STATE OF NEW HAMPSHIRE

Before the

PUBLIC UTILITIES COMMISSION

DT 20-111

COMCAST OF MAINE/NEW HAMPSHIRE, INC.

Petition for Resolution of Dispute and Declaratory Ruling

SUPPLEMENT TO PETITION
and
NOTICE OF RECENT FCC RULING

NOW COMES Comcast Maine/New Hampshire, Inc. ("Comcast") and hereby supplements its Petition for Resolution of Dispute and Declaratory Ruling ("Petition") filed July 13, 2020 in the above-captioned proceeding. In addition, Comcast hereby provides notice to the New Hampshire Public Utilities Commission ("NH PUC" or "the Commission") of relevant and instructive authority issued by the Federal Communications Commission ("FCC") July 29, 2020 in *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment,* WC Docket No. 17-84, by stating as follows:

1. Comcast's Petition seeks resolution of a pole attachment dispute with Consolidated Communications of Northern New England Company, LLC d/b/a Consolidated Communications-NNE ("Consolidated"). In addition, the Petition requests that the Commission issue a declaratory ruling that Consolidated's denial of riser access in the absence of specified capacity, safety, reliability, or engineering issues, and Consolidated's policy of insisting upon ownership and control of conduit between risers attached to its poles, constitutes unjust, unreasonable, and anti-competitive

pole attachment terms and conditions in violation of NH RSA 374:34-a and the Commission's pole attachment rules, N.H. Admin. R. Puc 1300.

2. Citing N.H. Admin. R. 1303.01 (b) and NH RSA 374:34-a, VI, Paragraph 39 of the Petition notes that the grounds for denying pole access are limited to insufficient capacity on the pole, "and for reasons of safety, reliability, and general applicable engineering purposes **with respect to the specific poles in issue**." [1] (Emphasis added.) The Petition also avers that a pole owner's denial of access must be specific, and must "'include all relevant evidence and information supporting its denial.'" Petition, para. 40. The pole owner must also "'explain how such evidence and information represent grounds for denial as specified in Puc 1303.01.'" *Id.*
3. The Petition asserts that "Consolidated has provided no legitimate justification to deny Comcast's application to install its risers at these specific poles." Petition, para. 44. The Petition further states that Consolidated's reason for refusing to allow Comcast to install risers "is hypothetical and speculative". Petition, para. 45.
4. In addition to Consolidated's failure to provide fact-specific reasons for denying Comcast's request for riser access to the two poles in question, Consolidated cited its "policy [that] prohibits Comcast from installing conduit between two Consolidated pole assets." Petition, para. 16.
5. After Comcast filed its Petition with this Commission, the Federal Communications Commission ("FCC") issued a declaratory ruling clarifying that a utility's "'blanket ban'"… on attachments to any portion of a utility pole is inconsistent with the

[1] Another ground for pole access denial is if the pole owner does not possess the authority to allow the proposed attachment, a situation that does not exist in this case. *See* N.H. Admin. R. Puc 1303.01(b)(3).

federal requirement that a 'denial of access…be specific' to a particular request…". *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment,* WC Docket No. 17-84, DA 20-796 (July 29, 2020), pp. 1-2. The FCC held that "utilities may not impose categorical bans on pole access that do not require the utility to provide a reason for denying access specific to the pole or attachment in question." *Id.,* p. 2. Denials "'must state the 'precise concerns' regarding the 'particular attachment(s) and the particular pole(s) at issue.'" (Citation omitted) *Id.,* p. 4. The FCC further held that although utilities may rely on construction standards, and state and national standards, pole attachment denials must be "based on actual (not theoretical) safety, reliability, capacity, or engineering grounds." *Id.*, p. 7. A "mere citation or reference to a construction standard to justify a denial of access is insufficient to comply with [47 CFR] section 1.1403(b)." *Id.*, p. 8.

6. Notwithstanding that New Hampshire pole attachment requests and disputes are subject to this Commission's jurisdiction,[2] the FCC's declaratory ruling is nonetheless instructive given the similarity between the FCC's rules regarding pole attachment denials and the Commission's rules on the same topic. More specifically, the FCC's rules state that "a utility's **denial of access shall be specific**, shall include all relevant evidence and information supporting its denial, and shall explain how such evidence and information relate to a denial of access for reasons of lack of capacity, safety, reliability or engineering standards."(Emphasis added.) 47 CFR

[2] The NH PUC's jurisdiction over pole attachments was established pursuant to 47 U.S.C. §224(c) upon this Commission's certification to the FCC that appropriate rules implementing the NH PUC's regulatory authority over pole attachments were effective. *See New Hampshire Joins States That Have Certified That They Regulate Pole Attachments*, 23 FCC Rcd 2796 (released February 22, 2008).

§1.1403 (b). The Commission's nearly identical denial rule states that a "pole owner's **denial of access shall be specific**, shall include all relevant evidence and information supporting its denial, and shall explain how such evidence and information represent grounds for denial as specified in Puc 1303.01." (Emphasis added.) N.H. Admin. R. Puc 1303.04(c). The "grounds for denial" specified in Puc 1303.01(b) are: 1) insufficient capacity on the pole; 2) for reasons of safety, reliability, or generally applicable engineering purposes; and 3) the pole owner does not have the authority to allow the proposed attachment.

7. Consolidated's letter denying Comcast's riser request fails to meet the specificity standard required by both the federal and state pole attachment denial rules. The denial letter states "Consolidated denied the riser licenses on each riser pole based on capacity and engineering standards." Petition, Attachment 9, p. 1. However, the denial letter is devoid of any specific information regarding the affected poles' actual capacity to physically accommodate risers. It also fails to cite the specific engineering standards upon which Consolidated relies, and does not explain why the requested risers (and their associated guards) are inconsistent with those standards. Instead, the denial letter is couched in general terms that do not address the actual capacity, safety or reliability of the poles in question, or any specific engineering standards that would not be met if risers were to be installed on the poles in question. Consolidated's denial letter merely states that Consolidated "implements policies that will allow for structural integrity and efficient use" of its pole, and that the denial of riser access to Consolidated's poles "is an example of just such a practice." *Id.*

8. Consolidated's denial letter also articulates Consolidated's blanket policy of not licensing risers for privately-owned conduit between Consolidated's poles. The stated purpose of this policy is to prevent "premature exhaustion" of underground and pole space. *Id.* However, nothing in the letter explains why the requested risers, or Comcast's proposed conduit between those risers, would actually exhaust pole or underground space in the particular locations. In fact, the opposite is true, as there are no risers on the affected poles, there is no conduit between them, and there is no evidence or reasonable expectation that such conditions will change in the foreseeable future. Petition, para. 21, 22 and 45.

9. As the FCC has made clear, a pole owner cannot invoke a blanket policy or issue a generic denial of pole access for any part of the pole. *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment,* WC Docket No. 17-84, DA 20-796 (July 29, 2020), p. 4. Accordingly, Consolidated's policy of denying riser access for privately-owned conduit between Consolidated poles is improper.

10. Comcast respectfully requests that the Commission take notice of the above-cited FCC ruling, a copy of which is submitted herewith, when the Commission considers the merits of Comcast's Petition.

11. In addition to its substantive relevance, the FCC's ruling supports Comcast's position that a declaratory ruling is the appropriate procedural remedy for addressing a pole owner's blanket denial of pole attachments based on policy or hypothetical reasons rather than concrete, specific facts about the capacity, safety or reliability of the

poles in question, or specific engineering standards implicated by the condition of the particular poles.

WHEREFORE, in view of the foregoing, Comcast respectfully requests that the Commission:

A. Take notice of the FCC's Declaratory Ruling, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment,* WC Docket No. 17-84, DA 20-796 (July 29, 2020), when the Commission considers the merits of Comcast's Petition;

B. Accept the information presented herein as a supplement to Comcast's Petition; and

C. Take such additional action as it deems appropriate.

Respectfully submitted,

COMCAST OF MAINE/NEW HAMPSHIRE, INC.

By its Attorneys,
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By: _____

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Dated: August 7, 2020

Certificate of Service

I hereby certify that on the date set forth above a copy of this Petition was sent by electronic mail to persons named on the Service List for this matter.

Susan S. Geiger

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
	)	
	)	

DECLARATORY RULING

Adopted: July 29, 2020 **Released: July 29, 2020**

By the Chief, Wireline Competition Bureau

I. INTRODUCTION

1. The Commission's top priority is closing the digital divide so that all Americans can enjoy the many benefits of a high-speed broadband Internet connection—whether job opportunities, remote learning, telehealth, or staying connected to family and friends. To further this goal, in August 2018, the Commission adopted the *2018 Wireline Infrastructure Order*, which eliminated barriers to broadband deployment by streamlining the process for attaching new communications facilities to utility poles and reducing associated costs.[1]

2. In September 2019, CTIA filed a Petition for Declaratory Ruling seeking clarification of certain issues raised in the *2018 Wireline Infrastructure Order*.[2] While CTIA commends the actions of both Congress and the Commission to unlock the "massive capital investments" necessary to accelerate the availability of broadband services, especially 5G wireless services,[3] it contends that some utilities are misinterpreting the Commission's pole attachment rules in a manner that hampers broadband deployment.[4]

3. Because we find that evidence in the record supports two of CTIA's contentions, the Wireline Competition Bureau issues this Declaratory Ruling to remove uncertainty and confusion regarding the issues raised by CTIA. Specifically, we clarify that: (1) the imposition of a "blanket ban" by a utility on attachments to any portion of a utility pole is inconsistent with the federal requirement that

[1] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, WT Docket No. 17-79, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705 (2018) (*2018 Wireline Infrastructure Order*).

[2] CTIA, Petition for Declaratory Ruling, WC Docket No. 17-84, WT Docket No. 17-79 (filed Sep. 6, 2019), https://ecfsapi.fcc.gov/file/10906760521179/190906%20CTIA%20Infrastructure%20PDR%20Final.pdf (CTIA Petition). Unless otherwise noted, the citations herein to comments, replies, and *ex parte* presentations are to such documents filed in response to the CTIA Petition in WC Docket No. 17-84.

[3] CTIA Petition at 2-3, 7; *see also* Letter from Kara Graves, Asst. V.P. Regulatory Affairs, CTIA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, WT Docket No. 19-250, Attach. at 2 (filed Jan. 29, 2020) (CTIA Jan. 29, 2020 *Ex Parte* Letter) (noting that with the new infrastructure rules adopted by the Commission in 2018, "the wireless industry has begun investing a projected $275 [billion] to build out next-generation wireless").

[4] CTIA Petition at 3-4 ("The existing record in this proceeding demonstrates that some localities and utilities are misinterpreting the rules to deny or condition access to existing structures through practices that conflict with the language and purpose of these statutory provisions and rules."); *see also* Verizon Comments at 3 ("the CTIA Petition shows that further action is needed to remove additional barriers that wireless providers encounter when seeking to attach to utility poles").

a "denial of access . . . be specific" to a particular request;[5] and (2) while utilities and attachers have the flexibility to negotiate terms in their pole attachment agreements that differ from the requirements in the Commission's rules, a utility cannot use its significant negotiating leverage to require an attacher to give up rights to which the attacher is entitled under the rules without the attacher obtaining a corresponding benefit.

II. BACKGROUND

4. Section 224 of the Communications Act of 1934, as amended (Act), grants the Commission broad authority to regulate attachments to utility-owned and -controlled poles, ducts, conduits, and rights-of-way.[6] In 2018, the Commission fundamentally shifted the framework for the vast majority of pole attachments by adopting new rules that allow some attachers to perform the work necessary to prepare a pole for a new attachment.[7] In so doing, the Commission reaffirmed its policy that utilities are required under section 1.1403(b) of the Commission's rules to provide a written explanation for denying pole access that is specific to the particular attachment and the particular pole.[8] The Commission also reiterated that parties are welcome to reach bargained solutions that differ from its rules and encouraged parties to seek solutions for distinct circumstances through voluntary privately-negotiated solutions.[9]

5. Following adoption of the new pole attachment rules, CTIA filed a Petition for Declaratory Ruling asking that we clarify certain aspects of the *2018 Wireline Infrastructure Order* and the Commission's rules by: (1) declaring that the term "pole" includes light poles and that utilities must afford nondiscriminatory access to light poles at rates, terms, and conditions consistent with the requirements of section 224 and the Commission's pole attachment rules; (2) affirming that utilities may

[5] 47 CFR § 1.1403(b).

[6] *See* 47 U.S.C. § 224(b)(1). The term "pole attachment" means any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility. 47 U.S.C. § 224(a)(4). The Act exempts from Commission jurisdiction those pole attachments in states that have elected to regulate pole attachments themselves. 47 U.S.C. § 224(c). To date, 22 states and the District of Columbia have opted out of Commission regulation of pole attachments in their jurisdictions. *See States That Have Certified That They Regulate Pole Attachments*, WC Docket No. 10-101, Public Notice, 35 FCC Rcd 2784 (WCB 2020).

[7] *See 2018 Wireline Infrastructure Order*, 33 FCC Rcd at 7706, para. 2. The Commission also made significant modifications to its existing multi-party pole attachment process and to its rules on overlashing and pole attachment rates for incumbent local exchange carriers, and clarified in a declaratory ruling that it will preempt state and local laws that inhibit the rebuilding or restoration of broadband infrastructure after a disaster. *Id.* at 7706-07, paras. 3-4. Utility groups challenged certain aspects of the *2018 Wireline Infrastructure Order*'s Third Report and Order and the City of Portland challenged the declaratory ruling, but those still-pending challenges do not relate to the two issues that we address in this Declaratory Ruling. *City of Portland v. FCC*, Case No. 18-72689 (9th Cir. filed Oct. 2, 2018); *American Electric Power Serv. Corp. v. FCC*, Case No. 19-70490 (9th Cir. filed Mar. 1, 2019).

[8] *2018 Wireline Infrastructure Order*, 33 FCC Rcd at 7773, para. 134 n.498; 47 CFR § 1.1403(b).

[9] *2018 Wireline Infrastructure Order*, 33 FCC Rcd at 7711, para. 13.

not impose blanket prohibitions on access to any portions of their poles; and (3) declaring that utilities cannot ask providers to accept terms and conditions that are inconsistent with the Commission's rules.[10]

III. DISCUSSION

6. In 2011, the Commission stated that "[b]lanket prohibitions are not permitted under the Commission's rules," a statement rooted in section 1.1403(b) of the Commission's rules requiring that a utility provide a written explanation when denying pole access that is specific to the particular attachment and pole at issue.[11] Nevertheless, the record shows that many pole owners continue to deny access summarily to all or part of poles, without giving reasons for denying access that are specific to the pole or attachment. We accordingly clarify that blanket bans on pole access do not satisfy the specificity requirement in section 1.1403(b) and therefore are not permissible under the Commission's rules. With respect to pole attachment negotiations, we clarify that utilities and attachers have flexibility to negotiate mutually agreeable terms in their pole attachment agreements, even if such terms deviate from the Commission's pole attachment rules.[12] Utilities cannot, however, use their ownership of the pole, which

[10] CTIA Petition at 5-6. In its Petition, CTIA also requests that the Commission clarify certain rules implementing section 6409(a) of the 2012 Spectrum Act (codified at 47 U.S.C. § 1455). *Id.* at 5. The Commission addressed this portion of CTIA's Petition earlier this year. *See 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, Declaratory Ruling and Notice of Proposed Rulemaking, 35 FCC Rcd 5977 (2020). The Wireline Competition and Wireless Telecommunications Bureaus placed the CTIA Petition on public notice and in response received dozens of comments, replies, and *ex parte* presentations from communication providers and utility groups. *See Wireless Telecommunications Bureau and Wireline Telecommunications Bureau Seek Comment On WIA Petition For Rulemaking, WIA Petition For Declaratory Ruling And CTIA Petition for Declaratory Ruling*, WT Docket No. 19-250, WC Docket No. 17-84, RM-11849, Public Notice, 34 FCC Rcd 8099 (WCB, WTB 2019). The Bureaus twice extended the comment deadlines. *See Implementation of State and Local Governments' Obligation to Approve Certain Wireless Facility Modification Requests Under Section 6409(a) of the Spectrum Act of 2012 Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 19-250, RM-11849, WC Docket No. 17-84, Order Granting Motion for Extension of Time, 34 FCC Rcd 10390 (WCB, WTB 2019).

[11] 47 CFR § 1.1403(b); *see also Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5275-76, paras. 75, 77 (2011) (*2011 Pole Attachment Order*).

[12] Neither of the two clarifications adopted today requires the adoption of a substantive rule because they merely resolve uncertainty surrounding previous Commission orders and the underlying pole attachment rules. The Administrative Procedure Act and the Commission's rules give us wide latitude to resolve such uncertainties via declaratory rulings. *See* 5 U.S.C. § 554(e) ("The Agency, with like effect as in the case of other orders and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty"); 47 CFR § 1.2 ("The Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty"); 47 CFR § 0.91(b) ("The [Wireline Competition] Bureau will, among other things . . . [a]ct on requests for interpretation or waiver of rules"); 47 CFR § 0.291; *see also* T-Mobile Comments at 26 ("it is well settled that agencies are authorized to interpret ambiguous provisions in the statutes they administer, and agencies may likewise clarify ambiguities in their own rules and provide additional guidance via declaratory ruling" (footnotes omitted)); CTIA Reply at 3-4, 9 ("Contrary to opponents' incorrect claims that CTIA and WIA are requesting changes to the rules via their petitions for declaratory ruling, these petitions in fact ask only for clarification of existing rules. Indeed, the opponents' own arguments assert different interpretations of those existing rules—which is exactly why clarification through a declaratory ruling is warranted."). We, therefore, reject EEI's argument that a rulemaking proceeding is needed to resolve the issues in CTIA's Petition. *See* EEI Comments at 28-30; *see also* Letter from Brett Heather Freedson, Counsel to CenterPoint Energy et al., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 1 (filed Feb. 24, 2020). We acknowledge that in the wireline infrastructure proceeding, Crown Castle requested the Commission to "prohibit blanket bans by utilities on the attachment of equipment in the unusable space on a pole," but the only other commentary in the record was from two electric utilities claiming they did not issue such blanket bans but instead only prohibited attachments "based on legitimate safety and engineering considerations." *2018 Wireline*

(continued….)

confers significant negotiating leverage, to require attachers to agree to give up rights to which they are entitled under the Commission's rules without the attacher obtaining a corresponding benefit from the utility.[13]

A. Utilities May Not Impose Blanket Restrictions on Access to Their Poles

7. Section 1.1403(b) of the Commission's rules specifies that requests for access must be in writing, any denial by the utility must be issued in writing, and such "denial of access shall be specific, shall include all relevant evidence and information supporting its denial, and shall explain how such evidence and information relate to a denial of access for reasons of lack of capacity, safety, reliability, or engineering standards."[14] We clarify that under this rule, utilities may not impose categorical bans on pole access that do not require the utility to provide a reason for denying access specific to the pole or attachment in question.[15] We anticipate that our clarification today will allow attachers to better plan deployments and could reduce burdens on utilities insofar as attachers choose not to file applications that cannot comport with the utilities' published standards.[16] Any disputes regarding the validity of a utility's general pole attachment requirements can be raised with the Commission via a pole attachment complaint.[17]

8. We agree with commenters that "[t]he Commission has already forbidden utilities from denying pole access to providers on a blanket basis. Instead, any denial must state the 'precise concerns' regarding the 'particular attachment(s) and the particular pole(s) at issue.'"[18] As ExteNet argues, "the pole attachment procedures in the Commission's rules are grounded in part on the principle that a utility cannot issue generic denials of pole access."[19] And, as ACA Connects points out, blanket denials "by definition do not address the specific attachment request and reason for denial" and therefore are inconsistent with the rule.[20] Indeed, the Commission already recognized in 2011 that "[b]lanket

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Infrastructure Order, 33 FCC Rcd at 7772-73, para. 134. Given the "paucity" of the record, the Commission declined to address Crown Castle's request and did not consider nor address whether denying access based on such a ban was consistent with section 1.1403(b) of the Commission's rules and the *2011 Pole Attachment Order*. The record here demonstrates that some electric utilities are instituting such bans and that there is substantial confusion regarding the meaning of the Commission's rules, despite the Commission's clear statements to the contrary. Therefore, it is appropriate for us to issue this clarification at this time.

[13] We do not address CTIA's request concerning light poles in this Declaratory Ruling, and this issue remains pending.

[14] 47 CFR § 1.1403(b).

[15] *See id.*; *2011 Pole Attachment Order*, 26 FCC Rcd at 5276, para. 77.

[16] *See Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Order and Further Notice of Proposed Rulemaking, 25 FCC Rcd 11864, 11871, para. 13 (2010) (stating that *ex ante* guidance from utilities will help attachers make informed decisions and should facilitate the attachment process). Attachers may still choose to file pole attachment applications that do not comply with the utilities' published standards, including applications that make arguments for why the standards should not apply to a particular attachment. Utilities remain obligated to review such applications and, in the event of a denial, provide attachment- and pole-specific justifications consistent with section 1.1403(b) of the Commission's rules. Utilities may, however, be able to avoid the additional burden of physical inspections before denying a pole attachment application if the application fails to comply with or address reasonable, nondiscriminatory attachment requirements adopted by utilities and the utility can document a specific actual (not theoretical) safety, reliability, capacity, or engineering issue.

[17] 47 CFR § 1.1404.

[18] Verizon Comments at 6 (footnote omitted); *see also* CTIA Petition at 26-27; ACA Connects Comments at 4 ("ACA supports the Commission adopting a ruling finding that utilities cannot impose blanket prohibitions on attachments by both wireless and wireline providers.").

[19] ExteNet Comments at 7.

prohibitions are not permitted under the Commission's rules."[21] While this statement was made in the context of pole top attachments, it was not limited to pole top attachments,[22] and we clarify today that it applies to all parts of the pole.[23]

9. The record also shows that utilities are in fact imposing blanket bans and that such denials are impeding the Commission's overarching goal of promoting broadband deployment. For example, Crown Castle submits that "[p]ole owners often impose ad hoc, unilateral bans on the attachment of particular equipment to utility poles or attachment to particular sectors of a pole without providing clear safety or engineering rationale."[24] AT&T explains that "some electric utilities have continued to adopt blanket prohibitions against certain types of attachments or for portions of poles, without providing any specific or legitimate basis for those prohibitions"[25] and that such "prohibitions are impeding AT&T's ability to timely and efficiently deploy the infrastructure needed to support 5G services."[26] CTIA makes clear that "[a]ccess to all safe and structurally sound parts of poles will be crucial to expediting small cell deployment."[27] And in its Petition, CTIA provides evidence that:

> [U]tilities have continued to resist giving access to pole tops. They have also flatly denied access to lower portions of poles, below where utility and cable lines are typically attached—sometimes referring to this area as 'unusable' space. Providers also continue to confront blanket restrictions on access to unusable space that do not comply with the requirement that they make a pole-specific showing of risks to safety or reliability.[28]

CTIA and commenters provided examples of situations where utilities prohibited access to certain parts of their poles.[29] In addition, we received dozens of comments, replies, and *ex parte* filings building a record

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[20] ACA Connects Comments at 5.

[21] *2011 Pole Attachment Order*, 26 FCC Rcd at 5276, para. 77.

[22] *Id.*

[23] We therefore disagree with EEI that the *2011 Pole Attachment Order* only prohibits blanket bans on pole top attachments. EEI Comments at 17. To the contrary, in 2011 the Commission specifically relied on the requirements of section 1.1403(b) in making its finding and section 1.1403(b) does not distinguish between different areas of the pole. *2011 Pole Attachment Order*, 26 FCC Rcd at 5276, para. 77 & n.227.

[24] Letter from D. Van Fleet Bloys, Sr. Utility Relations Counsel, Crown Castle, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, WT Docket No. 19-250, RM-11849, at 1 (filed Feb. 20, 2020).

[25] AT&T Comments at 27.

[26] AT&T Comments at 26.

[27] CTIA Petition at 27.

[28] CTIA Petition at 26; *see also* AT&T Comments at 27 ("The Commission has already found that wireless attachments to the bottom portions of poles can be safe and feasible, and thus has emphasized that inadequately justified blanket prohibitions against attachments are not permitted, even for portions of the pole that a utility deems 'unusable.'" (footnote omitted) (citing *2018 Wireline Infrastructure Order*, 33 FCC Rcd at 7773, para. 134); Verizon Comments at 7 (stating that "despite the Commission's clear statement, utilities continue to deny access by making blanket claims about areas of poles, such as the top and lower areas").

[29] CTIA Petition at 26-27; *see also* Crown Castle Comments at 42 ("Crown Castle frequently encounters unreasonable, blanket restrictions or prohibitions on the attachment of equipment or antennas in various sectors of poles."); Verizon Comments at 7 (giving examples of utilities that have made blanket denials "without providing any detailed concerns specific to the poles at issue"); Letter from Haran C. Rashes, Sr. Counsel Reg. Affairs, ExteNet, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, WT Docket No. 19-250, RM-11849, at 3 (filed June 1, 2020) ("In Texas, for example, some utilities do not have any standards at all for pole-mounted antennas and will not accept any permit requests until such standards are adopted. In other FCC-regulated states, some utilities revise their procedures and practices without notice after a pole attachment agreement is signed, or frequently change their specifications for what is allowed on their poles, again without notice.").

on this issue in response to the CTIA Petition.[30] Based on this record, we find it necessary to clarify, consistent with the *2011 Pole Attachment Order*,[31] that blanket bans on access to the pole top, unusable space, or any section of the pole are not permissible under section 1.1403(b) of the Commission's rules. We accordingly reject claims from utilities that blanket restrictions have not unreasonably restricted access to poles.[32]

10. We disagree with utility commenters who argue that granting CTIA's request will interfere with the enforcement of reasonable engineering and safety standards.[33] Consistent with both section 224 and the Commission's rules, utilities can deny pole access in a particular instance on a non-discriminatory basis "where there is insufficient capacity, and for reasons of safety, reliability, and generally applicable engineering purposes."[34] We simply make clear today that utilities need to exercise such discretion consistent with the specificity requirement in section 1.1403(b) of the Commission's rules and that use of a blanket ban does not comply with this specificity requirement.[35] We agree with

[30] *See, e.g.*, Crown Castle *Ex Parte* Letter at 2-4 (giving examples of utility bans on pole attachments); ExteNet Reply at 10 ("Crown Castle, for example, notes that nearly two-thirds of the utilities to which it attaches its facilities permit the attachment of some equipment in the 'unusable' space. This has been ExteNet's experience as well." (footnote omitted)); CTIA Reply at 36 ("In light of the additional record evidence in these dockets about the continued use of blanket bans, the Commission should reaffirm that such flat prohibitions on access to any portions of poles, including unusable space, are unlawful.").

[31] *2011 Pole Attachment Order*, 26 FCC Rcd at 5276, para. 77.

[32] POWER Coalition Comments at 17-18.

[33] *See* EEI Comments at 21-22 ("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 pole attachment rules." (emphasis in original)); Letter from Thomas B. Magee, Counsel for CCU, to Marlene Dortch, Secretary, FCC, WC Docket No. 17-84, at 5 (filed Mar. 12, 2020) (CCU Mar. 12, 2020 *Ex Parte* Letter) ("Utility standards established for worker safety, electric service reliability, and community service reasons often have general applicability and can easily be applied without any pole-specific analysis.").

[34] 47 U.S.C. § 224(f)(2); 47 CFR § 1.1403(a).

[35] *See, e.g.*, ACA Connects Comments at 6 (urging that "a utility should address attachment requests on a case-by-case basis and, should it reject any request, it needs to provide specific reasons for its action"); Crown Castle Comments at 42 ("Regardless of where these blanket restrictions are found or enforced, they are unreasonable if they are not supported by specific proof regarding either lack of capacity, safety, reliability, or generally applicable engineering principles that may otherwise restrict a particular attachment and pole at issue."); ExteNet Comments at 7-8 (stating that "as codified in Section 224(f)(2) of the Act and Section 1.1403(b) of the Commission's rules, the utility must provide a prospective attacher with its precise reasons for denying the proposed attachment, and must further show that those reasons are permissible (*i.e.*, they relate to lack of capacity, safety, reliability or engineering issues)"). We note EEI's claim that section 224(f)(2) of the Act contemplates that "an access restriction need not be pole- or location-specific to be lawful." EEI Comments at 15. While true on its face, we clarify that if such a restriction is used to prevent pole access, it must specifically apply to the pole and attachment at issue and be communicated to the applicant per section 1.1403(b) of the Commission's rules.

commenters such as AT&T that CTIA's requested clarification "is simply asking electric utilities to conduct a proper evaluation and provide specific reasons based on the specific request and pole."[36]

11. While utilities claim that "uniformly applied construction standards are both necessary and lawful,"[37] our ruling today does not prohibit utilities from adopting construction standards, nor does it dictate particular construction standards for utilities to adopt.[38] We recognize the value of construction standards in promoting safety and transparency, and we note that section 1.1403(b) does not prohibit utilities from adopting reasonable, nondiscriminatory attachment requirements that let attachers know what the utilities will limit or prohibit based on documented actual (not theoretical) safety, reliability, capacity, or engineering grounds.[39] We also note that utilities may rely on requirements found in state or national standards such as the National Electrical Safety Code,[40] but must specifically identify each requirement on which the utility relies and explain how that requirement justifies the denial at issue. Rote citations to standards documents are not sufficient to justify a denial. In some cases, we envision that adoption of such standards will allow attachers to better plan deployments and, to the extent that planning

[36] AT&T Reply at 24; *see also* ExteNet Comments at 8 (stating that requiring specific access denials from the utility "improves communication between the attacher and the utility, discourages arbitrary denials of access, facilitates faster resolution of disputes, and ultimately promotes quicker deployment of wireless broadband facilities"); Crown Castle Reply at 18 ("To the extent any valid safety challenges actually exist, they can be mitigated by processing applications on a pole-by-pole basis in accordance with the Commission's existing rules rather than enacting blanket denials."); CTIA Reply at 35 ("utilities mischaracterize the scope of CTIA's request. CTIA is not asking the Commission to 'ignore' utilities' safety standards or asking engineers to 'violate their code of ethics.' Rather, CTIA simply asks that if a utility refuses access to a pole, it must explain the basis of its concern with specificity, rather than being allowed to hide behind a broadly stated pretext that is not specific to a particular attachment." (footnotes omitted)).

[37] CCU Reply at 9; *see also* EEI Comments at 15 (noting "[n]othing 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)"); Electric Utilities Reply at 15 ("Where an electric utility's standards allow antennas or equipment on certain types of poles but not others based on legitimate safety and reliability concerns, the electric utility's standards do not serve as a barrier to access and do not constitute a 'blanket prohibition.' In fact, they are standards that specifically **allow** for access with parameters that are defined clearly and upfront." (emphasis in original)); Letter from David D. Rines, Counsel to Xcel Energy, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2 (filed Dec. 16, 2019) (Xcel Energy *Ex Parte* Letter) ("CTIA's request for declaratory ruling regarding 'blanket prohibitions' against access, as framed in its petition, would seek to effectively invalidate any generally applicable, nondiscriminatory construction standard a utility may adopt for communications attachments, because all standards serve as a 'prohibition' against certain types of attachments and/or attachment techniques.").

[38] *See 2018 Wireline Infrastructure Order*, 33 FCC Rcd at 7772, para. 133 ("We agree . . . the better policy is to defer to reasonable and targeted construction standards established by states, localities, and the utilities themselves where appropriate.").

[39] *See* 47 U.S.C. § 224(f)(2); *see also* Letter from Brett Heather Freedson, Counsel to Edison Electric Institute (EEI), to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84, at 2 (filed Mar. 15, 2020) ("Construction standards founded on specified safety, reliability, engineering, and capacity considerations, that are evenhandedly applied, are lawful, and promote transparency in the pole attachment process."); Xcel Energy Reply at 7 ("the Commission has consistently and expressly allowed electric utilities to adopt and apply nondiscriminatory standards, restrictions and requirements for the construction and installation of attachments on their distribution pole infrastructure"); Alliant Energy Reply at 1-2 ("Small cell and wireless providers use our construction standards from the beginning of their project to implement best practices safely, prevent later redesign, improve speed of deployment, and reduce costs.").

[40] This includes state and local laws that establish nondiscriminatory utility pole requirements to address specific and documented safety, reliability, capacity, or engineering issues (e.g., "storm-hardening" requirements in jurisdictions subject to frequent hurricanes or other natural disasters). *See* POWER Coalition Comments at 16-17.

reduces the filing of applications that are inconsistent with the utilities' published standards, reduce administrative burdens on utilities as well.[41]

12. Although utilities have discretion to adopt construction standards, we reiterate that mere citation or reference to a construction standard to justify a denial of access is insufficient to comply with section 1.1403(b). As the record makes clear, not every construction standard is necessary to ensure safety, reliability, capacity, or proper engineering, and we are troubled with evidence in the record suggesting that in some cases, utilities deny attachments simply by reference to a construction standard without providing a specific explanation as to why a proposed attachment's alleged violation of a construction standard poses a safety, reliability, capacity, or engineering issue.[42] Denials based on a utility's construction standard rather than a physical inspection of the pole still must document why the proposed attachment poses a safety, reliability, capacity, or engineering issue.[43] A denial limited to mere reference or citation to a utility construction standard is insufficient.[44]

13. While we strongly encourage parties to resolve potential access disputes amongst themselves in order to facilitate attachments as quickly as possible, we remind parties that the Commission's complaint process remains available for resolution of specific instances of utilities allegedly failing to comply with section 1.1403(b).[45] Such complaints will be reviewed on a case-by-case basis and because these cases involve denials of access, generally will be subject to the 180-day shot clock for resolution.[46] The complaint process enables the Commission to consider the legitimacy of a

[41] *See, e.g.*, Xcel Energy Reply at 7-8 ("[N]ondiscriminatory construction standards and requirements provide potential attachers with transparency, predictability, and certainty. This enables attachers to appropriately plan and design their deployments from the outset and thus minimize the time and expense of the application process"); Electric Utilities Comments at 20 (arguing "uniform construction standards benefit both pole owners and wireless providers by setting uniform expectations, creating mutual understanding, and speeding deployment"); AT&T Reply at 25 ("[T]here is no reason that the requested relief—no blanket prohibitions on the unusable space—would prevent any electric utility from articulating these safety concerns and denying access on a pole-by-pole basis pursuant to Section 224(f)(2).").

[42] *See* CTIA Reply at 34-35 ("In an effort to make the practice of blanket bans sound less nefarious, some utilities refer to their blanket bans as 'standards of general applicability' or 'system-wide restrictions.' But the Commission should not be fooled by such wordplay. In practice, as CTIA and commenters explained, wireless providers are being denied access to some utilities' poles altogether."); Crown Castle Comments at 42 ("Crown Castle frequently encounters unreasonable, blanket restrictions or prohibitions on the attachment of equipment or antennas in various sectors of poles."); Verizon Comments at 7 (giving examples of utilities that have made blanket denials "without providing any detailed concerns specific to the poles at issue"); ExteNet Reply at 10 ("Utilities have increasingly moved away from denials specific to a pole or attachment and towards blanket general rules for attachment, with little justification provided for the resulting blanket bans.").

[43] 47 CFR § 1.1403(b). We disagree with the premise of EEI's argument that "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." EEI Comments at 22. We do not prohibit such utility standards so long as they comply with section 224(f)(2) of the Act and would allow such standards to apply to a group of similarly-situated poles. But, any denials of access based on such standards must still comply with section 1.1403(b) of the Commission's rules.

[44] *See* AT&T Reply at 24 ("The Commission's rules instruct that 'denial of access shall be specific,' and the Commission has repeatedly emphasized that it 'is not sufficient for a utility to dismiss a request with a written description of its blanket concerns about the type of attachment or technology, or a generalized citation to Section 224.'" (footnote omitted) (citing *2011 Pole Attachment Order*, 26 FCC Rcd at 5275, para. 76)); ExteNet Reply at 10 (stating "a blanket ban supported only by generic safety concerns cannot reach the level of specificity required for denial of an attachment application"); Crown Castle *Ex Parte* Letter at 1 ("The FCC should affirm that sweeping, unspecified assertions of 'safety and reliability' are insufficient to demonstrate that the utility's prohibitions or limitations on access are reasonable.").

[45] *See* 47 CFR Part 1, Subpart J, Pole Attachment Complaint Procedures, §§ 1.1401 et seq.

utility's generally-applicable pole attachment policies in the context of an access complaint proceeding where a record can be developed regarding the specific situation.[47]

B. Attachers Must Receive Some Benefit in Exchange for Agreeing to Rule Deviations That Benefit Utilities

14. In the *2018 Wireline Infrastructure Order*, the Commission made several statements aimed at preserving the ability of utilities and attachers to reach mutually-bargained-for solutions (which may differ from the pole attachment rules) in negotiating their pole attachment agreements. For example, the Commission stated 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 for themselves through voluntary privately-negotiated solutions."[48] CTIA now asks that we prohibit utilities from seeking terms that conflict with the Commission's pole attachment rules.[49] According to CTIA, utilities sometimes demand unlawful and unfavorable terms in attachment agreement negotiations that are inconsistent with the Commission's rules and are harmful to attachers.[50] CTIA states that utilities have "far more leverage to secure favorable terms due to [their] sole control over access to [their] poles."[51]

15. In response to this request, we clarify that parties have flexibility to negotiate "superior solutions"[52] to pole attachment issues in their agreements, but any deviations from the Commission's rules must be mutually beneficial.[53] The "superior solutions" referred to in the *2018 Wireline*

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[46] 47 CFR § 1.1414(a) ("Except in extraordinary circumstances, final action on a complaint where a cable television system operator or provider of telecommunications service claims that it has been denied access to a pole, duct, conduit, or right-of-way owned or controlled by a utility should be expected no later than 180 days from the date the complaint is filed with the Commission. The Enforcement Bureau shall have the discretion to pause the 180-day review period in situations where actions outside the Enforcement Bureau's control are responsible for delaying review of a pole access complaint."). In cases where the Enforcement Bureau determines that a complaint challenging a utility's construction standards requires an examination of the reasonableness of the terms and conditions of attachment, the complaint will be subject to a 270-day review period. *See* 47 CFR §§ 1.1414(b), 1.740.

[47] *See, e.g.*, EEI Comments at 15 ("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."); Xcel Energy *Ex Parte* Letter at 3 ("To the extent that an attacher is concerned about the lawfulness of a particular standard adopted by a specific utility, we expressed the view that this is best resolved in an as-applied, case-specific context, rather than through an overly broad petition for declaratory ruling.").

[48] *2018 Wireline Infrastructure Order*, 33 FCC Rcd at 7711, para. 13 (footnotes omitted).

[49] CTIA Petition at 28. According to CTIA, "the Commission twice discussed the application of its rules to pole attachment negotiations, but appeared to reach differing conclusions that leave the issue unsettled." *Id*. at 30.

[50] CTIA Petition at 28-30 ("Rather than baldly demand that attachers waive legal rights granted under Section 224 and Commission rules, utilities condition their acceptance of terms the attacher seeks on the attacher's acceptance of other agreement terms that alter and weaken those rights."); *see also* ACA Connects Comments at 6-7 ("utilities often seek to impose their will on attachers, particularly smaller providers that are so resource-limited that they cannot afford to stand up to the power of the utilities").

[51] CTIA Petition at 28; *see also 2011 Pole Attachment Order*, 26 FCC Rcd at 5242, para. 4 (stating that Congress understood that there is no practical alternative to using a utility's existing poles, *i.e.* utilities have a local monopoly in ownership or control of poles); Crown Castle Comments at 46 (stating "at the outset, the parties negotiating a pole attachment agreement, namely, the attacher and the utility, are not on equal footing").

[52] *2018 Wireline Infrastructure Order*, 33 FCC Rcd at 7711, para. 13.

[53] *See, e.g.*, CCU Mar. 12, 2020 *Ex Parte* Letter at 7 ("Attacher-friendly contract provisions are often entered into by pole owners in order to provide benefits to attaching entities that might offset provisions attaching entities might deem less favorable."); CTIA Reply at 26 ("CTIA is not seeking to preclude negotiation of agreeable terms; it is (continued….)

Infrastructure Order are those that provide flexibility to utilities and attachers, creating win-win solutions, and a utility is not permitted to use its significant negotiating leverage to require an attacher to give up rights to which the attacher is entitled under the rules without the attacher obtaining a corresponding benefit.[54] With this clarification, we ensure that the Commission's pole attachment rules are more than merely hortatory.[55]

16. We agree with commenters that there is unequal bargaining power between utilities and attachers.[56] As ACA Connects notes, "the purpose of Section 224 and the rules is to address the leverage (unequal bargaining power) utilities have to impose unreasonable terms on attachers."[57] We agree with CTIA that absent clarification of the Commission's support for mutually bargained-for solutions "'bargained solutions' for pole attachments would rarely, if ever, occur absent the rules, given the uneven bargaining leverage. The utility is the 'gatekeeper' to its poles, while the attacher lacks any gatekeeper position."[58] In fact, the Commission's concern about unequal bargaining power in pole attachment negotiations resulted in the adoption of the "sign and sue" rule, which allows an attacher to sign an agreement with a utility and later file a complaint challenging the lawfulness of a provision.[59] CTIA's Petition and the record before us demonstrate, however, that the sign and sue rule in and of itself is not always sufficient to address this bargaining inequality.[60] Therefore, we find it necessary to clarify that attachers must receive some benefit, other than the right to attach to poles (already guaranteed by section 224), in exchange for agreeing to rule deviations that benefit utilities.[61]

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asking only that the Commission declare that pole owners may not *unilaterally* demand terms that are inconsistent with the Commission's rules." (emphasis added)).

[54] *See, e.g.*, ExteNet Reply at 11 ("The record explains that utilities, who have substantial leverage during pole attachment negotiations, are using pole attachment agreements to effectively force wireless attachers to surrender their pole attachment rights in order to gain access to utility-owned poles."); T-Mobile Comments at 25 (stating that "rather than overtly demanding that attachers waive legal rights granted under Section 224 and the FCC's pole attachment rules, some utilities achieve the same result indirectly by conditioning their acceptance of terms sought by the attacher on the latter's acceptance of other terms that alter and undermine those rights").

[55] *See* ACA Connects Comments at 6 (stating "there is no reason for the Commission to have rules if utilities are permitted to throw their weight around and demand an attacher sign onto terms that are more advantageous to the utility and inconsistent with the public interest as set forth in the Commission's rules").

[56] *See* ACA Connects Comments at 6; ExteNet Reply at 11; Crown Castle Comments at 46; *Cf. 2018 Wireline Infrastructure Order*, 33 FCC Rcd at 7769, para 126 (concluding, based on evidence in the record, that incumbent LEC bargaining power in pole attachment negotiations vis-a-vis utilities continues to decline).

[57] ACA Connects Comments at 6.

[58] CTIA Petition at 31.

[59] 47 CFR § 1.1407; *see also Southern Co. Servs, Inc. v. FCC*, 313 F.3d 574, 582-84 (D.C. Cir. 2002) ("The agency's limited authority to review negotiated settlements is consistent with the statute and it does not interfere with any of the rights afforded petitioners under the Act.").

[60] *See* CTIA Reply at 37-38 (stating that "the basis for that [sign and sue] rule was the monopoly power and resulting bargaining power that utilities now claim does not exist"); Crown Castle *Ex Parte* Letter at 5 (arguing that "the economic and relationship costs of utilizing the sign and sue process and the deployment delays occasioned by invoking the rule are significant deterrents to using the Commission's processes to obtain relief from unreasonable provisions demanded in attachment agreements"); ACA Connects Reply at 6 (arguing that "the utilities are wrong to assert that the formal complaint process somehow eliminates their incentive and ability to pursue unreasonable or discriminatory rates, terms, and conditions").

[61] *See, e.g.*, POWER Coalition Comments at 21-22 ("The mutually beneficial exchanges that exist now would be curtailed – even with respect to terms that an attaching entity would enthusiastically accept in order to receive a valuable concession from the utility pole owner.").

17. We do not grant CTIA's request insofar as it asks for an outright prohibition of contract terms that conflict with the Commission's pole attachment rules. The Commission's rules do not serve as a "floor" for negotiations[62] nor are utilities prohibited from seeking terms that deviate from our rules as CTIA requests.[63] As Xcel Energy explains, "CTIA's requested declaration would represent a significant departure from—not an affirmation of—long-standing Commission policy and precedent."[64] We agree with commenters who argue that the negotiation of pole attachment agreements does not lend itself to a "one size fits all" approach.[65] Instead, the Commission's rules can inform the parties' negotiations. For example, those solutions where a party accepts a deviation that is "worse" than the pole attachment rules (e.g., accepting a longer make-ready deadline than contemplated by section 1.1411[66]), but receives a significant benefit for such a deviation (i.e., one not otherwise guaranteed by the Commission's rules), could still be reasonable.[67] Given the unequal bargaining power of parties, however, the utility has the burden to show that the exchange accorded a significant benefit to the attacher where a utility claims that a rule deviation that benefits the utility was part of a negotiated exchange.

18. The sign and sue rule will remain a remedy for attachers to seek resolution of disputes involving utility efforts to negotiate deviations from the pole attachment rules.[68] We disagree with utility commenters,[69] however, that the sign and sue rule is sufficient in all cases to offset the bargaining leverage held by utilities in attachment agreement negotiations.[70] We find persuasive the claim of ACA

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[62] *See 2018 Wireline Infrastructure Order*, 33 FCC Rcd at 7711, para. 13 & n.55.

[63] CTIA Petition at 28-31.

[64] Xcel Energy Reply at 9; *see also, e.g.*, EEI Comments at 23-25 (CTIA's requested relief would "reverse decades of Commission precedent that favors privately negotiated solutions between utility pole owners and attachers"); Electric Utilities Comments at 28-29 (stating "parties to pole license agreements might actually **agree** that the Commission's rules are not best practice when it comes to deployment solutions" (emphasis in original)).

[65] CCU Comments at 31 ("Flexibility in contract negotiations is required for a variety of reasons, but one very important reason is because different utilities are located in different places, with different regulatory requirements, with different operating conditions, with different attaching entities, with different personnel, and with different attachment processes."); Crown Castle Reply at 21 ("Crown Castle understands the desire to have flexibility in pole attachment contract negotiations and not be forced into a one size fits all solution").

[66] *See* 47 CFR § 1.1411.

[67] *See, e.g.*, POWER Coalition Comments at 21 ("Without the opportunity to receive any reciprocal benefit in exchange for services provided ***in excess*** of what is required by law, pole owners would have no incentive to offer communications companies anything more than the bare minimum attachment right that the Commission's rules require." (emphasis in original)); CCU Mar. 12, 2020 *Ex Parte* Letter at 9 (stating "pole owners might otherwise deny attachment requests that require poles to be replaced, but implementing certain overlashing requirements in exchange for a commitment to expand capacity may be mutually beneficial. Parties should be free to negotiate such tradeoffs.").

[68] *See, e.g.*, CCU Mar. 12, 2020 *Ex Parte* Letter at 7 ("Although parties are entitled to agree on contract terms that differ from Commission rules, both parties also understand during contract negotiations that the Commission will apply its regulations if a complaint is ever filed, thus placing a limitation on inappropriate contract negotiations.").

[69] *See* CCU Comments at 30 (stating "the Commission's 'sign and sue' policy is more than sufficient remedy if individual terms and conditions stray beyond reasonableness"); EEI Comments at 23, 26-27; Electric Utilities Comments at 30; Xcel Energy Reply at 10.

[70] *See* Crown Castle Comments at 46-47 ("Many attachers do not have the resources to effectively file a complaint. Indeed, attachers have contractual deadlines for the deployment of their network facilities and cannot withstand the delay associated with filing a complaint and having it fully resolved."); ACA Connects Reply at 7 ("Formal pole attachment complaints are not only largely ineffective, particularly for smaller providers, but the complaint process itself is an inefficient means to resolve disputes, costing too much, taking too long, and producing limited results."). According to ACA Connects, "the Commission should view 'sign and sue' for what it really is – a limited and commercially inefficient means of recourse available, at best, only to the largest attachers." *Id.*

Connects that filing a formal pole attachment complaint with the Commission is a remedy that many providers lack the resources to pursue.[71] As a result, we find that requiring mutually-beneficial terms if attachers give up rights under the pole attachment rules[72] is a necessary clarification to offset utility bargaining superiority.[73]

IV. ORDERING CLAUSES

19. Accordingly, IT IS ORDERED that, pursuant to sections 1-4 and 224 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 224, sections 0.91(b), 0.291, and 1.2 of the Commission's rules, 47 CFR §§ 0.91(b), 0.291, 1.2, and section 5(e) of the Administrative Procedure Act, 5 U.S.C. § 554(e), this *Declaratory Ruling* IS ADOPTED.

20. IT IS FURTHER ORDERED that the CTIA Petition IS GRANTED IN PART and DENIED IN PART as set forth herein.

21. IT IS FURTHER ORDERED that this *Declaratory Ruling* IS EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Kris Anne Monteith
Chief
Wireline Competition Bureau

[71] ACA Connects Reply at 3 (stating "even where a provider may have sufficient resources to engage in a formal complaint proceeding, it would be inefficient for all parties to have to do so when rights can be clarified up front with clear rules"); *see also* ExteNet Comments at 10 (requiring an attacher to file a complaint "only empowers utilities to insist that the attacher trade away its pole attachment rights, because this effectively forces the attacher into the Hobson's choice of: (i) accepting an unreasonable agreement and enduring the delays and costs of subsequently litigating that agreement before the Commission, with no guarantee of a favorable resolution, or (ii) forgoing any access to the utility's poles at all until the utility changes its position.").

[72] *See, e.g.*, Electric Utilities Comments at 27 ("Without a legitimate possibility of *quid pro quo* (where an attaching entity exchanges a perceived regulatory entitlement for a concession from the pole owner beyond what is expressly required by the law), **pole owners will have no incentive to give attaching entities anything other than the bare minimum**." (emphasis in original)).

[73] *See* ACA Connects Comments at 6 ("The reason [for CTIA's requested relief] is straightforward: the purpose of Section 224 and the rules is to address the leverage (unequal bargaining power) utilities have to impose unreasonable terms on attachers.").