

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

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

**OPPOSITION TO PETITION FOR DECLARATORY RULING OF
EDISON ELECTRIC INSTITUTE
UTILITIES TECHNOLOGY COUNCIL
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION**

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EXECUTIVE SUMMARY

The member companies of the Edison Electric Institute (“EEI”), the National Rural Electric Cooperative Association (“NRECA”), and the Utilities Technology Council (“UTC”) (collectively, the “Utility Associations”) own and operate utility poles as part of the electric industry’s mission to provide smarter energy infrastructure that ensures the reliable, safe, secure, and efficient delivery of electric power to the public. Electric utility companies support the Commission’s national goals for the deployment of broadband and Fifth Generation (“5G”) wireless networks by providing pole infrastructure to communications service providers, ultimately for the benefit of communities. The Utility Associations support policies that encourage cooperation with the communications industry to develop smarter, safer, and more technically efficient communities which offer superior benefits and services to the public. To that end, Utility Association members not only have provided access to pole infrastructure, to the extent required by Section 224 – they also have **voluntarily** developed innovative attachment solutions that enable communications service providers to access a broader selection of utility-owned poles, at a reasonable, market-based rate. For these types of solutions to thrive, however, it is vital that utility pole owners continue to have exclusive discretion to resolve all questions of safety, reliability, and engineering, and continue to be compensated fairly for pole access, and the related services that they provide. Importantly, in the case of infrastructure that is **not** subject to the mandatory access requirements of Section 224, such as utility-owned light poles and other utility-owned structures, this means that the Commission must not interfere with a utility pole owner’s right to charge negotiated market-based attachment rates. The declaratory relief that CTIA requests, while perhaps intended to expand pole access for wireless service providers, would in fact have the opposite effect – it would provide a disincentive for utilities to **voluntarily** provide many of the important benefits and services that Commission’s rules do not explicitly require.

The Commission should reject all of the relief requested in CTIA’s Petition for Declaratory Ruling (“Petition”),¹ because such relief would unlawfully expand the Commission’s Section 224 pole attachment jurisdiction, would conflict with well-settled judicial and Commission precedent, and would interfere with the application of state and local requirements that affect pole attachments and electric utility construction. The Petition fails to demonstrate that any current practice of utility pole owners is unjust, unreasonable, or discriminatory, or results in a complete denial of access to poles, in violation of Section 224. Conversely, the Petition also offers no evidence to support that the declaratory relief requested by CTIA is necessary to ensure pole access under Section 224, or to advance the deployment of broadband or 5G services. At bottom, the Commission would have no justification whatsoever to grant the vast scope of relief that CTIA demands.

First, the Petition requests that the Commission declare a seemingly broad, but undefined classification of utility-owned structures referred to as “light poles” subject to all requirements of Section 224, and the Commission’s poles attachment rules.² This declaration contradicts the plain language of Section 224, as well as the clearly articulated intent of Congress, at the time that the statute was first enacted, and again, in 1996, when the statute was amended to include attachments by telecommunications service providers. This declaration also is foreclosed by judicial precedent that expressly limits the scope of Section 224 to poles that comprise a utility’s electric distribution network, and are used to provide power service to the utility’s customers.

The policy basis provided by CTIA similarly lacks merit. While the Petition claims that so-called “light poles” are optimal for the placement of wireless antennas, nowhere does it demonstrate that access to light poles is **necessary** to provide wireless services, or that the current interpretation

¹ The comments of the Utility Associations address only the declaratory relief requested with respect to Section 224 of the Act, and the Commission’s pole attachment rules.

² See Petition at 21-25. See also 47 U.S.C. §224, 47 C.F.R. §1.1401 *et seq.*

of Section 224 (which does not provide mandatory access to “light poles”) has been an impediment to the deployment of wireless services. To the contrary, utility-owned light poles comprise only a small part of the robust free market that has developed over the past two decades for wireless service providers to access towers, buildings, and other structures that are suitable for the operation of small cells. Moreover, the Petition provides no evidence that utility pole owners possess monopoly power with respect to light poles, or are positioned to assert any leverage that would result in unreasonable rates, terms, or conditions for access to light poles.

Second, the Petition requests that the Commission broadly prohibit all reasonable and non-discriminatory construction standards that limit the encumbrance of the lowest portion of the pole, known as the “unusable space”.³ This relief violates Section 224(f)(2), which expressly permits any utility pole owner to deny access to its pole where insufficient capacity exists, for reasons of safety, reliability, or engineering.⁴ The statute does not prohibit system wide utility construction standards that incidentally restrict certain uses of utility poles, provided that such standards are based on the concerns identified in Section 224(f)(2) – and in fact, the Commission has endorsed such “*ex ante*” requirements that are “clear, objective, and equally applied.”⁵ The Commission also historically has not disturbed construction standards that a utility pole owner has adopted to comply with state and local requirements that affect pole attachments and pole attachment construction. The construction standards complained of by CTIA are squarely within the types of construction standards permitted by the Commission in the past, and importantly, CTIA’s Petition offers no evidence that restrictions

³ Petition at 25-27.

⁴ 47 U.S.C. § 224(f)(2).

⁵ *In the Matter of Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Order and Further Notice of Proposed Rulemaking, FCC 17-151, WC Docket No. 07-245, GN Docket No. 09-51, 25 F.C.C. Rcd 11864, ¶ 13 (rel. May 20, 2010)(“2010 Order”).

on the use of the unusable space violate Section 224, or adversely impacts the deployment of 5G or broadband services.

Third, the Petition requests that the Commission prohibit any proposal for pole attachment terms that are “in conflict with” its pole attachment rules.⁶ This relief is inconsistent with the text and purpose of Section 224, and contradicts decades of Commission precedent that acknowledges private contract negotiations to be the preferred basis for all pole attachment arrangements. In fact, the Commission has several times over conceded that its Section 224 pole attachment jurisdiction is, and was intended to be limited to the resolution of disputes. However, in any event, CTIA fails to demonstrate that privately negotiated pole attachment terms tend to be unjust, unreasonable, or discriminatory, or that the existing “sign and sue” rule fails to adequately protect the interests of smaller communications companies where unequal bargaining power exists.

Fourth, in addition to the substantive infirmities of CTIA’s Petition, the Commission lacks the authority to provide the relief that CTIA requests in the form of a declaratory ruling. Under the requirements of the Administrative Procedure Act (“APA”), the Commission must issue a public notice, and must offer interested parties an opportunity to comment on any new substantive rule – **in an APA-compliant rulemaking**.⁷ The relief requested by CTIA undoubtedly would require the Commission to promulgate new substantive rules, as its Petition invites the Commission to expand its pole attachment jurisdiction over the private property rights of utility pole owners, in a way that would fundamentally alter the current, and highly successful free market for wireless infrastructure access. While the Utility Associations do not believe that proper process would resolve the lack of legal and policy justification for the relief that CTIA requests, the Commission must, at a minimum, initiate an APA-compliant rulemaking if it is inclined to consider the Petition on its merits.

⁶ See Petition at 28-31.

⁷ 5 U.S.C.A §553(a)(3).

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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”) submit these comments in opposition to the Petition for Declaratory Ruling of CTIA (“Petition”), and urge the Federal Communications Commission (“FCC” or “Commission”) to reject proposals that would expand, and fundamentally alter the scope of its pole attachment jurisdiction under the Act, in ways never intended by Congress.⁸ *First*, the Utility Associations oppose CTIA’s request that the Commission declare all utility-owned “light poles subject to the access requirements of Section 224, and the Commission’s pole attachment rules.⁹ *Second*, the Utility Associations oppose CTIA’s request that the Commission declare unlawful all utility construction standards that restrict an attacher’s use of a pole’s unusable space, regardless of any capacity, safety, reliability, or engineering concern identified by the pole owner.¹⁰ *Third*, the Utility Associations oppose CTIA’s

⁸ Wireless Telecommunications Bureau and Wireline Competition Bureau Seek Comment on WIA Petition for Rulemaking, WIA Petition for Declaratory Ruling and CTIA Petition for Declaratory Ruling, Public Notice, DA 19-913 (rel. Sept. 13, 2019). *See also In the Matter of 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)(directing parties to file all comments that exclusively concern pole attachment issues only in WC Docket No. 17-84).

⁹ *See* Petition at 21-25. *See also* 47 U.S.C. §224, 47 C.F.R. §1.1401 *et seq.*

¹⁰ *See* Petition at 25-27.

request that the Commission eliminate the rights of private parties to negotiate pole attachment terms that differ in any way from is the pole attachment rules.¹¹ If the Commission is even inclined to consider the merits of CTIA’s Petition – most of which it considered just one year ago – it must in a rulemaking that complies with the Administrative Procedure Act (“APA”).¹²

I. INTRODUCTION

EI is the trade association that represents all U.S. investor-owned electric utility companies. Collectively, EI’s members provide electricity for 220 million Americans, operate in all 50 states and the District of Columbia, and directly and indirectly employ more than seven million people in communities across the United States. EI’s members invest more than \$100 billion each year to build a smarter energy infrastructure and to transition to even cleaner generation resources. Electric companies are among the nation’s largest users of communications services and operate some of the largest private communications and pole infrastructure networks. Therefore, EI has filed comments with the Commission in various proceedings affecting the interests of its members.¹³ Accordingly, EI is an interested party and appreciates the opportunity to meaningfully participate in this proceeding.

NRECA is the national trade association representing nearly 900 local electric cooperatives operating in 48 states. America’s electric cooperatives power over 20 million businesses, homes, schools, and farms across 56 percent of the nation’s landmass, and serve one in eight (42 million) consumers. NRECA’s member cooperatives include 62 generation and transmission (“G&T”)

¹¹ See Petition at 28-31.

¹² See *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, FCC 18-111, WC Docket No. 17-84, WT Docket No. 17-79, 33 FCC Rcd. 7705, ¶ 134 (rel. Aug. 3, 2018)(“2018 Order”). See also *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment* (WC Docket No. 17-84), Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, FCC 17-37, 32 FCC Rcd 3266, at ¶ 30, 34 (rel. Apr. 21, 2017).

¹³ EI participated actively in the rulemakings that resulted in the Commission’s 2010, 2011, 2015, and 2018 orders interpreting Section 224 of the Communications Act. 47 U.S.C. § 224.

cooperatives and 831 distribution cooperatives. The G&T cooperatives generate and transmit power to distribution cooperatives that provide it to the end-of-the-line co-op consumer-members. Collectively, G&T cooperatives provide power to nearly 80 percent of the nation's distribution cooperatives. The remaining distribution cooperatives receive power from other generation sources within the electric sector. Both distribution and G&T cooperatives share an obligation to serve their members by providing safe, reliable and affordable electric service. NRECA's member cooperatives include cooperatives that are Registered Entities with compliance obligations under Reliability Standards established by NERC. In addition, cooperatives own and operate substantial local distribution facilities and are responsible for the reliability and security of their local distribution systems.

UTC is the international trade association for the telecommunications and information technology interests of electric, gas, and water utilities and other critical infrastructure industries. UTC's members include large investor-owned electric companies who serve millions of customers across multi-state service territories, as well as smaller rural electric cooperative and public power utilities, which may serve only a few thousand customers in isolated communities or remote areas. UTC's members own, manage, and control extensive infrastructure that they use to support the safe, reliable and secure delivery of essential services to the public at large.

II. THE COMMISSION CANNOT EXPAND ITS SECTION 224 JURISDICTION TO INCLUDE LIGHT POLES.

The Utility Associations oppose CTIA's request for declaratory ruling that a broad and undefined classification of utility-owned structures referred to as "light poles" are "poles" that are subject to the Commission's Section 224 pole attachment jurisdiction. As an initial matter, CTIA's Petition fails to identify what "light poles" its members seek to access or to consider the substantial

variations in how utility-owned light poles are constructed and used.¹⁴ For example, a “light pole” could be a 100-foot metal or concrete structure on the side of an interstate highway or in shopping mall parking lot. Or it could be a decorative fiberglass structure in a residential subdivision, or on a golf course. However, **all** of the dedicated light poles owned by electric utility companies have in common two unique characteristics that exclude them from the scope of Section 224: *first*, these structures do not support equipment used to deliver electric power; and, *second*, these structures are custom-built pursuant to private contracts between the utility pole owner and its customer,¹⁵ at the customer’s direction and expense. Accordingly, a utility pole owner has no discretion to modify or replace a dedicated light pole to accommodate communications equipment and has no authority to grant access to the pole without the consent of the party that commissioned it.¹⁶

The statutory language, the legislative history, and the context of the provisions within the statute can only be interpreted to exclude light poles from the Commission’s regulatory jurisdiction. Furthermore, judicial precedent excludes from jurisdiction those poles – such as light poles – that are not part of the local electric distribution plant and prohibits the Commission from requiring utilities to expand capacity – as would be necessary in many cases to attach wireless antennas and related equipment to light poles. A decision by the Commission to regulate light poles also would distort the robust free market that exists today for access to wireless infrastructure, including small cells, and would encourage further gamesmanship by companies who demand access and regulated, artificially low rates for themselves, but then charge higher,

¹⁴ See *Exhibit A*.

¹⁵ In some cases, dedicated light poles are requested by a municipality, or municipal organization.

¹⁶ Importantly, these private contacts also require a utility pole owner to *remove* a light pole at the request of the party that commissioned it. In other words, a utility pole owner can make no assurances with respect to the continuing availability of a dedicated light pole.

market based rates to wireless providers that must indirectly negotiate access to attach their wireless equipment to utility infrastructure.

A. “Light Poles” are Not “Poles” Within the Meaning of Section 224.

When Congress passed the Pole Attachment Act in 1978, it did so for two reasons: (i) cable television providers needed access to utility poles; and (ii) telephone and electric utilities possessed monopoly control over those poles. In establishing a statutory framework that provided pole access for cable television providers, Congress clarified that the Commission’s jurisdiction is strictly circumscribed and extends only as far as needed into commercial relationships to achieve the purpose of the statute.¹⁷ When Congress amended Section 224 in 1996, it did so to provide access to poles by competitive telecommunications carriers and to entitle them to rates, terms, and conditions that are just and reasonable. It did not otherwise expand the Commission’s jurisdiction, nor did it alter the predicate for pole attachment regulation: that access to poles must be necessary to provide service, and that utilities be shown to be able to exercise monopoly control over poles to negotiate rates, terms, and conditions that are not just and reasonable. Against this backdrop, Section 224 does not extend to light poles.

First, the plain language of Section 224(a)(1) defines those poles that are covered by the statute to include only poles that are owned or controlled by utilities, **and** that are used in whole or in part for wire communications.¹⁸ Jurisdiction is further limited by sections 224(a)(1)-(3), which exclude federal- and state-owned utility poles from pole attachment regulation.¹⁹ Although it is true that Section 224(a)(4) and Section 224(f)(1) have been construed to broadly extend the

¹⁷ See .S. Rept. No. 95-580, 14, 1978 U.S.C.C.A.N. 109, 122 (adding that it does not authorize “a continuing direct involvement by the Commission in all CATV pole attachment arrangements,” nor is the Commission “empowered to prescribe rates, terms and conditions for CATV pole attachments generally.”).

¹⁸ *National Cable & Telecommunications Ass’n v. Gulf Power Co.*, 534 U.S. 327, 340 (2002)(finding that Section 224(a)(1) is the provision within the statute that describes the poles that are covered.)

¹⁹ See Section 224(a)(1)-(3).

FCC’s jurisdiction to *any* type of pole attachment “by a cable television system or provider of telecommunications service,” even the Commission has recognized that Section 224 does not confer jurisdiction over all types of utility infrastructure.²⁰ Moreover, the Commission and the courts have interpreted these provisions of the statute to mean that pole attachment jurisdiction only extends to poles, ducts, and conduit that are used in connection with a utility’s local electric distribution network.²¹ As described in more detail below, light poles do not carry wires that are part of the electric distribution network, and therefore, are not part of it. Accordingly, light poles are not “poles” within the plain language of Section 224.

1. CTIA’s Expansive Interpretation of “Poles” is Inconsistent with Congressional Intent.

Nothing in the legislative history suggests that Congress intended to include light poles within the meaning of Section 224(a)(1). When Congress passed the Pole Attachment Act of 1978, it only extended jurisdiction to those poles that were necessary for the provision of cable television service, and even when Congress passed the Telecommunications Act of 1996, which amended Section 224 to apply to certain types of telecommunications carriers and to require non-discriminatory access, it did not further expand jurisdiction to include other types of utility infrastructure beyond “poles, ducts, conduit and rights of way.” Although light poles existed at the time, Congress did not include them as subject to pole attachment regulation. Nor does anything in the legislative history indicate that Congress intended to include them. There is no mention of light poles. Moreover, Congress only intended to extend access to infrastructure that could be

²⁰ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, FCC 96-325, CC Docket No. 96- 98, 11 FCC Rcd. 15499, 16084-85, ¶ 1185 (rel. Aug. 8, 1996)(observing that “The intent of Congress in section 224(f) was to permit cable operators and telecommunications carriers to ‘piggyback’ along distribution networks owned or controlled by utilities, as opposed to granting access to every piece of equipment or real property owned or controlled by the utility.”)(“Local Competition Order”)

²¹ *Southern Company v. FCC*, 293 F.3d 1338, 1345 (11th Cir. 2002).

considered necessary for the provision of cable television or telecommunications services and that utilities held monopoly control over – neither of which is the case with regard to wireless access to light poles, as described more fully below. Accordingly, the legislative history does not support any interpretation that Congress intended to regulate attachments to light poles.

2. The Language and Structure of Section 224 Do Not Support a Conclusion That The Term “Poles” Includes “Light Poles.”

The context of the provisions within Section 224 further indicate that light poles are not “poles” that are subject to pole attachment regulation. The Supreme Court has held that Section 224(a)(1) defines the types of utility infrastructure, as well as the types of entities, that are covered under the Act.²² The other subsections of Section 224 define the rates, terms, and conditions for pole attachments. While Congress broadly defined pole attachments to include *any* attachments by a cable television system operator or a telecommunications service provider, and required utilities to provide non-discriminatory access for *any* pole attachments, it did not use the word *any* in Section 224(a)(1). When Congress chooses to use the word *any* in one provision but not another, the courts and the Commission must treat the omission of the word *any* to be deliberate and are obliged to adopt a narrower interpretation of such a provision.²³ This canon of statutory construction is underscored by the Fifth Amendment implications of the Act, and the judicial determination that pole attachments effect a *per se* taking of utility property that requires just compensation.²⁴ Courts and the Commission must narrowly interpret a statute that effects such a

²² See *infra* n. 18.

²³ See, e.g., Antonin Scalia & Brian A. Garner, *Reading Law: The Interpretation of Legal Texts* 93–100 (2012) (explaining semantic canon that “[n]othing is to be added to what the text states or reasonably implies (*casus omissus pro omisso habendus est*). That is, a matter not covered is to be treated as not covered.”); *id.* at 107–111 (explaining the “negative-implication canon” which suggests that “[t]he expression of one thing implies the exclusion of others (*expressio unius est exclusio alterius*).”); see also *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993).

²⁴ See e.g. *Gulf Power Co. v. United States*, 187 F.3d 1324, 1328-29(11th Cir.1999) citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439-40 (1982) (finding that “the Act’s mandatory access provision effects

taking. Accordingly, the Commission must not broadly interpret Section 224(a)(1) to include light poles.

3. CTIA’s Broad Interpretation of “Poles” is Contrary to Commission and Judicial Precedent.

Judicial precedent also makes it clear that the only conclusion the Commission can reach is that light poles are not “poles” for purposes of Section 224. In *Southern Co. v. FCC*, the United States Court of Appeals for the Eleventh Circuit found that the Commission’s jurisdiction only extended to poles that are part of the electric distribution network.²⁵ Specifically, the court determined, based on Section 224(a)(1) and the reverse preemption provisions of Section 224(c)(1), that “the Act’s coverage was intended to be limited to the utilities’ local distribution facilities, and was not to extend to the general regulation of interstate transmission towers and plant.”²⁶ Following this logic, light poles are not considered “poles” under Section 224, and cannot be regulated by the Commission because they are not part of the electric distribution network. First, because dedicated light poles are not specifically engineered to support lateral cables, such poles are not the equivalent of electric distribution poles in terms of size, strength, or capacity. Even if the Commission were to declare these poles subject to Section 224, the reality is that pole access would in many, if not all cases, be denied under 47 U.S.C. § 224(f)(2), for reasons of safety, engineering, and insufficient capacity. Second, but perhaps more importantly, dedicated light poles are not covered under the same body of state regulations as utility infrastructure used for the provision of electric service to consumers. In fact, dedicated light poles have no function related

a taking of property” requiring just compensation for the physical occupation of utility property by pole attachments regardless of the public purpose).

²⁵ *Southern Co.*, 293 F.3d at 1345.

²⁶ *Id.* at 1345.

to electric utility operations at all.²⁷ Therefore, light poles are not part of an electric utility’s local electric distribution system and do not carry or support any communications or electric distribution lines, and thus they are not facilities that are “used, in whole or in part, for any wire communications.”²⁸

The statements of the Commission and the Broadband Deployment Advisory Committee (“BDAC”) about access to publicly-owned light poles, in the context of Section 253 and Section 332(c)(7) of the Communications Act, and the FCC’s new wireless infrastructure rules, cannot be relied on to expand the scope of jurisdiction to include the privately-owned electric utility poles covered by Section 224.²⁹ The provisions of Sections 253 and 332(c)(7) are separate from Section 224 and do not supersede Section 224. In addition, the provisions of Section 224 expressly exempt cooperatively organized and government-owned utilities, further underscoring that Section 224 is distinctly separate from Sections 253 and 332(c)(7) that pertain to state and local governments and wireless siting.³⁰ Accordingly, CTIA cannot bootstrap these separate provisions within the Act to expand the Commission’s jurisdiction under Section 224 to include light poles.

²⁷ Joint Reply Comments of CenterPoint Energy Houston Electric, LLC, Dominion Energy Virginia and Florida Power & Light Company in WC Docket No. 17-84 at 17 (Jul. 17, 2017)(adding that “all dedicated street light poles are constructed, operated, maintained, and retired pursuant to private agreements between the utility pole owner and various third parties, including counties, municipalities, private subdivisions, and individual real property owners. All such poles are set in rights-of way or easements dedicated to specific projects, and all such poles exist at the convenience, and for the sole benefit of the party that commissioned them.”).

²⁸ Joint Reply Comments of Alliant Energy Corporation, WEC Energy Group, Inc. and XCEL Energy Services, Inc. in WC Docket No. 17-84 at 22 (Jul. 17, 2017).

²⁹ *But see* CTIA Petition at 21, *citing Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Accelerating Wireline Broadband Deployment Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, FCC 18-133, WT Docket Nos. 17-79, 17-84, 33 FCC Rcd 9088 at ¶¶ 50, 92 (re. Sep. 27, 2018). *See also id.*, *citing* Broadband Deployment Advisory Committee, State Model Code for Accelerating Broadband Infrastructure Deployment and Investment, § 2(51), <https://www.fcc.gov/sites/default/files/bdac-12-06-2018-model-code-for-states-approved-rec.pdf>; Model Code for Municipalities, § 1.2(v), <https://www.fcc.gov/sites/default/files/bdac-07-2627-2018-model-code-for-municipalities-approved-rec.pdf>.

³⁰ *See* Section 224(a)(1)-(3)(defining the term “utility” and excluding from that definition “any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State.”).

B. Access to Light Poles is Not a Barrier for 5G and Regulation Would Violate Private Property Interests and Distort the Robust Free Market that Currently Exists for Wireless Infrastructure Siting.

In the absence of any valid legal basis to support its request for declaratory relief, CTIA’s Petition relies heavily on hollow policy-based assertions that are equally unavailing. CTIA claims that light poles are the “optimal” location for small cells and that the Commission should assert jurisdiction over them because utilities are denying access. Leaving aside the vagueness of CTIA’s claims for the moment, the premise of its argument is that the Commission may regulate infrastructure that is “optimal” but not necessary for wireless service providers. But that is not what Congress and the courts have held. Instead, Congress limited the scope of Section 224 to infrastructure that was necessary to provide cable television or telecommunications services. Moreover, utilities are permitted to deny access for reasons of safety, reliability, capacity, and other generally applicable engineering purposes. Finally, as the FCC itself has recognized, utilities may not grant to third parties more expansive rights than their own under state and local laws.³¹ This is particularly important with respect to light poles, which in many cases are subject to overlapping ownership and control by localities or private land owners, as well as complex state and local property laws, and state and local zoning and permitting requirements. CTIA therefore overreaches by arguing that somehow light poles should be subject to mandatory access at regulated rates simply because they are “optimal” for wireless providers to use.

Given that pole attachments effect a *per se* taking of utility property under the Fifth Amendment, the Commission may not broadly interpret its authority to include light poles, regardless of the public purpose that may be served by doing so.³² CTIA’s public policy rationale

³¹ See Local Competition Order, at ¶1179 (stating that “[t]he scope of a utility’s ownership or control of an easement or right-of-way is a matter of state law,” and that “access obligations of section 224(f) apply when, as a matter of state law, the utility owns or controls the right-of-way to the extent necessary to permit such access”).

³² *Loretto*, 458 U.S. at 441.

is predicated on the claim that light poles are convenient, rather than necessary, for use by wireless providers. Moreover, it ignores the fact that regulating light poles would undermine the property rights and reasonable investment-backed expectations of a vast array of infrastructure access providers – including tower companies, municipalities, and building owners as well as – all of whom own or control sites that represent reasonable alternatives to the use of light poles.

If the Commission were to take the unprecedented step of regulating privately-owned light poles under Section 224, it would distort the robust free market that has developed over the past two decades for access by wireless communications service providers to towers, buildings, and other sites suitable for small cells. It would undercut negotiations between carriers and these infrastructure providers by reducing demand and lowering market-based rates. It also would encourage regulatory arbitrage, under which third parties could obtain non-discriminatory access and artificially cheaper, regulated rates for light poles that are owned or controlled by utilities, which these third parties could in turn offer to communications service providers at higher, negotiated rates, terms, and conditions.

CTIA's assertion that utilities are denying access to light poles fails to demonstrate that utilities possess market power or have exercised market power to impose unjust and unreasonable rates, terms and conditions from wireless providers. The reality is quite the opposite. At the outset, utilities represent a small fraction of the overall market of wireless infrastructure providers and they do not possess market power. Nor are they exercising market power to impose unjust and unreasonable rates, terms, and conditions from wireless providers.

In fact, a number of utilities actively are marketing and providing access to appropriate light poles for small cells by wireless communications service providers. These light poles are specially designed for wireless equipment and are distinctly different from light poles that utilities

own or control. These smart light poles include LED lights and wireless equipment, as well as other equipment and capabilities, such as back-up power storage.³³ They are specially designed and manufactured to accommodate wireless antennas, which is not the case for ordinary streetlight infrastructure. Utilities work closely with localities to ensure that these light poles comply with their zoning and permitting requirements, as well as state and federal requirements for loading and safety.³⁴ Most importantly for wireless service providers, these light poles enable them to deploy small cells quickly and cost effectively, through privately negotiated arrangements. Some utilities that market light poles for wireless infrastructure access also have developed a database of available sites that enables wireless providers to choose locations that would provide the best coverage for their needs. This further illustrates how utilities are enabling and promoting 5G deployment, and how they are innovating and investing in the free market that exists for wireless infrastructure access.

CTIA cites to examples of utilities that it claims are impeding providers from investing in and deploying 5G, but fails to identify these utilities, or to provide any context around its claims that utilities are barring access or overcharging wireless service providers for access to light poles. The only reference is a footnote to an *ex parte* presentation by Verizon Wireless, which itself is directed mainly at “state and local barriers,” and only generally refers in passing to utilities that it

³³ Maddox, Teena, Innovation, “How LA is now saving \$9M a year with LED streetlights and converting them into EV charging stations” (Jul. 7, 2016), <https://www.techrepublic.com/article/how-la-is-now-saving-9m-a-year-with-led-streetlights-and-converting-them-into-ev-charging-stations/>. Hamblen, Matt, Computer World, “Totem streetlight poles to combine wireless with power on city streets” (Mar. 24, 2017), <https://www.computerworld.com/article/3184662/totem-streetlight-poles-to-combine-wireless-with-power-on-city-streets.html>.

³⁴ See Beckman, Kristen, WIRELESS INFRASTRUCTURE ASSOCIATION, “Xcel Energy’s Ed Bieging on How Utilities Can Help Accelerate 5G Network Buildouts” (Apr. 24, 2019), available at <https://wia.org/blog/xcel-energys-ed-bieging-on-how-utilities-can-help-accelerate-5g-network-buildouts/> (last visited Oct. 28, 2019)(“...everybody so far is working together, getting ordinances put together and understanding the process. Cities don’t feel like they are all alone out in the small cell world. We are here to help them through that process.”).

claims are charging a premium for access to light poles.³⁵ There is no indication at all that the rates charged by utilities for access to utility-owned light poles are any higher than the rates charged by any other similarly situated wireless infrastructure provider through private negotiations. There also is no indication that any of the utilities in these claims are actually subject to the FCC's pole attachment jurisdiction. Moreover, even assuming that any of the utilities in question were subject to the FCC's pole attachment jurisdiction, there still is no indication that they denied access to light poles for reasons that were impermissible under Section 224. In fact, there is no discussion of the specific facts at all. The claims are at best anecdotal and there is no indication that this is a widespread problem that requires Commission regulation.

For all of these reasons, the Commission should dismiss or deny CTIA's request for a declaratory ruling that light poles are subject to pole attachment regulation under Section 224. Light poles are not and never were considered poles that were subject to Section 224. Moreover, there is no basis upon which the Commission should expand its authority to regulate light poles, because its failure to do so does not create a barrier for 5G deployment and because there are reasonable alternatives in the form of a robust free market for access to wireless infrastructure siting. Therefore, the Utility Associations respectfully request that the Commission dismiss or deny CTIA's Petition with regard to regulation of light poles under Section 224.

III. THE COMMISSION MUST NOT PROHIBIT CONSTRUCTION STANDARDS THAT RESTRICT AN ATTACHER'S USE OF THE UNUSABLE SPACE.

In its Petition, CTIA requests that the Commission broadly prohibit all reasonable and non-discriminatory construction standards that restrict the use of pole space below minimum clearance level – on the lower portion of the pole, known as the “unusable space.”³⁶ Specifically, CTIA

³⁵ CTIA Petition at 22, *citing Ex Parte* Letter from Katherine R. Saunders, Verizon, to Marlene H. Dortch, FCC, WT Docket No. 17-79 and WC Docket No. 17-84, at 2 (filed June 21, 2018).

³⁶ Petition at 25-27.

invites the Commission to expand dramatically its prohibition of utility practices that deny pole access for wireless antennas³⁷ to include uniformly applied specifications that simply require the placement of electric meters and auxiliary equipment where they will be most safe and least likely to interfere with core utility operations. All construction standards place some limitation on how a pole may be used to ensure safety, reliability, and structural integrity. However, under CTIA's interpretation of the law, even the most elementary provisions of the National Electric Safety Code ("NESC") could be construed as an impermissible "blanket ban" of certain pole attachment practices.³⁸

The relief requested by CTIA is contrary to Section 224. The statute's mandatory access provisions are expressly limited where insufficient capacity exists or where a utility identifies a safety, reliability, or engineering concern.³⁹ The Commission also has concluded that various state and local requirements may control how, and where, utility poles are constructed, maintained, and used, and that such requirements are entitled to deference, even where the state has not preempted federal law, pursuant to Section 224(c).⁴⁰ The Petition also fails to demonstrate that the restrictions that CTIA complains of result in any denial of pole access or are unreasonable or discriminatory. Moreover, CTIA presents no factual support for its claim that restrictions on use of a pole's unusable space adversely affects or inhibits broadband or 5G deployment, and no sound policy basis for the relief that it requests.

³⁷ *Id.* at 27.

³⁸ For example, consistent with the requirements of the NESC, most utility companies require 12 inches of separation between communications attachments. Under CTIA's theory this, construction requirement also could be construed as an impermissible "blanket ban", as it limits the number of attachments that can be maintained on the pole. *See* Reply Comments of Ameren Corporation et al., WC Docket No. 17-84 (filed July 17, 2017).

³⁹ 47 U.S.C. § 224(f)(2).

⁴⁰ Local Competition Order at ¶ 1154.

A. The Statute Expressly Permits Utility Pole Owners to Impose Reasonable and Non-Discriminatory Restrictions on Pole Access.

The pole access mandates of Section 224 are not absolute. While Section 224(f)(1) requires that a utility provide access to its poles, Section 224(f)(2) creates a clear and distinct exemption to that requirement. Specifically, a utility may deny access to its poles, provided that its denial is both (i) reasonable (“where there is insufficient capacity, or for reasons of safety, reliability or generally applicable engineering purposes”); and (ii) non-discriminatory.⁴¹ Nothing in the text of Section 224 states, or implies, that a restriction of general applicability could not meet both of the requirements of Section 224(f)(2), and in fact, the statute’s use of the plural “*poles*” contemplates that an access restriction need not be pole- or location-specific to be lawful. The Commission’s complaint process is the appropriate forum in which to consider any claim that a utility’s specific restriction on an attacher’s use of a pole’s unusable space violates Section 224.⁴² However, unless the Commission determines, based on a complete factual record, that there is *no* scenario in which a restriction on use of the unusable space could pass muster under the statute, it cannot ban *all* such restrictions wholesale.

The Commission has now twice refused to invalidate system wide restrictions on a particular pole attachment practice or technique that a utility pole owner has determined is universally unsafe, or a threat to the integrity of its infrastructure. In 2010, the Commission confirmed that a pole owner may restrict, or even prohibit, a pole attachment technique in *all* cases, based on any one or more of the considerations identified in Section 224(f)(2), provided that the same restrictions are applied to the utility’s attachments under comparable circumstances.⁴³ And more recently, in 2018, the

⁴¹ 47 U.S.C. § 224(f)(1)-(2).

⁴² *Id.*

⁴³ 2010 Order, ¶¶ 11, 13. Importantly, CTIA’s Petition presents no evidence that restrictions on the use of the unusable are not applied evenhandedly, or that comparable utility equipment is exempt from such restrictions.

Commission rejected demands to limit the application of utility-specific construction standards and requirements, which may similarly restrict the manner in which poles are used or attachments are constructed, on a system wide, rather than on a pole-by-pole basis.⁴⁴ In fact, with respect to so-called “blanket bans” on use of the unusable space, the 2018 Order expressly **denied** the exact relief that CTIA requests in its Petition.⁴⁵ The Commission has never concluded that a utility’s pole access restriction based on the considerations of Section 224(f)(2) violates the statute simply because it is applied system wide. Consistent with this precedent, the Commission should reject CTIA’s request that it do so here.

Importantly, the Commission not only has permitted “clear, objective and equally applied” restrictions on certain attachment practices – it actually has validated them.⁴⁶ For example, in the 2010 Order, the Commission concluded that “*ex ante* guidance will help attachers make informed decisions and should facilitate the attachment process.”⁴⁷ For their part, electric utility companies maintain that uniform, openly communicated construction requirements that restrict or prohibit an attacher’s use of the unusable space for reasons of capacity, safety, reliability, or engineering is consistent with, and serves the objective of transparency articulated in the 2018 Order, and related BDAC reports.⁴⁸ Indeed, if an attacher is informed, before it submits its application to attach, that certain equipment cannot be constructed in the unusable space, then an opportunity is provided for the attacher to proactively revise its attachment design **before** it confronts the time and expense of the application process. The members of the Utility Associations have both supported, and actively

⁴⁴ 2018 Order at ¶ 133.

⁴⁵ 2018 Order at ¶ 134 (“At this time, we decline to adopt Crown Castle’s request that we prohibit blanket bans by utilities on the attachment of equipment in the unusable space on a pole...”) As discussed in the sections that follow, CTIA’s Petition fails to introduce any new record evidence either that restrictions of the use of the unusable space are impediments to 5G deployment, or that a blanket prohibition of such restrictions would expedite 5G deployment.

⁴⁶ 2010 Order at ¶ 13.

⁴⁷ *Id.*

⁴⁸ *See e.g.* 2018 Order at ¶ 60, BDAC Report at 33.

participated in the efforts of wireless communications attachers to develop attachment designs that are compliant with state, local, and utility-specific construction standards and requirements.

Contrary to the Commission's past directives on this issue, CTIA implores the Commission to "apply the *2011 Pole Attachment Order* to all portions of the pole."⁴⁹ By this, CTIA refers to the narrow decision of the Commission to foreclose restrictions on pole top access that were determined to be *de facto* bans on the attachment of wireless antenna devices.⁵⁰ That decision was the exception, and not the rule, and in any event, was based on circumstances that do not exist in the present case. First, the Commission noted that utility restrictions on pole top access were intended predominantly to reserve space for power supply equipment, and thus, did not fall within the proper scope of Section 224(f)(2).⁵¹ Second, the Commission expressed particular concern that restrictions on access to pole tops effectively precludes the use of poles to support wireless antennas.⁵² Importantly, however, the Commission reiterated, both in its 2011 Order and its 2004 Wireless Attachment Public Notice that Section 224(f)(2) expressly limits antenna placement for wireless telecommunications carriers.⁵³

In stark contrast to the specific practice disallowed by the 2011 Order, construction standards that restrict an attacher's use of the unusable space are lawful under Section 224(f)(2) and do not raise the same perceived barriers to the deployment of wireless services. Because these restrictions are applied in the same manner to **all** attachments (including attachments of the utility pole owner), they are non-discriminatory and do not constitute an unlawful reservation of space.⁵⁴

⁴⁹ CTIA Petition at 27.

⁵⁰ *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, ¶ 77 (2011) ("2011 Order").

⁵¹ *Id.*, See also 2004 Wireless Attachment Public Notice.

⁵² *Id.* Incidentally, despite those concerns, enhancement in wireless attachment technology after the 2011 Order has made it feasible, and in some cases preferable, to install wireless antenna attachments in the communications space.

⁵³ *Id.*

⁵⁴ Moreover, an electric utility pole owner has no incentive to discriminate against communications attachers because they do not provide competing services.

Moreover, as Utility Association members routinely communicate to attachers, restrictions on whether and how a pole's unusable space may be used for attachment are properly tailored to address specific safety, reliability, engineering, and capacity concerns.⁵⁵ For example, as Utility Association members have detailed in prior comments, attachments in the unusable space create fall hazards and other safety concerns, and obstruct the ability of utility employees and contractors to climb the pole, to access the power supply space.⁵⁶ Such attachments also 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.⁵⁷ The problems associated with attachments in the unusable space that have led some utility pole owners to prohibit or restrict them do not vary by pole type or by pole location.

Unlike the restrictions on pole top access considered by the Commission in its 2011 Order, construction standards that restrict an attacher's use of the unusable space do not **deny** access to any pole for the placement of a wireless antenna. In all cases that the Utility Association members are aware of, access to the unusable space is requested exclusively for the placement of auxiliary equipment, while wireless antenna devices are constructed in the communications space or at the pole top.⁵⁸ Where a utility pole owner prohibits or restricts attachment in the unusable space, an attacher typically is provided options to place auxiliary equipment in the communications space, or on the ground, in the immediate vicinity of the pole. CTIA's Petition fails to demonstrate, or even to allege, that the placement of such equipment in an alternative location on or near the pole adversely affects the function of the equipment itself or the wireless attachment as a whole – and

⁵⁵ See, e.g., CenterPoint Energy Pole Attachment Guidelines and Procedures (May 2019 Revision) at 14, *available at*: <https://www.centerpointenergy.com/en-us/Documents/Pole-Attachment-Guidelines-and-Procedures.pdf>.

⁵⁶ 2018 Order at ¶ 134; Reply Comments of Ameren et al. in Docket No. 17-84 (filed July 17, 2017); Reply Comments of the Coalition of Concerned Utilities in Docket No. 17-84 (filed July 17, 2019) at 28.

⁵⁷ *Id.*

⁵⁸ The types of equipment that wireless service providers typically propose to attach in the unusable space includes power meters, battery back-up, and remote devices used to power-up and power-down wireless antennas.

the Utility Associations are not aware of such claims. In fact, to the contrary, utility pole owners work cooperatively with attachers, in all cases, to develop mutually acceptable solutions that meet the needs of wireless service providers, but do not compromise lawful construction standards and requirements.

B. The Access Requirements of Section 224 Must be Applied in a Manner That is Consistent with State and Local Law.

Section 224 and the Commission's pole attachment rules do not supersede or displace state or local laws or the utility construction practices developed to comply with them.⁵⁹ This important limitation on the Commission's pole attachment jurisdiction was best expressed by the Commission itself, in its 1996 Local Competition Order:

For present purposes, we conclude that state and local requirements affecting attachments are entitled to deference even if the state has not sought to preempt federal regulations under section 224(c)... Such regulations often relate to matters of local concern that are within the knowledge of local authorities and are not addressed by standard codes such as the NESC. We do not believe that regulations of this sort necessarily conflict with the scheme established in this Order. More specifically, we see nothing in the statute or the record that compels us to preempt such local regulations as a matter of course. Regulated entities and other interested parties are familiar with existing state and local requirements and have adopted operating procedures and practices in reliance on those requirements. We believe it would be unduly disruptive to invalidate summarily all such local requirements.⁶⁰

Since that time, the Commission has declined to exercise its Section 224 jurisdiction in a manner that would create a direct conflict between federal and state (or local) law, such that utility pole owners could not comply with the requirements both.⁶¹ In fact, as recently as in its 2018 Order, the Commission reiterated its distinct policy choice to defer to the standards of states and localities,

⁵⁹ Local Competition Order at ¶ 1154.

⁶⁰ *Id.*

⁶¹ 2010 Order at ¶ 24.

and even those of utility companies, on all matters related to pole attachment construction.⁶² The Commission should not use this opportunity to reverse course and second guess the reasonable requirements established by utility pole owners to protect and preserve the pole infrastructure that is indispensable to both electric utility and communications businesses. To the extent that any state or local law, or any utility-specific construction practice developed in accordance with such a law, is found to be in **direct conflict** with federal pole attachment policy, the Commission may resolve that conflict through its complaint process.⁶³

Even in states that have not preempted the Commission’s jurisdiction, utility construction is subject to the requirements of all applicable state and local laws. To comply with such laws, it often is necessary for utility companies to implement system wide standards for pole construction. Such standards may prescribe not only how much load may be placed on the pole, but also **where** on the pole certain types of equipment may be placed. For example, if local laws restrict the ability of a utility to use bucket trucks, it is important that the unusable space is left unobstructed to permit the pole to be climbed. Similarly, in certain “storm hardened” jurisdictions, where state commission-mandated storm hardening plans establish pole attachment standards (which include maximum load requirements), one Utility Association member indicated that the placement of all “non-critical” equipment adjacent to the pole, rather than in the unusable space, is an important part of its compliance plan.⁶⁴ In these respects, determinations about the use of the unusable space

⁶² 2018 Order at ¶ 133 (“We agree with those utility commenters who argue that one-size-fits-all national construction standards (even if they were based on the NESC or similar codes) are not a good idea, **and the better policy is to defer to reasonable and targeted construction standards and requirements established by states, localities, and the utilities themselves where appropriate.**”)(emphasis added)

⁶³ Local Competition Order at ¶ 1154.

⁶⁴ See, e.g., Fla. Admin. Code § 25-6.0342, and *In re: Petition for Approval of Florida Power & Light Company’s Storm Hardening Plan pursuant to Rule 25-6.0342 F.A.C.*, Petition of Florida Power & Light Company for Approval of Storm Hardening Plan (filed Mar. 1, 2019). Florida Power & Light Company (“FPL”) will consider placement of non-electric equipment on its poles where elevation is needed on a case-by-case basis. If elevation is not needed for such equipment to function, it must be placed adjacent to the pole. However, if an attacher demonstrates that no option for placement of non-critical equipment is available off the pole, FPL will review certain

are exactly the types of determinations that the Commission historically left to the sole discretion of state and local authorities and utility pole owners.

In cases where wireless service providers request to install electric power meters and related equipment in the unusable space, state and local laws applicable to the utility pole owner's provision of retail electric power service also must be considered. If an attacher purchases electric power from the utility pole owner, that attacher becomes a retail electric customer of the utility. In this particular context, most state laws provide utilities broad discretion to implement uniform standards for the installation of electric power equipment at requested sites.⁶⁵ However, once those standards are in effect, state laws also typically prohibit customer-specific variations from them, which are deemed to be discriminatory.⁶⁶ A number of Utility Association members include in their state commission-approved tariffs system wide, explicit prohibitions of electric power meters on poles.⁶⁷ Therefore, any accommodation made only for wireless service providers that desire to place power meters in the unusable space would violate both the utility pole owner's construction standards for retail electric power service and applicable state requirements.

C. The Petition Fails to Demonstrate That Restrictions on Access to the Unusable Space Are In Fact Barriers to 5G Deployment.

In its Petition, CTIA claims that restrictions on the use of a pole's unusable space constitute a barrier to pole access that can be eliminated only by an expansive declaratory order, which would effectively invalidate **lawful** construction standards in nearly all jurisdictions subject to the federal

uses of the unusable space. Similarly, Duke Energy provides an "exception" to its restriction on the use of the unusable space, based on necessity.

⁶⁵ Utility requirements for the construction and placement of power meters are contained in state commission approved tariffs, and therefore are enforceable.

⁶⁶ See, e.g., Fl. Stat. § 366.03, Tex. PURA § 36.003(b)-(c), 16 Tex. Admin. Code § 25.234(a).

⁶⁷ See, e.g., FPL Electric Service Standards, Section II, at 7, <https://www.fpl.com/partner/pdf/electric-service-standards.pdf>, Tariff for Retail Delivery Service of CenterPoint Energy Houston Electric, LLC at §§ 5.4.3, 6.1.1.2, <https://www.centerpointenergy.com/en-us/Documents/RatesandTariffs/HoustonElectric/CNP-Retail-Del-Tariff-Book-HOU.pdf>.

pole attachment rules.⁶⁸ Even if Section 224 authorized the Commission to provide such relief (and it does not), it could do so only if CTIA demonstrates two factual predicates: *first*, that restrictions on use of the unusable space, **in fact**, obstruct access to poles for the provision of wireless telecommunications services; and *second*, that a prohibition of all such restrictions would, **in fact**, expedite 5G wireless deployment. The CTIA Petition is devoid of any evidence that either of these statements is true. Rather, CTIA's claims rest entirely on examples of utility practices in states that have preempted the Commission's pole attachment jurisdiction,⁶⁹ and mere conclusory statements that such practices have caused harm to wireless businesses.

Ironically, the relief requested in CTIA's Petition appears far more likely to burden the pace of 5G wireless deployment than it ever would be to expedite it.⁷⁰ Specifically, in lieu of construction standards that reliably communicate to attachers, up front, what practices are considered unsafe on a utility's poles, the members of CTIA demand a pole-by-pole analysis of concerns that simply do not vary by pole, or by pole location. For example, if a utility pole owner restricts the use of the unusable space because that practice obstructs the ability of utility workers to climb the pole, it does not matter where the pole is located – the same concern exists whether the pole sits on a city street or in rural America. In other words, the pole-by-pole review process requested by CTIA would not cause a different result, or a better result for the advancement of 5G deployment.

Importantly, however, CTIA's favored approach would most certainly raise attachers' costs, and extend the time to market, with no attendant benefit. Should the Commission require a utility pole owner to evaluate requests to access the unusable space on a pole-by-pole basis, it follows that an application must be submitted for each requested pole, at the attacher's sole expense, that fees

⁶⁸ CTIA Petition at 27.

⁶⁹ Specifically, Connecticut, New Jersey, New York, and Pennsylvania all have preempted the Commission's pole attachment jurisdiction.

⁷⁰ CTIA Petition at 27.

must be paid, and that the attacher must wait up to 45 days for a written statement of approval or denial of its pole access request. To endure this process seems nonsensical in cases where a utility pole owner has previously determined, and has informed all attachers, that use of the unusable space is unsafe.

IV. THE COMMISSION MUST NOT DICTATE POLE ATTACHMENT RATES, TERMS AND CONDITIONS THROUGH ITS RULES.

In its Petition, CTIA requests that the Commission prohibit any proposal for pole attachment terms that “are in conflict with” the Commission’s rules.⁷¹ Stated another way, the Petition asks the Commission to declare as *per se unreasonable* any negotiated pole attachment term that varies from the plain text of its rules. This relief would violate Section 224 and reverse decades of Commission precedent that favors privately negotiated solutions between utility pole owners and attachers. In fact, since the 1996 amendments to the Act, the Commission consistently interpreted the scope of its own pole attachment jurisdiction to be limited to the resolution of complaints. Moreover, to the extent that unequal bargaining power between a utility pole owner and an attacher is alleged to have resulted in pole attachment terms that are unjust or unreasonable, the Commission has relied, with success, on its “sign and sue rule” to address any inequities.

Section 224 was never intended to confer on the Commission broad authority to prescribe specific rates, terms, and conditions for pole attachments.⁷² At the time that the statute was enacted, Congress declared unequivocally that the Commission may regulate pole attachments only through its complaint process. Specifically, Senate Report 95-580 states:

The expansion of FCC regulatory authority is strictly circumscribed and extends only so far as is necessary to permit the Commission to involve itself in arrangements affective the provision of utility pole communications space to CATV systems. Even in this instance S. 1547, as reported, does not contemplate a continuing direct

⁷¹ *Id.* at 28.

⁷² S. REP. 95-580, 15-16, 1978 U.S.C.A.A.N. 109, 123-24.

involvement by the Commission in all CATV pole attachment arrangements. FCC regulation will occur only when a utility or CATV system invokes the powers conferred by S. 1547, as reported, to hear and resolve complaints related to the rates, terms and conditions of pole attachments. The Commission is not empowered to prescribe rates, terms and conditions for CATV pole attachments generally. It may, however, issue guidelines to be used in determining whether the rates, terms and conditions for CATV pole attachment are just and reasonable in any particular case.⁷³

Consistent with its directive, the Commission expressly limited its application of its rules to cases where “[the] parties are unable to arrive at a negotiated agreement, and an aggrieved party files a complaint.”⁷⁴ Similarly, the Commission has rejected, in the past, proposals to require uniform pole attachment terms based on its substantive rules, and instead required parties to negotiate such terms in good faith before involving the Commission in their dispute.⁷⁵

The Commission’s preference for negotiated agreements between utility pole owners and attachers has been pronounced in nearly every one of its pole attachment policy orders since the 1996 amendments to the Act. Initially, in 1998, the Commission recounted that:

The statute, legislative policy, administrative authority, and current industry practices all make private negotiation the preferred means by which pole attachment arrangements are agreed upon between a utility pole owner and a attaching entity.⁷⁶

And then, once more, on reconsideration, the Commission reiterated:

We encourage, support and fully expect that mutually beneficial exchanges will take place between the utility and the attaching entity. When utilities and attaching entities are innovative and provide mutually beneficial negotiated alternatives... the

⁷³ *Id.*

⁷⁴ *Amendment of Commission's Rules and Policies Governing Pole Attachments, In the Matter of Implementation of Section 703(e) of The Telecommunications Act of 1996*, Consolidated Partial Order on Reconsideration, FCC 01-170, CS Docket Nos. 97-98, 97-151, 16 FCC Rcd 12103, ¶ 10 (rel. May 21, 2001)(“Consolidated Reconsideration Order”); *Implementation of Section 703(e) of the Telecommunications Act of 1996*, Report and Order, FCC 98-20, CS Docket No. 97-151, 13 FCC Rcd 6777, ¶ 10 (rel. Feb. 6, 1998)(“Telecom Order”).

⁷⁵ *Id.* at ¶ 11.

⁷⁶ Telecom Order at ¶ 10.

deployment of services to all communities will be fostered, resulting in the successful implementation of the 1996 Act.⁷⁷

In its 2011 Order, the Commission, for the first time, determined that parties not only should, but **must** negotiate in good faith before resorting to the Commission's complaint process.

Indeed, we affirm, pursuant to our authority under section 224(b) of the Act, that both attachers and utilities have a duty to negotiate the rates, terms, and conditions of attachment in good faith, and to make a good faith effort to resolve disputes prior to seeking relief from the Commission.⁷⁸

And finally, as CTIA's Petition points out, in its 2018 Order, the Commission emphasized:

...that parties are welcome to reach bargained solutions that differ from our rules. Our rules provide processes that apply in the absence of a negotiated agreement, but we recognize that they cannot account for every distinct situation and encourage parties to seek superior solutions from themselves through voluntary privately-negotiated solutions.⁷⁹

This matter is not unsettled, as CTIA would lead the Commission to believe.⁸⁰ The relief requested by CTIA would eliminate, wholesale, meaningful private negotiations between utility pole owners and attachers, which cannot be reconciled with the text or purpose of Section 224, or the past four decades of Commission pole attachment law and policy decisions.

CTIA's attempts to distract the Commission's attention from clear adverse precedent, but these efforts are unavailing. Specifically, in its Petition, CTIA claims that the Commission's 2018 Order reaches different conclusions with respect to the application of the Commission's pole

⁷⁷ Consolidated Reconsideration Order at ¶ 14.

⁷⁸ 2011 Order at ¶ 123. Importantly, in modifying its pole attachment complaint rules to include a requirement that the complainant certify that it "in good faith, engaged or attempted to engage in executive level discussions with the respondent to resolve the... dispute," the Commission noted that "comments from both utilities and attachers emphasized the need for parties to engage in good faith negotiations to resolve disputes over contract terms before claims are raised at the Commission." (emphasis added).

⁷⁹ 2018 Order at ¶ 13 and n.15 (rejecting the request of Crown Castle for the Commission to clarify that "its rule serve as a floor, and that...negotiated agreements must incorporate the new rules as a baseline and build upon, rather than replace them).

⁸⁰ CTIA Petition at 30.

attachment rules in the context of privately negotiated contracts. Not so. The seemingly contradictory statement referred to in CTIA’s Petition does not address pole attachment agreements at all, but rather, agreements between communications companies and their third-party contractors that are not subject to Section 224.⁸¹ The Commission’s decision to subvert collective bargaining agreements to its pole attachment rules has absolutely no relevance with respect to the question of whether the Commission may similarly subvert privately negotiated pole attachment agreements that are explicitly protected under Section 224.

In its Petition, CTIA attributes purportedly unfavorable and unlawful pole attachment terms to the issue of unequal bargaining power between utility pole owners and attachers.⁸² Interestingly, however, the Petition makes no mention of the “sign and sue” remedy adopted by the Commission to address precisely this problem. As recently as in its 2010 Order, the Commission maintained its “sign and sue rule,” based in substantial part on attachers’ statements that it served to check any abusive tactics of utility poles owners, and thus, reduced the incidence of disputes.⁸³ Just one year later, the Commission concluded, based on the relatively small number of complaints before it, that, in most instances, parties are able to reach an agreement that is acceptable to both sides.⁸⁴ The playing field is no less level now than it was in the 2010-2011 timeframe, when the Commission determined, on the basis of a fully developed factual record, that its complaint processes effectively deter bad faith and abuse by utility pole owners in their negotiations of pole attachment terms.

From the perspective of the Utility Association members, the “sign and sue” rule removes any incentive that otherwise would exist to negotiate pole attachment terms that the Commission would find to be unjust, unreasonable, or discriminatory. Because utility companies desire business

⁸¹ *Id.* (citing 2018 Order at ¶ 50).

⁸² CTIA Petition at 28.

⁸³ 2010 Order at ¶ 100.

⁸⁴ 2011 Order at ¶ 123.

certainty, it is of no benefit to a utility pole owner whatsoever to negotiate attachment terms that ultimately may be unenforceable or reversed by the Commission after a protracted complaint proceeding. Moreover, in any case where a utility pole owner has made a valuable concession to an attacher as part of a *quid pro quo*, there remains a substantial risk that the benefit of the bargain to the utility pole owner would be lost if the attacher in the future elects to exercise its “sign and sue” right.

As a final matter, in a universe of new wireless services and technology, negotiated solutions are more important than ever. Even in its 2011 Order, the Commission acknowledged that wireless equipment varies greatly and is rapidly changing.⁸⁵ Consequently, utility pole owners are forced to contend with new capacity, safety, reliability, and engineering concerns on a day-to-day basis, all of which require time, resources, and careful consideration. For this reason, in particular, the Commission’s current, flexible approach is critical to successful 5G deployment.

The declaration requested by CTIA is a solution in search of a problem. The Petition fails to provide even one example of an unlawful term in an **executed** pole attachment agreement, let alone proof that utility companies systematically demand waivers of Section 224 rights.⁸⁶ To the contrary, the current paucity of complaints before the Enforcement Bureau supports precisely the opposite conclusion – private negotiations produce mutually acceptable pole attachment terms with little need for Commission intervention.⁸⁷ As only one non-ILEC service provider currently has a complaint before the Commission, it is difficult to fathom that the abusive tactics alleged in CTIA’s Petition are so pervasive as to justify the unprecedented relief that CTIA requests.

⁸⁵ *Id.* at ¶ 44.

⁸⁶ CTIA Petition at ¶ 28.

⁸⁷ 2011 Order at ¶123.

V. THE COMMISSION LACKS AUTHORITY TO ISSUE A DECLARATORY RULING.

Contrary to CTIA claims, the Commission lacks authority to issue a declaratory ruling here. The APA requires that agencies provide sufficient notice and an opportunity for interested parties to comment as a necessary precondition for promulgating any new substantive rule. While the APA provides exceptions for “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice,” the relief that CTIA requests is clearly a substantive rule that lies outside of the scope of any of these exceptions.⁸⁸

It is a substantive rule because it would require the Commission to exercise its legislative authority from Congress to extend its pole attachment jurisdiction over the property rights of utilities generally, as well as to distort the entire free market for wireless infrastructure access in the process.⁸⁹ This is not a procedural rule or an interpretive rule that would not alter the rights of the parties or that would not amount to a substantive change or modification of its previous rules. Regulating light poles, mandating access to the unusable space on the pole, and invalidating negotiated terms and conditions of all pole attachment agreements that are subjectively considered in conflict with the Commission’s rules *is* a significant expansion of the Commission’s pole attachment jurisdiction that would have a profound effect on the utility industry, as well as other interested parties indirectly affected by the requested relief sought by CTIA.⁹⁰

⁸⁸ 5 U.S.C.A §553(a)(3).

⁸⁹ *See, e.g., American Min. Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106 at 1109-1112 (DC. Cir. 1993)(holding that an Agency’s rule is a “legislative rule,” and thus subject to the APA’s notice-and-comment requirements, if the court can answer affirmatively to any of these questions: (1) whether in absence of rule there would not be adequate legislative basis for enforcement action or other agency action to confer benefits or ensure performance of duties; (2) whether agency has published the rule in Code of Federal Regulations; (3) whether agency has explicitly invoked its general legislative power; and (4) whether the rule effectively amends a prior legislative rule).

⁹⁰ *See Electronic Privacy Information Center v. U.S. Dept. of Homeland Sec.*, 653 F.3d 1 (2011); *U.S. Telecom Ass’n v. F.C.C.*, 400 F.3d 29 (2005).

While CTIA cites to Commission precedent, these cases can easily be distinguished from the declaratory relief that is being sought here. In *Continental Airlines*,⁹¹ the Commission granted declaratory relief to allow Continental to deploy a Wi-Fi antenna in its frequent flyer lounge at Logan Airport. The Commission reasoned that it didn't make sense to distinguish between antennas protected under the Over-the-Air Reception Devices Rule ("OTARD") based on whether such antennas are used with licensed services or unlicensed devices.⁹² Moreover, the Commission recognized that its decision was "highly dependent on the facts alleged by the parties involved," which involved the placement of its own antenna in its own frequent flyer club within the airport.⁹³ Similarly, CTIA also cites to the Commission's *Declaratory Ruling* that established the timeframes for state and local permitting of applications for wireless infrastructure.⁹⁴ In that case, the Commission was merely interpreting the provisions within the Communications Act that required state and local governments to act within a "reasonable amount of time."⁹⁵ The statutory authority was clear; and it was merely up to the Commission to determine the specific timeframes for state and local authorities to permit applications for wireless infrastructure.

Unlike those cases, the Commission is being asked here to establish a rule of general applicability that affects private property that is not and was never previously regulated as a "pole" for purposes of Section 224. This is not an adjudicatory proceeding involving two parties. Nor is it an interpretation that would not affect the interests of the parties substantially. This request requires a rulemaking because it does not simply involve concrete and narrow questions of law as

⁹¹ *Continental Airlines*, Memorandum Opinion and Order, FCC 06-157, 21 FCC Rcd 13201 (rel. Nov. 1, 2006).

⁹² *Id.* at ¶8.

⁹³ *Id.* at ¶7.

⁹⁴ *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, Declaratory Ruling, FCC 09-99, WT Docket No. 08-165, 24 FCC Rcd 13994 (rel. Nov. 18, 2009) (interpreting the statute's phrase "reasonable period of time."), *aff'd*, *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 569 U.S. 290 (2013).

⁹⁵ *Id.* at ¶1 (citing 47 U.S.C. § 332(c)(7)(B)(ii)).

applied to specific factual scenarios. Instead, CTIA presented the Commission with vague factual assertions that are highly dependent on the engineering and legal factors involved with individual light poles, unusable space on the pole and the terms of conditions of negotiated pole attachment agreements. Moreover, the arguments are based almost entirely on policy objectives that are not countenanced by the Act, rather than a reasonable and straightforward interpretation of the statutory provisions involved. Therefore, while the Utility Associations underscore that CTIA's Petition is entirely without merit, if the Commission is inclined to consider the relief requested, it must do so in an APA-compliant rulemaking.

VI. CONCLUSION

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

Respectfully submitted,

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EXHIBIT A



Figure 6. Washington Family – Upright Poles



As compared to electric distribution poles that are subject to Section 224 (left), light poles (right) vary substantially in terms of size, strength, and capacity, and are constructed of different materials, ranging from steel and concrete, to aluminum and fiberglass. As is apparent from the photos above, most light poles are not designed to support communications equipment.