

February 1, 2018

VIA ECFS

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84

Dear Ms. Dortch:

On January 30, 2018, John Burchett of Google Fiber Inc. and Julie Veach and I, both of Harris, Wiltshire & Grannis LLP, met with Lisa Hone, Daniel Kahn, Adam Copeland, Michael Ray, Deborah Salons, Annick Banoun, and Gail Krutov, all of the Wireline Competition Bureau, and Paul LaFontaine of the Office of Strategic Planning. Google Fiber discussed the BDAC's recent vote to recommend that the Commission adopt rules implementing one-touch make-ready ("OTMR"), and responded to recent filings on the record in this docket.

Google Fiber discussed the BDAC vote to recommend OTMR, and noted that the BDAC recommended OTMR in a form very similar to the process Google Fiber proposed in the record on this proceeding. During the BDAC process, stakeholders from all corners supported OTMR as the best way to speed deployment of broadband facilities via pole attachments by aligning incentives, increasing efficiency, and reducing costs. When considered together with the very compelling record in this proceeding, Google Fiber believes it is clear that the use of OTMR will create numerous benefits for broadband deployment.

By reducing inefficiency and waste in make-ready, adoption of OTMR will shift the core economic assumptions that inform deployment planning. Today, even under perfect circumstances, a new attacher must pay for several separate trips to the pole—sometimes by the same contractor but under agreement with different existing attachers. Moreover, delays caused by bad weather, illness, or the need to redeploy crews to another job to respond to emergency situations can leave a new attacher with an idle work crew. All of this adds up to wasted time and money.¹ OTMR will allow new attachers to pay for one trip to the pole instead of several, facilitate streamlined engagement of contractors, reduce duplication of effort, and eliminate the need to pay pass-through administrative costs of existing attachers—all factors that make deployment of new networks expensive and slow. OTMR, moreover, may not only be more efficient, but will also improve safety and reliability, “when a limited number of experienced

¹ See CMA Strategy Consulting, *Perspectives on the Current State of Make Ready and the Potential Impact of a One-Touch Make-Ready Policy* at 1, attached to Letter from Katharine Saunders, Verizon, to Marlene H. Dortch, WC Docket No. 17-84 (Nov. 13, 2017) (“CMA Study”) (“Sequential make-ready performed by different parties is very unpredictable, inefficient, and results in significant delays.”).

contract personnel perform the work” and make fewer trips to each pole.² The cost savings and other improvements that result from the use of OTMR will make it possible for new attachers to expand their planned service areas.³ For example, the cost savings from OTMR may make it possible for a provider to deploy to areas that otherwise would not have presented a business case because they are less densely populated.⁴ This means that adoption of OTMR may significantly increase broadband deployment, a key goal of the FCC in this proceeding.⁵

Google Fiber noted that the most vocal standout against OTMR continues to be AT&T, and discussed AT&T’s recent filings in the above-referenced docket. AT&T argues that OTMR should be limited to “routine transfers,” that the existing attacher must be allowed to determine whether a transfer is “routine” or complex, that the new attacher must honor the existing attacher’s collective bargaining agreements—even where doing so would require using the existing attacher’s own employees for make-ready work rather than a third-party contractor—and that the new attacher must provide a broad indemnification for existing attachers. Though AT&T argues in the record that its proposed procedure is “balanced” and “sensible,”⁶ the primary beneficiary of its proposal is, in fact, AT&T itself.

First, AT&T encourages the Commission to reject the use of OTMR for any make-ready work that is complex, and to allow existing attachers to determine whether any make-ready work is simple or complex. Adoption of these two proposals would gut OTMR by giving existing attachers the power to decide when OTMR can be used. This would perpetuate the existing power imbalance, in which incumbent attachers have the ability to delay and even prevent deployment of new networks by competitors.

By giving existing attachers what amounts to veto power over the use of OTMR, AT&T’s proposal perpetuates the fundamental problem with the current make-ready procedure—that make-ready work performed by each attacher must be performed in order and is controlled by existing attachers. Because AT&T and other ILEC attachments are generally the lowest attachments on a pole, those attachments must be moved first before any other attacher

² Letter from Eben M. Wyman, Power and Communication Contractors Association, to Marlene H. Dortch, WC Docket No. 17-84 at 2 (Dec. 1, 2017).

³ See Letter from Katharine R. Saunders, Verizon, to Marlene H. Dortch, WC Docket No. 17-84 at 2 (Nov. 21, 2017) (“Verizon Nov. 21, 2017 Letter”) (citing CMA Study) (“Anticipating these delays, the report concludes that the new attacher routinely budgets a worst-case scenario, which effectively shrinks the new attacher’s contemplated deployment radius. Some providers even choose the more expensive option of deploying underground because those deployments can be more predictable.”); see also Letter from Thomas J. Navin, Counsel to Corning, Inc., to Marlene H. Dortch, WT Docket No. 17-79 at Attachment A at 5 (noting that “estimated impacts from OTMR alone could result in about 8.3M in incremental premises passed...and about \$12.6B in associated incremental capital expenditure”).

⁴ See *id.*

⁵ See *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking, WC Docket No. 17-84, 32 FCC Rcd. 3266 (2017).

⁶ See Letter from Frank S. Simone, AT&T, and Debbie Goldman, Communications Workers of America, to Marlene H. Dortch, WC Docket No. 17-84 (Jan. 16, 2018).

can perform make-ready to make space for a new attacher.⁷ Even if the current process worked perfectly, these moves would have to be performed in order—and, of course, the current process rarely works perfectly. Under the existing rules, parties have 60 days to perform make-ready work—but that work does not occur at the same time. Coordination among multiple attachers regarding what work is to be done, in what order, and in what time frame, is logistically complex.⁸ If the lowest attacher on the pole fails to move until the end of the 60-day notice period, the entire process can be derailed; likewise, a single missed deadline anywhere in the process can throw the entire sequence out of whack, leading to outsized delays.

AT&T's proposal would increase the likelihood that other existing attachers situated higher on the pole would bear the brunt of the lowest attacher's failure to move. Because the first attacher to move has no incentive to move until the last possible moment,⁹ that attacher would deprive subsequent attachers of an opportunity to perform make-ready under the current process. Imposing penalties—or even strengthening the self-help remedy—would not resolve this fundamental problem and would, instead, likely introduce new problems, as existing attachers would reasonably seek extensions of time—or other remedies—for delays outside of their control.

In contrast to AT&T's proposal, the BDAC recommendation aligns the incentives of all parties to reduce inefficiencies while also preserving safety and network reliability.¹⁰ For instance, allowing pole-owner approved contractors to determine whether make-ready is simple or complex means neither the incumbent nor the new attacher has an opportunity to inject anti-competitive bias into the process. The approved contractor—which wants to preserve relationships with *all* attachers as well as with the pole owner—has appropriate incentives to make this decision. If the contractor purposefully describes a move as simple when it is really complex and damage results, the new attacher will be liable for the damage—and will likely not use that contractor for future work. The contractor could even be removed from the approved list by the pole owner. It is more likely that approved contractors will be conservative in their determination of whether work is simple or complex, limiting their risk.

Of course, the more subjectivity involved in determining whether work is simple or complex, the more room the parties will have to disagree. This is why the BDAC proposed that complex work should be work that involves splicing, as well as that might be reasonably likely to cause an outage.¹¹ Other entities that have adopted OTMR—namely, CPS Energy—have

⁷ See CMA Study at 6-7.

⁸ See *id.* at 5-6.

⁹ See *id.* at 10.

¹⁰ Cf. Verizon Nov. 21, 2017 Letter at 2 (noting that, in the current make-ready process, “parties’ incentives are not aligned”).

¹¹ Report of the Competitive Access to Broadband Infrastructure Working Group, *presented to the Broadband Deployment Advisory Committee of the Federal Communications Commission*, Washington, DC, Jan. 23-24, 2018, at 13.

similarly defined complex make-ready as work “that will require cutting and splicing.”¹² By establishing objective criteria, the Commission can remove much of the subjectivity—and opportunity for disagreement—from this determination. Where a determination must be made, though, that determination should be made by a third party—neither the new attacher nor the existing attacher.

Complex make-ready, furthermore, should not be excluded from OTMR.¹³ Google Fiber supports providing existing attachers with a reasonable amount of time to self-perform complex make-ready;¹⁴ but completely exempting complex make-ready would only perpetuate delays. Make-ready work on a single pole does not occur in isolation and, while it is possible to create a make-ready plan to work around longer deadlines for a handful of poles that require complex make-ready work, those longer deadlines still must be predictable and controllable. Depriving new attachers of the ability to use OTMR for complex make-ready after a reasonable time period would allow incumbent attachers to hold a new attacher’s make-ready and deployment hostage.

Many of AT&T’s proposals would benefit it more than any other existing attacher—as the lowest attacher on the pole in nearly all cases, its action (or failure to act) could be the bottleneck for all other work. But no other proposal is more self-serving than its insistence that new attachers be obligated to honor existing attachers’ collective bargaining agreements (“CBAs”). Google Fiber has no problem using union contractors that have been approved by the pole owner. But the reality is that, in many areas, no such contractors exist; instead, in some of these places, the only Communications Workers of America (“CWA”) members covered by AT&T’s collective bargaining agreements are AT&T employees. In those areas, if new attachers were required to honor AT&T’s CBA, not only would they be unable to use union contractors for OTMR, but they would also be unable to exercise their self-help remedy *under the current rules*. The Commission should not adopt rules that allow AT&T or any other attacher to get special treatment—under any process.¹⁵

Google Fiber continues to urge the Commission to reject AT&T’s continued calls for broad indemnification by new attachers for losses related to OTMR. In its filings on the record, AT&T says indemnification is necessary to protect it against suits by its customers for losses (including for economic losses) arising from a network outage—a claim that AT&T would not

¹² CPS Energy, *Pole Attachment Standards*, Version 3.0 at § II.A.40 (eff. Jan. 1, 2018) (defining a “Complex Transfer” as one “that will require cutting and splicing of a Communication Facility resulting in a network and/or customer outage”).

¹³ See Letter from Ola Oyefusi, AT&T, to Marlene H. Dortch, WC Docket No. 17-84 at Attachment at 2 (Jan. 22, 2018) (“a OTMR regime would . . . apply to routine transfers only”) (emphasis in original).

¹⁴ See, e.g., Comments of Google Fiber Inc., WC Docket No. 17-84 at ii, 5 (June 15, 2017); Reply Comments of Google Fiber Inc., WC Docket No. 17-84 at 5-6 (July 17, 2017) (“Google Fiber Reply Comments”).

¹⁵ As Google Fiber has noted, AT&T’s insistence that new attachers honor its CBAs “subverts the supremacy of federal law over contracts.” Google Fiber Reply Comments at 7. Indeed, the only federal court to consider whether OTMR rules violate the Contracts Clause expressly found no substantial impairment of private contractual rights in permitting new attachers to perform make-ready. See *BellSouth Telecommunications, LLC v. Metro. Gov’t of Nashville & Davidson Cty., Tennessee*, No. 16-2509, 2017 WL 5641145 (M.D. Tenn. Nov. 21, 2017).

permit a customer to bring under its tariffs. But at the BDAC, AT&T also argued that it wanted indemnification for its *own* consequential damages, saying that it should be permitted to seek damages from a new attachor in the event it “lost a big contract” because of an unexpected outage. The extremely speculative nature of such consequential damages means the risk a new attachor would assume could be enormous—potentially business-ending. In general, commercial agreements between parties to pole attachment agreements limit consequential damages for this very reason. In any event, the FCC did not mandate indemnification for self-help when it adopted the current rules in 2011, despite calls by pole owners and others for protection from liability. It should not do so now, either.

Finally, Google Fiber encourages the Commission to take steps consistent with its statutory authority to encourage access to OTMR for all providers nationwide. Reminding the states—even those states subject to the Commission’s pole attachment rules—that they are not preempted from adopting OTMR policies applicable to municipally owned poles and for broadband internet access providers would help mitigate any potential impact of the broader deregulatory steps the Commission has taken.

Google Fiber appreciates the opportunity to discuss its position. Please do not hesitate to contact me with any questions.

Sincerely,



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