is required – **or even permitted** – by Section 224, or is necessary to advance the deployment of Fifth Generation ("5G") wireless and broadband services. Moreover, certain commenters have improperly attempted to broaden the limited scope of the issues presented for the Commission's consideration in CTIA's Petition, and to that end, included in their comments pointed objections to countless utility-specific standards, practices, processes, and policies – all of which the Commission is authorized to address **only** in the context of a formal complaint. Therefore, for the reasons set forth in the Opposition of the Utility Associations, and in these reply comments, the Commission must deny the Petition in its entirety, and all further requests for declaratory relief raised in public comments.

First, the comments made in support of the Petition mistakenly look to Section 224(f) to define the term "poles", where that term is unambiguously defined in Sections 224(a)(4) and (c)(1), and has been interpreted by Federal appeals courts to include **only** poles that are part of the utility's local electric distribution system. The advocates of the Petition also fail to demonstrate that access to utility-owned "light poles" is **necessary** to provide cable or telecommunications services, as the

statute requires, or that suitable structures for wireless deployment are currently unavailable, and will remain unavailable without intervention by the Commission.

Second, the comments made in support of the Petition incorrectly refer to the requirements of 47 C.F.R. § 1.1403(b) – which apply to individual attachment applications – as a basis for the Commission to declare unlawful **all** utility construction standards that restrict an attacher's use of a pole's unusable space. As the Utility Associations explained in their Opposition, the Commission has determined that such standards are **permitted** under Section 224, provided that they are based on reasons of capacity, safety, reliability, or engineering, and are applied in a non-discriminatory manner. No commenter has demonstrated that the utility construction standards opposed by CTIA are unlawful, or result in a denial of access to poles.

Third, the comments made in support of the Petition do not refute that private negotiations are the preferred means by which pole attachment terms are concluded between parties, or that the Commission may regulate such terms **only** through its complaint process. Moreover, the comments submitted by Crown Castle, in particular, contradict that the declaratory relief requested by CTIA is needed to ensure that pole attachment terms are just, reasonable, and non-discriminatory because the substantive terms that Crown Castle complains of do not conflict with Commission's rules.

The Utility Associations reserve the right to address any and all issues outside the scope of CTIA's Petition through the Commission's *ex parte* process.

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The Edison Electric Institute ("EEI"), the National Rural Electric Cooperative Association ("NRECA"), and the Utilities Technology Council ("UTC") (together, the "Utility Associations") hereby submit these reply comments in opposition to the Petition for Declaratory Ruling of CTIA ("Petition").[1] The initial comments made in support of the broad relief that CTIA requests, like the Petition itself, offer no valid legal basis for the Federal Communications Commission ("FCC" or "Commission") to expand the scope of its pole attachment jurisdiction under Section 224 of the Communications Act. As the Utility Associations already demonstrated, the declarations requested in the CTIA Petition are contrary to the text, history, and purpose of Section 224, the Commission's interpretations of Section 224, and the Commission's clear policy statements in favor of privately-negotiated pole access arrangements.[2] For these reasons, the CTIA Petition should be denied in its

[1] *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment* (WT Docket No. 17-79), *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment* (WC Docket No. 17-84), *WIA Petition for Rulemaking, WIA Petition for Declaratory Ruling, and CTIA Petition for Declaratory Ruling* (RM-11849), Petition for Declaratory Ruling of CTIA, filed Sept. 6, 2019 ("Petition" or "CTIA Petition").

[2] *See* Opposition to Petition for Declaratory Ruling of Edison Electric Institute, Utilities Technology Council, and National Rural Electric Cooperative Association, filed Oct. 29, 2019 ("Utility Association Comments"). These reply comments, like the initial comments of the Utility Associations, are limited to the issues raised in the CTIA Petition relative to Section 224 of the Communications Act, 47 U.S.C. § 224.

entirety. Moreover, the Commission must not consider in relation to the Petition the countless new issues raised by commenters such as Crown Castle and ExteNet.[3]

I. INTRODUCTION

The Utility Associations are the Edison Electric Institute ("EEI"), the National Rural Electric Cooperative Association ("NRECA"), and the Utilities Technology Council ("UTC"). The complete descriptions of each of the Utility Associations are provided in their initial comments.[4]

II. SUPPORTERS OF THE PETITION FAIL TO DEMONSTRATE THAT ACCESS TO "LIGHT POLES" IS REQUIRED BY SECTION 224, OR IS NECESSARY TO PROVIDE WIRELESS TELECOMMUNICATIONS SERVICES.

In its Petition, CTIA requests that the Commission dramatically expand the scope of utility-owned "poles" subject to requirements of Section 224. Like CTIA, most commenters that promote this relief rely on Section 224(f) for the proposition that a utility must provide access to all "poles" that it owns or controls.[5] However, as explained in the initial comments of the Utility Associations, this interpretation of the statute is misplaced.[6] As the court in *Southern Company* confirmed, the term "poles" is in fact narrowly defined under Section 224(a)(4), which, coupled with the reverse-preemption provision of Section 224(c)(1), clearly limits the statute's scope to components of the local electric distribution system.[7] Moreover, because the court in *Southern Company* determined the statute to be unambiguous on its face,[8] the Commission cannot render a contrary interpretation of the term "poles" here.[9]

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[3] *See* Comments of Crown Castle International Corp., filed Oct. 29, 2019 ("Crown Castle Comments"); Comments of ExteNet Systems, Inc. ("ExteNet Comments").

[4] Utility Association Comments at 2-3.

[5] *See* CTIA Petition at 23. *See also* Comments of AT&T, filed Oct. 29, 2109 at 23-23 ("AT&T Comments"); Crown Castle Comments at 39-40.

[6] Utility Association Comments at 5-9.

[7] *Southern Company v. FCC*, 293 F.3d 1338, 1344-45 (11th Cir. 2002).

[8] *Id*. at 1345 ("Applying the *Chevron* test to the relevant FCC guideline, we find that the Act, when considered as whole, speaks precisely to the question at issue. Our inquiry is therefore complete after the first step of the *Chevron* test.").

[9] *See* Opposition of the POWER Coalition 6-7 (citing *Nat'l Cable Telecomms. Ass'n v. Brand X Internet Servs*., 545 U.S. 967, 982-83 (2005) ("POWER Comments").

CTIA, and proponents of its Petition, mistakenly read *Southern Company* to merely exclude interstate electric transmission plant from the scope of Section 224, rather than to circumscribe the nature of the "poles" that are within the scope of the statute.[10] On this basis, some commenters urge the Commission to redefine the term "poles" as broadly as to include any "long slender cylindrical object" owned by a utility, regardless of its function or purpose.[11] This interpretation not only would be at odds with a core holding of *Southern Company* – it would have bizarre consequences.[12] Again, CTIA and its supporters rely on the court's analysis of Section 224(f) to provide a more expansive definition of the term "poles" than actually is indicated by the plain text of the statute.[13] However, the references made by certain commenters to *Southern Company*'s discussion of Section 224(f), when considered in the full context of the court's decision, mean only that the "poles" **within the scope of Section 224(a)** need not be used for wired communication in each individual case to be subject to the access requirements of Section 224(f).[14] To construct Eleventh Circuit's decision in *Southern Company* to the contrary would render that decision internally inconsistent.

Any reliance on Section 224(f) is further misplaced because it is Section 224(a) – and **not** Section 224(f) – that defines and circumscribes the types of poles and other infrastructure that are subject to the Commission's jurisdiction. The Supreme Court in *Gulf Power* recognized this when it stated that it is the definition of a "utility" in Section 224(a)(1) that describes the "poles" covered under the Act.[15] While the Supreme Court found that Section 224(a)(1) could not be read to exclude wireless attachments from the scope of the Act, it agreed with the underlying economic rationale

[10] CTIA Petition at 24-25. *See also* AT&T Comments at 25.
[11] *See* Comments of Verizon at 3 ("Verizon Comments").
[12] The dictionary definition of "poles" advocated by Verizon would be virtually limitless, and could be interpreted to include flag poles, fence poles, or essentially any stake in the ground, regardless of its function, or whether it is used for **any** utility operations.
[13] *See* AT&T Comments at 23-23; Crown Castle Comments at 39-40.
[14] *Southern Company*, 293 F.3d at 1349.
[15] *National Cable & Telecommunications Ass'n v. Gulf Power Co*., 534 U.S. 327, 340 (2002)(recognizing that Section 224(a)(1) defines the poles that are covered under the Act, not the types of attachments that are covered).

that pole attachment regulation was predicated on access to poles that constitute bottleneck facilities.[16] Therefore, Section 224(a) defines the "poles" that are covered by the Act, and Section 224(f) requires utility pole owners to provide non-discriminatory access to the "poles" defined by Section 224(a). However, Section 224(f) cannot be read in isolation by CTIA and others to expand the coverage of the Act to include "light poles," and Section 224(a) must be read to cover only those poles that are bottleneck facilities – which do not include "light poles".

The purpose of Section 224 is to ensure access to infrastructure that is **necessary** to provide telecommunications and cable television services – not merely convenient for that purpose.[17] However, as the Utility Associations observed, CTIA's weak claim that light poles are "optimal" for the placement of small cells cannot be squared with the intended application of Section 224.[18] Like the CTIA Petition itself, comments made in support of the declaration that CTIA requests entirely fail to demonstrate that "light poles" are anything more than "excellent candidates" for wireless attachments,[19] or that such poles are in any respect imperative to the deployment of broadband and 5G services.[20] In fact, only CTIA and one commenter even attempt to show any sort of necessity, and that claim was limited to the small number of cases in which all electric lines along the right-of way are buried.[21] The fact that wireless service providers to date have successfully constructed networks on privately and publicly owned infrastructure, and on both regulated and

[16] *Id.* at 341.
[17] Utility Association Comments at 10.
[18] *Id*. *See also* CTIA Petition at 21.
[19] Crown Castle comments at 39; Comments of T-Mobile USA, Inc. at 22 (T-Mobile Comments"). While some proponents of the CTIA Petition articulate that "light poles" are useful for the provision of 5G, it does not follow that such structures are "bottleneck" facilities, to which the mandatory access requirements of Section 224 are intended to apply.
[20] *See* AT&T Comments at 21. Similarly, AT&T's bland statement that 5G deployment depends in "significant part" on access to utility poles (although not necessarily "light poles") does not imply "necessity", as Section 224 requires.
[21] See CTIA Petition at 21. *See also* Verizon Comments at 24. Importantly, however, the Commission cannot conclude that no alternative structures for the placement of wireless equipment exist in the right-of-way simply because there are no electric distribution poles. For example, municipally-owned poles, subject to the requirements of the FCC's *Wireless Infrastructure Order* and rules may be available in those locations.

unregulated terms, belies that any expansion of the scope of the "poles" subject to Section 224 is consistent with the statute's purpose, or is needed to further the Commission's objectives related to broadband and 5G deployment. Absent proof of necessity, the relief request by CTIA must be denied.

The policy justifications presented by commenters in support of the CTIA Petition also are without merit, as those relate to different statutory provisions, and a different body of Commission rules.[22] Like CTIA, proponents of the Petition incorrectly assume that statements about the use of publicly-owned structures made by the Commission and by the Broadband Deployment Advisory Committee ("BDAC") in the context of the *Wireless Infrastructure* docket are simply transferable to the Commission's regulation of privately-owned poles, under Section 224.[23] That is not the case. As the Utility Associations explained in their initial comments, Section 253 and Section 332(c)(7) of the Communications Act are separate and distinct statutory provisions which apply to state- and municipally-owned infrastructure – **only**.[24] In stark contrast, Section 224 applies only to privately-owned poles, and in that important respect, raises Fifth Amendment "takings" considerations that do not exist for infrastructure owned by a state or by a municipality. Moreover, in many cases, "light poles" implicate the private property interests not only of the utility pole owner, but also of a third party who contributed to construction costs of the pole, who pays to maintain the pole, and whose rights and interests are explicitly protected by a written contract with the utility pole owner.[25] The Commission must reject CTIA's borrowed policy rationale as a basis to fundamentally expand the scope of Section 224.

[22] *See* CTIA Petition at 21. *See also* AT&T Comments at 24; ExteNet Comments at 7.
[23] *See id.*
[24] Utility Association Comments at 9.
[25] *See* POWER Comments at 8-9.

Interestingly, while CTIA, and proponents of the CTIA Petition, insist that the Commission must exercise its Section 224 jurisdiction over all utility-owned "light poles" to ensure access for wireless service providers, all of those parties actually concede that utility companies **voluntarily** make "light poles" available for attachment, at market-based rates, where it is operationally safe and feasible to do so. For example, Crown Castle boasts that it has worked with utility pole owners to develop solutions that are able to accommodate radio and antenna attachments on certain "light poles," and are fully compliant with utility-specific safety requirements.[26] In fact, collectively, the Petition, and all supportive comments, identify less than a handful of utility pole owners that deny access to all "light poles" – and with respect to those cases, provide no discussion of the capacity, safety, reliability, or engineering concerns that may be associated with such poles.[27] Furthermore, as discussed at length in the comments of the Utility Associations, a robust free market currently exists for infrastructure that is suitable for the placement of small cells, which includes buildings, towers, and other privately-owned structures.[28]

While CTIA, and proponents of the CTIA Petition also allege that some utility pole owners impose excessive fees for access to "light poles," the reality is that such structures are not subject to the artificially discounted pole attachment rates required by Section 224.[29] Therefore, in cases where a utility **voluntarily** permits attachments to "light poles," it is both lawful, and completely appropriate for the utility to seek compensation at a market-based rate that is consistent with local demand. In fact, for most utility companies, it is the ability to receive market-based compensation for pole access that provides a strong incentive to pursue arrangements beyond the requirements

[26] Crown Castle Comments at 39.
[27] *See, e.g.*, CTIA Petition at 22. Furthermore, at least one of the utility pole owners identified in the CTIA Petition operates in Massachusetts, and therefore is not subject to the FCC's pole attachment rules.
[28] Utility Association Comments at 11-12.
[29] Absent an affirmative interpretation of Section 224 that include "light poles" within the statutory definition of "poles," utility pole owners have no legal obligation to charge the Section 224(e) Telecom Rate.

of Section 224.[30] Moreover, the market-based rates charged by utility companies for access to "light poles" often times reflect costs incurred to customize such poles, as needed to accommodate a specific attacher's wireless equipment.[31]

III. SUPPORTERS OF THE PETITION FAIL TO PROVIDE ANY LEGAL BASIS TO INVALIDATE UTILITY CONSTRUCTION STANDARDS THAT RESTRICT USE OF A POLE'S UNUSABLE SPACE.

In its Petition, CTIA requests that the Commission declare unlawful **all** utility construction standards that restrict use of a pole's unusable space, and instead, mandate, in all cases, that utility companies provide a written pole-by-pole analysis of any specific safety, reliability, engineering, or capacity concern that forms the basis for such a restriction. However, in support of that request, CTIA and commenters mistakenly refer to 47 C.F.R. § 1.1403(b), and associated parts of the 2011 Order that are applicable only to individual attachment applications.[32] When considered in the full context of the 2011 Order, the rule's specific reference to the 45-day "Survey Phase" of the access process in fact confirms that the rule's specificity requirements relate exclusively to a pole owner's decision to permit or deny a particular attachment, on a particular pole.[33] As explained in the initial comments of the Utility Associations, utility construction standards have received much different treatment by the Commission over time, for important legal and policy reasons.[34]

While none of the proponents of the CTIA Petition appear to dispute the unqualified right of a utility pole owner to deny access to its pole "where there is insufficient capacity, or for reasons

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[30] *See* Utility Association Comments at 11-12.
[31] *Id.*
[32] *See* CTIA Petition at 25-26. *See also* AT&T Comments at 26-27; Crown Castle Comments at 41; ExteNet Comments at 7; T-Mobile Comments at 23; Verizon Comments at 7.
[33] *See* 47 C.F.R. § 1.1403(b). *See also In the Matter of Implementation of Section 224 of the Act, A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, WC Docket No. 07-245, GN Docket No. 09-51, 26 FCC Rcd 5240 (rel. Apr. 7, 2011) at ¶ 24 ("2011 Order"). The "specificity of denials" required by 47 C.F.R. § 1.1403(b) expressly qualifies a utility pole owner's response to a specific attachment request within the 45-day time period required for "surveys".
[34] Utility Association Comments at 13-23.

of safety, reliability, or generally applicable engineering purposes,"[35] Crown Castle brazenly asks the Commission to evaluate the validity of various justifications provided by utility companies for their construction standards.[36] Section 224(f) does not authorize the Commission to undertake this sort of assessment, and as the Commission wisely concluded in the past, it is "better" policy to defer to the expertise of states, localities, and utility companies themselves on all matters related to pole attachment construction.[37] Moreover, as Crown Castle certainly is aware, the **only** forum in which the Commission may consider whether a utility pole owner's denial of access is based on "pretext" is in a complaint case, where an attacher has demonstrated, based on specific facts, that its request to access **a particular pole** was denied in a manner that was unreasonable or discriminatory.[38] But in any event, even if Crown Castle's demand was permitted under Section 224, there is simply no reason in the record warranting the Commission to question that **any** of the construction standards identified by Crown Castle are at odds with Section 224(f)(2).[39]

While the CTIA Petition alleges that utility pole owners routinely fail to provide any safety or reliability justification for restrictions on certain uses of the unusable space, the initial comments of Crown Castle actually demonstrate that claim to be false.[40] As the Utility Associations explained previously, any obstruction of the lowest section of a pole creates safety and reliability concerns –

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[35] 47 U.S.C. § 224(f)(2).

[36] *See, e.g.*, Crown Castle Comments at 43 ("While Crown Castle appreciates that this alternative is available, such policies clearly are not based on legitimate safety or engineering bases.")

[37] *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, WT Docket No. 17-79, WC Docket No. 17-84, 33 FCC Rcd 7705 (rel. Aug. 3, 2018) at ¶ 133-34 ("2018 Order").

[38] *See* 2011 Order at ¶ 76 ("Concerns that appear to be mere pretexts rather than legitimate reasons for denying statutory rights to access will be given serious scrutiny by the Commission, **including in any complaint proceeding arising out of a denial of access.**")(emphasis added).

[39] While these comments are limited in scope to the issues raised in the CTIA Petition, the Utility Associations reserve the right to respond in *ex parte* comments to any and all of Crown Castle's claims related to other utility construction standards, as discussed more fully below.

[40] *See* CTIA Petition at 25-26. *But see also*, Crown Castle Comments at 42 ("… it is still common for utilities to broadly allege safety and climbing concerns as a rational for blanket prohibits of any equipment in the unusable space on utility poles.").

the most important of which is that the pole cannot be climbed.[41] This hazard is routinely disclosed by pole owners to **all** attachers, early on in their relationship.[42] Moreover, the same risk is identified in the National Electric Safety Code ("NESC"), which provides, in relevant part, that "attachments shall neither obstruct the climbing space nor present a climbing hazard to utility personnel."[43]

The initial comments of Crown Castle also undercut any contention that restrictions on the placement of auxiliary equipment in a pole's unusable space amounts to a *de facto* denial of access for wireless attachments. On one hand, Crown Castle confirms that technically feasible alternatives exist in cases where a utility pole owner requires auxiliary equipment to be placed adjacent to the pole. While some local jurisdictions perhaps "loath" this use of the public right-of-way ("PROW"), or "prefer" auxiliary equipment to be collocated on utility poles,[44] such jurisdictions ultimately are inclined to **permit** ground installations, as needed to accommodate utility construction standards.[45] Furthermore, and on the other hand, Crown Castle also confirms that utility pole owners **do** in fact work with wireless service providers to develop safe solutions for certain uses of a pole's unusable space in cases where local law fully **prohibits** the placement of telecommunications equipment in the PROW.[46] Against this backdrop, and Crown Castle's clear statement that practical alternatives to use of the unusable space exist,[47] it is apparent that the declaratory relief requested by CTIA is a matter of convenience – not of necessity.

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[41] *See* Utility Association Comments at 18. *See also* POWER Comments at 16. Attachments in the unusable space also create fall hazards, are an impediment to pole replacements, and in cases where a pole is replaced, are known to create added nuisance and debris in the right-of-way.

[42] *See* Utility Association Comments at 16; POWER Comments at 15-16. Indeed, Crown Castle appears to acknowledge restrictions on certain uses of a pole's unusable space are uniform in nature, and disclosed to **all** attachers in boilerplate pole attachment agreements, or in utility construction standards. Crown Castle Comments at 42.

[43] The Nat'l Electric Safety Code ("NESC"), 217A4 (2012).

[44] Crown Castle Comments at 42-43.

[45] Crown Castle Comments at 42-43.

[46] *Id*.

[47] *Id*. at 43 ("**While Crown Castle appreciates that this alternative is available,** such policies clearly are not based on legitimate safety or engineering bases.").

In its initial comments, Crown Castle also complains of a number of construction standards commonly applied by utility pole owners that are far beyond the scope of the CTIA Petition. These include (i) specifications for the installation of power meters;[48] (ii) indications for the number of radiofrequency ("RF") emitting devices that may be safely maintained and operated on any single pole;[49] (iii) indications for where on any pole an RF emitting device may be safely maintained and operated;[50] and (iv) restrictions on the placement of equipment at an unsafe distance from primary electric lines.[51] If, and to the extent that Crown Castle believes the construction standards applied by a particular utility pole owner to be unjust, unreasonable, discriminatory, or contrary to Section 224, an appropriate remedy may be requested in a complaint. However, the Commission simply is not permitted to grant relief (**in any form**) that broadly prohibits all utility construction standards, despite clearly expressed capacity, safety, reliability, and engineering concerns.

IV. SUPPORTERS OF THE PETITION FAIL TO PROVIDE ANY LEGAL BASIS FOR THE COMMISSION TO INTERVENE IN PRIVATE NEGOTIATIONS FOR POLE ATTACHMENT TERMS.

In their initial comments, the Utility Associations demonstrated ***first***, that the plain text of Section 224, the statute's history, and Commission precedent stipulate private negotiations to be the preferred means by which pole attachment terms are concluded between parties; and ***second***, that the statutorily-mandated complaint process developed by the Commission effectively serves as a "backstop" to ensure that the terms of individually negotiated agreements are just, reasonable, and non-discriminatory. None of the comments submitted would call into question the validity of these bedrock principles. While some wireless service providers simply parroted CTIA's request for a declaration that would disallow any proposal for pole attachment terms that are "in conflict

[48] *Id*. at 43-44.
[49] *Id*. at 44.
[50] *Id*. at 44-45.
[51] Crown Castle Comments at 45.

with" the Commission's pole attachment rules, only two advocates for the Petition even attempted to clarify the relief requested, or to provide any justification for such relief beyond elusive claims made in the Petition itself. However, those commenters relied entirely on obsolete allegations that costs and delays associated with the Commission's complaint process are prohibitive.[52] All such concerns were resolved by the Commission's recent improvements to its complaint process, and are now moot.[53]

Within just the past two years, the Commission adopted several important amendments to its formal complaint rules which ensure that Section 224 complaints (and particularly, "pole access complaints") are promptly decided.[54] For example, the Commission's new "Accelerated Docket" rule permits any pole attachment complaint to be placed on an expedited procedural schedule that requires the matter to be fully concluded within 60 days.[55] The Commission also implemented so-called "shot clocks" for pole attachment complaints, which require the disposition of "pole access complaints" within 180 days, and of other complaints within 270 days.[56] In other words, even in the worst case scenario, a pole attachment complainant is always ensured a final resolution by the Commission in less than one year. Moreover, in all cases that involve overpayments by an attacher, the Commission's current rules permit a complainant to be fully refunded, with interest, consistent with the applicable statute of limitations.[57] Because the Commission has taken these positive steps to expedite its pole attachment complaint process, and to provide for full recovery of unreasonable

[52] *See* Crown Castle Comments at 46; ExteNet Comments at 9-10.
[53] *See In the Matter of Amendment of Procedural Rules Governing Formal Complaint Proceedings Delegated to the Enforcement Bureau* (EB Docket No. 17-245), Report and Order, FCC 18-96, 33 FCC Rcd 7178 (rel. July 18., 2018) ("Formal Complaints Order").
[54] *Id*.; *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment* (WC Docket No. 17-84), Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking, FCC 17-154, 32 FCC Rcd 11128 (rel. Nov. 29, 2017) ("2017 Order").
[55] Formal Complaints Order at ¶ 19. See also 47 C.F.R. § 1.736.
[56] Formal Complaints Order at ¶¶ 22-23; 2017 Order at ¶ 9.
[57] 47 C.F.R. § 1.1410(c).

fees or charges, the particular concerns presented by Crown Castle and ExteNet do not require any further consideration here.

Of the very few commenters that favored the declaratory relief requested by CTIA on this particular issue, **only one of them** – Crown Castle – identified the contract terms that utility pole owners ostensibly demand contrary to the Commission's pole attachment rules.[58] Ironically, however, the instances discussed in the initial comments of Crown Castle underscore why CTIA's request makes no practical sense. In short, Crown Castle apparently believes that certain contract terms are "in conflict" with the Commission's rules based entirely on its **subjective** interpretation of what is "reasonable." For example, the Commission's rules are completely silent with respect to liability limitations and indemnity, and yet Crown Castle asserts certain industry standard risk management terms to be "at odds with [its] broad access rights."[59] The formal complaint process is intended precisely to address disputes of this nature, which arise in cases where the Commission's rules are unclear. However, the declaration that CTIA demands would be of no avail in such cases, as there is no actual "conflict" with the Commission's rules.

V. THE UTILITY ASSOCIATIONS RESERVE THE RIGHT TO ADDRESS IN EX PARTE COMMENTS ALL ISSUES OUTSIDE THE SCOPE OF THE PETITION.

The CTIA Petition raised only three discreet issues with respect to Section 224 of the Act, and the Commission's pole attachment jurisdiction: ***first***, whether the Commission may reinterpret the term "poles," as used in Section 224, to include all utility-owned "light poles"; ***second***, whether the Commission may prohibit all reasonable and non-discriminatory utility construction standards that restrict certain uses of a utility pole's unusable space; and ***third***, whether the Commission may

[58] Crown Castle Comments at 47-49.

[59] *Id*. at 47. Similarly, while the FCC's rules and orders are silent with respect how the "space occupied" component of the Section 224(e) Telecom Rate formula is determined in cases where the "one foot" presumption is rebutted, Crown Castle appears to take the position that a methodology which account for an attachment's depth is "in conflict" with the Commission's rules.

eliminate wholesale a utility pole owner's right to negotiate attachment terms that are "in conflict" with its pole attachment rules. Therefore, the scope of any comments submitted in support of, or in opposition to the CTIA Petition must be appropriately limited to the scope of those issues, and the three specific requests for declaratory relief made by CTIA. However, certain proponents of the Petition, in complete disregard of the Commission's procedures, introduced a number of new issues related to utility-specific RF emission policies,[60] and other attachment requirements that one wireless service provider implores the Commission to declare *per se* unlawful.[61] The Commission must not consider any issue beyond the scope of the Petition without a separate public notice, and a subsequent opportunity for public comment. However, out of an abundance of caution, the Utility Associations reserve the right to submit supplemental comments on all new issues, whether raised in initial comments or reply comments, as part of the *ex parte* process.[62]

VI. CONCLUSION

For the reasons set forth herein, and in their initial Opposition, EEI, UTC, NRECA, and their respective member companies urge the Commission to deny all declaratory relief requested in the CTIA Petition with respect to Section 224 and the Commission's pole attachment rules.

Respectfully submitted,

/s/ Aryeh B. Fishman

Aryeh B. Fishman
Associate General Counsel, Regulatory Legal Affairs
EDISON ELECTRIC INSTITUTE

[60] *See* Crown Castle Comments at 44-46.

[61] *See id. See also* ExteNet Comments at 10-21. With respect to the ExteNet Comments, in particular, it is clear that the "additional" relief requested, in each case, relates to a specific practice, of a single utility pole owner, and thus, must be addressed in a pole attachment complaint.

[62] *See 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), Order Granting Extension of Time, DA 19-978 (rel. Sept. 30, 2019) at ¶ 4.

701 Pennsylvania Avenue NW
Washington, D.C. 20004
afishman@eei.org

/s/ Brett Kilbourne

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Brett Kilbourne
Vice President, Policy, and General Counsel
UTILITIES TECHNOLOGY COUNCIL
2550 South Clark Street, Suite 960
Arlington, VA 22202
brett.kilbourne@utc.org

/s/ Brian O'Hara

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Brian O'Hara
Sr. Director Regulatory Affairs – Telecom & Broadband
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION
4301 Wilson Boulevard
Arlington, VA 22203
brian.ohara@nreca.coop

Brett Heather Freedson
Robert James Gastner
Eckert Seamans Cherin & Mellott, LLC
U.S. Steel Tower – 44th Floor
600 Grant Street
Pittsburgh, PA 15219
bfreedson@eckertseamans.com
rgastner@eckertseamans.com

Dated: November 20, 2019