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April 4, 2018

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Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

**Re: Wireline Infrastructure, WC Docket No. 17-84**

NCTA – The Internet & Television Association (NCTA) submits this letter in response to recent ex parte letters from Verizon and Google in the above-referenced proceeding.<sup>1</sup> As explained below, the criticism that Verizon and Google direct at NCTA’s Accelerated and Safe Access to Poles (ASAP) Proposal<sup>2</sup> is fundamentally flawed and provides no persuasive reason for the Commission not to adopt the proposal.

**The ASAP Proposal**

The ASAP Proposal is a balanced, comprehensive proposal that meets the Commission’s goal of accelerating the process by which broadband providers are able to attach to utility poles in a manner that reflects the legitimate interests of *all parties*.<sup>3</sup> As NCTA explained, the key to the ASAP Proposal is that it requires *all parties* to compromise from positions they have taken previously – utilities would be required to process applications more quickly than they do under current rules; existing attachers would be required to perform their own make-ready more

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<sup>1</sup> Letter from Katherine Saunders, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 17-84 (filed Mar. 8, 2018) (Verizon Letter); Letter from Kristine Laudadio Divine, Counsel to Google Fiber, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 17-84 (filed Mar. 14, 2018) (Google Letter).

<sup>2</sup> Letter from Steven F. Morris, NCTA – The Internet & Television Association, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 17-84 (filed Mar. 5, 2018) (ASAP Proposal).

<sup>3</sup> *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, 32 FCC Rcd 3266, 3268, ¶ 6 (2017) (*Notice*). As the court recently found in *BellSouth Telecommunications v. Metropolitan Government of Nashville*, No. 3:16-cv-02509, 2017 WL 5641145, at \*6 (M.D. Tenn. Nov. 21, 2017), versions of one-touch that eliminate an attacher’s control of its own facilities might be consistent with the Commission’s goal of promoting broadband deployment but “ignore[] one-half of the equation” by failing to “safeguard[] the network.”

quickly than they do today; and new attachers would be required to use the contractors selected by an existing attacher if they choose to move the facilities of an existing attacher.<sup>4</sup>

Verizon and Google's opposition to the ASAP Proposal is entirely predictable given that the proposal departs in a number of ways from the extreme positions they have advocated. In particular, Google advocates a regime in which a new attacher would have near total control over the network facilities of existing attachers with no obligation to take serious responsibility for its actions.<sup>5</sup> And Verizon simply appears resistant to any changes that would require it to process applications more quickly.<sup>6</sup>

### **Make-Ready Timing**

The ASAP Proposal addresses the crux of the most frequent complaint of new attachers – the timeframes set forth in the current application and make-ready process. Under the current rules, new attachers may have to wait approximately 150 days to attach new facilities, including a minimum of 60 days for existing attachers to move their facilities. And the record is clear that it often takes far longer. In contrast, the ASAP Proposal accelerates the total period by months – dramatically accelerating a new attacher's revenue opportunities and decreasing its cost of capital. Under ASAP, all existing communications attachers must perform simple make-ready work within 30 days and complex work within 45 days from receipt of the requisite notice, regardless of the number of existing attachers.<sup>7</sup> After this initial period, a new attacher is entitled to engage in self-help by moving existing facilities using a contractor selected by the existing attacher. ASAP thus offers a dramatic improvement over the current rules, and even over the recommendation of the Broadband Deployment Advisory Committee (BDAC), which shaves only two weeks off current timelines for complex make-ready and is one to three weeks *longer* than ASAP for simple make-ready.<sup>8</sup>

Verizon and Google express strong opposition to this portion of the ASAP Proposal, but their opposition mischaracterizes or misunderstands the proposal. For example, they claim to oppose ASAP because communications make-ready work will still be performed sequentially,<sup>9</sup>

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<sup>4</sup> ASAP Proposal at 3.

<sup>5</sup> Google Letter at 2-3.

<sup>6</sup> Verizon Letter at 7.

<sup>7</sup> Moreover, if existing attachers choose not to do their own make-ready work, ASAP imposes an affirmative obligation to inform the new attacher and allow the new attacher to immediately move the facilities using a pre-selected contractor.

<sup>8</sup> Report of the Competitive Access to Infrastructure Working Group, Presented to the Broadband Deployment Advisory Committee (Jan. 23-24, 2018) (BDAC Recommendation).

<sup>9</sup> Verizon complains that this proposal “would perpetuate, rather than remedy, the already unwieldy and unpredictable process of multiple truck rolls and uncertain timing.” Verizon Letter at 3. Similarly, Google erroneously states the proposal “merely restates current law and ignores the physical realities of make-ready work.” Google Letter at 2.

but under ASAP the accelerated 30 or 45 day window applies to all existing attachers. It is therefore the responsibility of the communications attachers to coordinate their moves to meet that deadline. Existing attachers must use this window or lose it even if work is done sequentially. By contrast, Google endorses the BDAC recommendation, which exempts from one-touch deadlines (and therefore requires separate truck rolls and crews for) every pole replacement; every make-ready move of electric primary lines, electric secondary lines, transformers in the power space, and electric drops; and every make-ready move of complex communications equipment.

They also claim that ASAP's proposal that any attacher contemplating an extremely high volume project give existing attachers 90 days advance notice would lengthen the application and make-ready process and reveal competitive intelligence.<sup>10</sup> New attachers already are required to provide longer notice periods for larger projects to utilities, both under current rules and under the BDAC proposal, so the only real difference is that under ASAP they would be required to provide this notice to the existing attachers as well, who would *themselves* then be tasked with engaging in large-scale make-ready activity on hundreds or thousands of poles. Moreover, advance notice can be provided under ASAP during the pre-application stage, before applications are even ready to be submitted, with no delay to deployment. Such notice reveals no more intelligence than other relevant applications (small cell deployments, outdoor distributed antenna systems, franchises, etc.) and provides a necessary window for coordination and staffing to meet ASAP's accelerated timelines. These ASAP provisions fit well within a timetable far more accelerated than any other proposal. They provide existing attachers with their statutorily required opportunity to move and protect the operation and integrity of their own facilities, while enabling new attachers to deploy far more quickly than they could under the current rules or the BDAC proposal.

The acceleration of the ASAP proposal is not limited to the shortened timetables. ASAP has been designed to save time and resources by eliminating key sources of dispute and disruption, and their resulting delays and expenses. For example, a tight window for a network owner to do its own work removes the risk that a third party with no relationship to a network owner will mistake complex work for simple or move existing attachers into violation, and it avoids the service disruptions, disputes and delays that would otherwise arise. Likewise, that tight window, combined with the opportunity for joint walks and consultation, removes the risk for prolonged debates over pre-existing pole violations, the authorizations for existing attachments, and the optimal rearrangements, while safeguarding existing attachers' statutory rights to "add to or modify [their] existing attachment[s]." And as we discuss below, allowing attachers to designate contractors who are knowledgeable about their networks, committed to their technical specs, and backed by meaningful indemnities, ensures that new attachers are accommodated even if existing attachers fail to act on a timely basis. By eliminating these sources of delays and expense, ASAP *increases* the capital available while speeding up the calendar for deployment. ASAP is a win-win – a practical solution based on decades of field

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<sup>10</sup> Google Letter at 2.

experience by the very companies that have deployed the most broadband facilities in the country and are vested in deploying far more.

Verizon and Google also suggest that the shortened timetables and clarity regarding the pole owner obligations in the ASAP proposal will do little to resolve pole disputes and speed up broadband deployment.<sup>11</sup> These criticisms miss the mark. Pole owners retain critical control over access to poles for the make-ready process. Imposing reasonable time limits for pole owners to satisfy their obligations will help expedite the make-ready process by minimizing disputes between the pole owner and the attacher. More broadly, clarifying pole owner obligations will promote broadband infrastructure deployment in general by reducing delays and streamlining the pole attachment process.

### **Selection of Contractors**

The ASAP Proposal allows existing attachers to select the contractor that can work on their networks, which protects the reliability of those networks by ensuring that the contractors are familiar with and committed to honoring the technical specifications for the specific network equipment they will be working on. This is a far superior approach to requiring the Commission to develop, and the pole owner to administer, a new set of certification criteria that will inevitably require *more* process and lead to *more* disputes.<sup>12</sup>

Verizon and Google take issue with the contractor selection provisions of the ASAP Proposal, but their proposals will create numerous problems for everyone involved. For example, under Google's preferred approach, the pole owner and the new attacher would have virtually complete control over the selection of contractors to perform make-ready work. And, although Verizon has proposed major changes to the BDAC proposal on other points,<sup>13</sup> its suggestion to give existing attachers only an ill-defined and highly constrained right to "provide input" in the selection process, but not the right to approve the contractors working on their plant, represents no real improvement over Google's approach.<sup>14</sup> Neither approach accounts for record evidence that utilities do not have the specialized knowledge to take on this role, because they "are not aware of the standards some communications attachers may require concerning

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<sup>11</sup> Verizon Letter at 3-4; Google Letter at 4.

<sup>12</sup> Verizon Letter at 5.

<sup>13</sup> For example, Verizon proposes that, in addition to performing all simple and complex make-ready work, one contractor should also perform all electric utility make-ready. This is contrary to industry practice, under which specialized training is required to perform such work. Using only OSHA qualified power contractors to do all work would narrow the field of available communications line workers, slowing deployment and increasing the cost of communications line rearrangements.

<sup>14</sup> Verizon Letter at 5.

specialized equipment at the pole location. Therefore, utilities alone will not be able to certify contractors that are qualified to handle all make-ready work at the pole.”<sup>15</sup>

Nor do Verizon or Google acknowledge, let alone address, the record evidence demonstrating the disputes that arise in any regime in which there is no privity between the owner of a network facility and the company moving that facility. Verizon and Google both rely on the Verizon-filed CMA Report as evidence that there are no issues when contractors move existing facilities.<sup>16</sup> But that report includes assertions that are explicitly contradicted by evidence in the record of this proceeding. For example, Comcast and Charter submitted comments demonstrating safety and damage issues in Louisville, Nashville and Kansas City.<sup>17</sup> These experiences belie Google’s implausible scenario of a contractor paid by and contractually committed only to the new attachers nonetheless punctiliously respecting all other attaching parties in order to preserve relationships or curry future favor. These safety and damage issues are a matter of public record and certainly would have been known by Google, yet somehow CMA claims to have received no reports of safety issues or damage to existing networks from one touch make-ready.<sup>18</sup>

### **Indemnification**

Broad indemnification of existing attachers, such as that included in the ASAP Proposal, is required to fulfill the statutory requirements of Section 224(i).<sup>19</sup> The Commission has made clear that a utility can impose reasonable requirements, such as a service bond, in the context of a contractual relationship with a contractor, and it has endorsed related insurance requirements in leased access contracts where a cable system operator does not control a third party’s impact on its system.<sup>20</sup>

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<sup>15</sup> Edison Electric Institute Reply Comments at 21, WC Docket No. 17-84 (filed July 17, 2017). For this reason, Verizon’s assertion that the protections included in the BDAC Recommendation are sufficient is wrong because those protections do not include compliance with standards followed by existing attachers.

<sup>16</sup> Perspectives on the Current State of Make Ready and the Potential Impact of a One-Touch Make-Ready Policy (“CMA Report”), attached to Letter from Katherine Saunders, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 17-84 (filed Nov. 13, 2017).

<sup>17</sup> NCTA Reply Comments at 16-17; Charter Comments at 39-43; Comcast NPRM Comments at 21-22.

<sup>18</sup> CMA Report at 13. CMA’s further assertion that allowing OTMR for complex attachments will not cause serious issues are pure speculation and belied by the problems already experienced in the context of simple make-ready. Existing OTMR requirements generally do not allow one touch for complex make-ready and the potential for damages and significant harm arising from complex modifications is high.

<sup>19</sup> Section 224(i) provides that existing attachers “shall not be required to bear *any of the costs of rearranging or replacing its attachment*” resulting from an additional attachment by another entity, including any damages – such as damages caused by service downtime – resulting from such work. 47 U.S.C. § 224(i) (emphasis added).

<sup>20</sup> *In the Matter of Implementation of Section 224 of the Act A National Broadband Plan for our Future*, 26 FCC Rcd. 5240, 5266-69 ¶¶ 52-58 (2011); *In the matter of Leased Commercial Access*, 23 FCC Rcd. 2909, 2923 ¶ 27 (2008).

Google's suggestion that prior Commission decisions support narrow indemnities in this context is erroneous.<sup>21</sup> The Commission's 2011 finding that use of contractors would not expose utilities to substandard work, which is cited by Google, may make sense in a context where the utility has the right to approve the contractor performing the work on facilities it owns, but there is no basis for a similar finding in a context in which there is no privity of contract (and potentially no relationship at all) between the owner of the facilities – the existing attacher – and the contractor. Where there is a lack of privity and a statutory requirement to hold harmless existing attachers, as is the case here, an indemnification requirement in the Commission's rules is the only practical mechanism by which an existing attacher can hold a new attacher or its contractor accountable for the consequences of performing shoddy work.

Google's objections to taking any responsibility for the work of its chosen contractors beyond reimbursement for physical damage to the network is suspect. Indeed, Google Fiber has agreed to far broader indemnification provisions protecting pole owners and municipalities in its pole and right of way agreements with Kansas City, Provo and Huntsville.<sup>22</sup> And when its own interests are at stake, Google requires developers creating apps for Android devices to agree to broad indemnification protecting Google "to the maximum extent permitted by law."<sup>23</sup>

### **Conclusion**

The ASAP Proposal avoids the problems that would result from the extreme form of one touch make-ready advocated by Verizon and Google. By providing a tight window for a network owner to do its own work; by providing attachers with the right to designate contractors knowledgeable about their networks, committed to their technical specs, and backed by meaningful indemnities; by providing strict timelines and other safeguards for both pole owners and existing attachers; and by eliminating the real sources of delays and expense, ASAP *accelerates* the time frame for new attachments and *increases* the capital available for deployment.

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<sup>21</sup> Google Letter at 3 n.11.

<sup>22</sup> See Google Fiber Development Agreement with Kansas City Missouri §§ 8, 9 (available at <http://cityclerk.kcmo.org/LiveWeb/Documents/Document.aspx?q=8OhiEnh5QRUzYmhhPBOauwHL5G24qmBK6541OIXXPkZ2eiYVOgmvkavN7%2fPqQ8hd>); Pole Attachment Agreement between Google Fiber and Provo City Corporation Article X (available at <http://www.provo.org/Home/ShowDocument?id=2306>); Pole Attachment Agreement between Google Fiber and Huntsville Utilities Electric Board § 15 (available at <http://www.localnetchoice.org/wp-content/uploads/2016/03/Pole-Attachment-Agreement.pdf>).

<sup>23</sup> See Android Software Development Kit License Agreement, Terms and Conditions § 12 (available at <https://developer.android.com/studio/terms.html>).

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In sum, the ASAP Proposal is the balanced approach that aligns with the Commission's goals.

Respectfully submitted,

**/s/ Steven F. Morris**

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