

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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

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EXECUTIVE SUMMARY

To encourage the deployment of the next generation of network technology, the Commission must ensure that service providers can quickly and safely place their facilities on utility poles. To achieve this goal, Google Fiber Inc. proposes that the Commission adopt a one-touch make-ready (“OTMR”) procedure for pole attachments.

Using OTMR, a new attacher pays contractors, pre-approved by the utility pole owner, to perform all make-ready work, including moving existing attachments to make room for new facilities. This procedure eliminates unnecessary and expensive delays that result under the Commission’s current rules. At the same time, this procedure protects existing attachers’ investments in their facilities. Specifically, under the proposed OTMR rules, only pre-approved contractors may perform make-ready work; the new attacher must pay reasonable expenses for existing attachers to perform a field inspection after the contractors complete make-ready; and the new attacher must pay for the correction of any errors found. Existing attachers can move their own attachments if the proposed make-ready work would reasonably be expected to cause a service outage. Thus, OTMR appropriately balances the interests of all parties involved in the make-ready process.

The Commission has full legal authority to adopt OTMR, relying on the same authority that supports the current pole attachment rules. And new OTMR rules would preserve the authority of states and municipalities to regulate their rights-of-way in a manner that is consistent with the Commission’s rules. Google Fiber therefore encourages the Commission to issue new rules adopting OTMR for pole attachments.

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I. INTRODUCTION AND SUMMARY

Congress has charged the Commission with “encourag[ing] the deployment on a reasonable and timely basis of advanced telecommunications capability,” like broadband Internet access, “to all Americans.”¹ Expanding access to super fast and affordable broadband requires deployment of new facilities, such as last-mile fiber, high-capacity backhaul, and, increasingly, wireless equipment. And in nearly every part of the country, the necessary wired facilities for those networks must be installed on utility poles, which, as the Commission has recognized, often involves a time-consuming and expensive process that discourages new construction.² Making the process of placing attachments on utility poles faster, more efficient, and less costly is one of the most effective steps the Commission can take to increase broadband availability and competition.

The Pole Attachment Act gives certain communications providers the right to attach their facilities to existing poles owned by electric utilities and incumbent local exchange carriers.³ In 2011, addressing concerns that access to utility poles for new providers had been subject to unreasonable terms and conditions—including excessive delay by pole owners and incumbent attachers in preparing utility poles to receive new attachments—the Commission adopted rules

¹ 47 U.S.C. § 1302(a).

² See, e.g., FCC, *Connecting America: The National Broadband Plan* 109-13 (2010), <https://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf>; Comments of Time Warner Cable Inc. at 15, WC Docket No. 07-245, GN Docket No. 09-51 (filed Aug. 16, 2010) (agreeing with Commission “that costly delay in accessing infrastructure stymies deployment of broadband facilities”).

³ 47 U.S.C. § 224. Telecommunications carriers, including providers of broadband Internet access services, are among the providers with rights to attach. See *id.* § 224(f)(1); *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601, 5617 ¶ 56 (2015), *aff’d sub nom. U.S. Telecom Ass’n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016), *reh’g en banc denied*, 855 F.3d 381 (D.C. Cir. 2017).

governing so-called make-ready work.⁴ Those rules were intended to ensure that new attachers gain access to poles in a timely fashion.⁵

Unfortunately, those rules have not had their intended effect. For instance, the Commission envisioned that all make-ready would occur within a single 60-day notice period.⁶ But in practice, make-ready often occurs in sequential notice periods—meaning that the pole owner sends notice to one existing attacher that it must move its facilities within 60 days, and only after that attacher completes such work does the utility issue a second 60-day notice to the next attacher, and so forth. Of course, make-ready work often must proceed in a particular order. In many cases, one attacher’s facilities cannot be moved until another attachment is moved and space is cleared. But staging make-ready in sequential 60-day notice periods leads to many months of make-ready work on a single pole, results in delay and increased costs, and makes it impossible for the Commission’s current deadlines to be met. These problems, in turn, hinder—and may even foreclose entirely—the deployment of new networks and expansion of broadband service.

Google Fiber Inc.⁷ is therefore encouraged that the Commission is exploring additional rules that allow attachers to use one-touch make-ready (“OTMR”). OTMR will make network

⁴ *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd. 5240 (2011) (“*2011 Pole Attachment Order*”); see also Petition for Rulemaking of Fibertech Networks, RM-11303 (filed Dec. 7, 2005).

⁵ See *2011 Pole Attachment Order* at 5252 ¶ 23.

⁶ 47 C.F.R. § 1.1420(e)(1)(ii) (requiring pole owners to “[s]et a date for completion of make-ready that is no later than 60 days after notification is sent”); *2011 Pole Attachment Order* at 5250–61 ¶¶ 21–39 (discussing the need for quick deployment and recognizing that a 60-day maximum for completion of all make-ready should be sufficient for all parties to successfully perform).

⁷ Google Fiber Inc. is an indirect, wholly owned subsidiary of Alphabet Inc., a publicly traded company.

deployment faster and more efficient—and therefore more likely to happen—by allowing new attachers to use pole-owner-approved contractors to rearrange and move all existing attachments in a single visit to make room for a new attachment. Not only is this process quicker and less costly than the procedure established under the Commission’s current rules, but it also minimizes the disruption to public rights-of-way caused by make-ready work. Because pole owners will approve the contractors that perform make-ready, OTMR procedures protect both the quality of that work and safety in performing it. Finally, by reducing the number of times work needs to be done on a pole, OTMR further minimizes danger to workers and the already-small risk of service outages.

Quick, efficient deployment is essential to ensuring that Americans in every part of the country have access to high-speed Internet. According to the Commission’s own data, 39 percent of Americans living in rural areas lack access to broadband Internet that meets the Commission’s speed benchmarks.⁸ Additionally, around 19 percent of rural Americans lack access to Internet service with even 4 Mbps download/1 Mbps upload speeds.⁹ The deployment of fiber, even in rural areas, is growing, but not nearly fast enough. According to the Commission’s data, as of June 2016 only 14.2 percent of the residential broadband connections providing 25 Mbps/3 Mbps were fiber to the premises, up from 12.2 percent two years previous.¹⁰ To be sure, the number of fiber connections has grown by almost three million in

⁸ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, 2016 Broadband Progress Report, 31 FCC Rcd. 699, 732 ¶ 79 (2016) (noting that “more than 39 percent of Americans living in rural areas lack[] access to 25 Mbps/3 Mbps advanced telecommunications capability, as compared to 4 percent of Americans living in urban areas”).

⁹ *Id.* ¶ 79 n.242.

¹⁰ See FCC, WIRELINE COMPETITION BUREAU, INDUSTRY ANALYSIS AND TECHNOLOGY

that time,¹¹ and more and more consumers have the option to subscribe to fiber-based broadband service,¹² but in order to continue and accelerate that growth, a uniform, efficient make-ready process like OTMR will be essential. This is true not only for traditional wireline networks but also for next-generation wireless networks, which require robust wireline facilities for backhaul and network resiliency, in addition to last-mile fixed wireless facilities.

Google Fiber urges the Commission to add OTMR procedures to its pole attachment rules to facilitate expanded broadband access across the country. At the same time, Google Fiber encourages the Commission to reaffirm that the Commission's pole attachment rules were not intended to prevent local governments from regulating their public streets and sidewalks in a manner that is consistent with the Commission's rules and policies.¹³ As long as local regulations do not prevent pole owners and new attachers from complying with the Commission's rules, the Commission's rules should not preempt such regulations.

DIVISION, *Internet Access Services: Status as of June 30, 2016* 22, Figs. 23 & 24 (2017), https://apps.fcc.gov/edocs_public/attachmatch/DOC-344499A1.pdf (residential fixed connections at least 25 Mbps downstream and 3 Mbps upstream by technology).

¹¹ See *id.* at 16, Fig. 11 (showing 8,326,000 fiber-to-the-premises connections as of June 2014 and 11,129,000 as of June 2016).

¹² Compare BROADBANDNOW, Fiber-Optic Internet in the United States at a Glance, <http://broadbandnow.com/fiber> (last visited June 14, 2017), with BROADBANDNOW, Fiber-Optic Internet in the United States at a Glance, <http://web.archive.org/web/20141012160805/http://broadbandnow.com/fiber> (last visited June 14, 2017) (Wayback Machine snapshot of Oct. 12, 2014). A comparison of the data shows that fiber availability has increased significantly in states where Google Fiber operates, like Texas and Missouri.

¹³ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Red. 15499, 16072 ¶ 1154 (1996) (“*Local Competition Order*”). (“[W]e conclude that state and local requirements affecting attachments are entitled to deference even if the state has not sought to preempt federal regulations under section 224(c).”) (subsequent history omitted).

II. THE COMMISSION SHOULD ADOPT NEW RULES ALLOWING ATTACHERS TO ELECT TO USE OTMR

The Commission should adopt rules allowing the use of OTMR to encourage deployment of improved broadband service to consumers. Adoption of OTMR by the Commission under the Pole Attachment Act will facilitate access to advanced broadband services, including high-speed fiber services, for consumers served by investor-owned utilities in those states that have not certified to the Commission that they regulate pole attachments. Even in the 20 certified states and the District of Columbia, OTMR rules adopted by the Commission would serve as a template for state and local governments, as well as for municipally-owned utilities nationwide, seeking to adopt OTMR and similar rules that expand access to high-quality broadband service within their jurisdictions.

In particular, Google Fiber urges the Commission to allow new attachers to use OTMR procedures similar to those adopted by the metropolitan government in Nashville, Tennessee.¹⁴ Nashville's OTMR ordinance reasonably balances the interests of pole owners, existing attachers, and new attachers while improving the efficiency of make-ready, all to the benefit of consumers. Specifically, Google Fiber recommends that the Commission adopt rules that provide for the following procedures:

- Once the pole owner approves a new attacher's application to attach facilities to its pole(s), new attachers that choose to use OTMR must give existing attachers 15 days' written notice before commencing make-ready work using approved contractors.¹⁵ Where the make-ready work is complex—that is, reasonably expected to cause a service

¹⁴ See NASHVILLE AND DAVIDSON COUNTY, TENN., METRO. CODE § 13.18.020. A similar OTMR ordinance was also adopted by the metropolitan government of Louisville, Kentucky. See LOUISVILLE AND JEFFERSON COUNTY, KY., METRO. CODE § 116.72(D).

¹⁵ Each utility is currently required to "make available and keep up-to-date a reasonably sufficient list of contractors it authorizes to perform surveys and make-ready in the communications space on its utility poles" under the Commission's rules. 47 C.F.R. § 1.1422(a).

outage—the new attacher must give 30 days’ notice, within which time existing attachers may complete the complex make-ready work themselves.

- After the 15- or 30-day notice period has expired, the approved contractors are authorized to perform all make-ready, including rearrangement of existing attachers’ facilities, on behalf of the new attacher. The new attacher pays for this make-ready.
- Within 30 days of completion of make-ready, the new attacher must send a notice of completion to existing attachers via an electronic system like the National Joint Utilities Notification System (“NJUNS”) or any other system already employed or reasonably selected by the pole owner.¹⁶
- Existing attachers may conduct a field inspection of any of their attachments that were adjusted during the make-ready process; such inspections must occur within 60 days of the date the new attacher sends its notice of completion. The new attacher must pay any reasonable expenses incurred by existing attachers for performing the field inspection.
- If an existing attacher finds a problem that affects its attachments during its field inspection, the new attacher must correct the problem within 30 days of receipt of notice from the existing attacher of the problem. After the correction is made, the new attacher must notify the existing attacher and the pole owner within 30 days that the correction has been completed.

Local legislators have found, and Google Fiber agrees, that these procedures appropriately balance the interests of all stakeholders—pole owners, existing attachers, and new attachers.¹⁷ By adopting obligations that put the onus of coordination and payment on the new attacher, OTMR relieves pole owners of burdens they have long complained about.¹⁸ By providing for reasonable but compact timelines, OTMR ensures that pole owners’ and existing attachers’ concerns about safety and network reliability are addressed while also reducing delay

¹⁶ NJUNS is an electronic system that allows utilities and attachers to track workflow and coordinate their activities. *See About NJUNS*, NJUNS, <https://web.njuns.com/about/> (last visited June 14, 2017). Not all utilities use NJUNS, but most use some form of electronic notification system.

¹⁷ *See* Nashville and Davidson County, Tenn., Ordinance No. BL2016-343 (Sep. 21, 2016) (adopting OTMR procedure); *see also* Statement of Interest of the United States, *BellSouth Telecomms., LLC v. Louisville/Jefferson Cty. Metro Gov’t*, No. 3:16-cv-00124-TBR (W.D. Ky. Oct. 31, 2016).

¹⁸ *See* Letter from Thomas B. Magee and Jack Richards, Counsel for the Coalition of Concerned Utilities, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, GN Docket No. 09-51, at 2 (filed Nov. 17, 2010); attachment to *id.* at 85.

and waste. A 15-day notice period is sufficient for simple make-ready that poses essentially no risk of service outages. This notice period gives existing attachers enough time to raise any legitimate and significant concerns about the proposed make-ready, while stopping short of allowing them to veto construction altogether—and without creating delays for new attachers and approved contractors that might cause them to sit idle.¹⁹

Because OTMR creates a streamlined process that allows one contractor to complete all make-ready, OTMR avoids much of the time-consuming planning that is necessary under the current rules, which not only require utilities to manage the coordination of make-ready among existing attachers but also require existing attachers to play a substantial role in ensuring that make-ready is completed. OTMR relieves utilities and existing attachers of these burdens and makes new attachers responsible for coordination and completion of make-ready.

Where make-ready may require work that would reasonably be expected to cause a service outage, a longer notice period is appropriate. For instance, if a taller or stronger pole must be installed to accommodate a new attacher's facilities, the transfer of attachments from the old pole to the new pole may result in a brief outage period while the attachments are moved. A 30-day notice period for situations like this allows existing attachers to minimize the risk and impact of service disruption from make-ready, while also recognizing that even complex make-ready may be more efficiently completed by an approved contractor. Where existing attachers believe proposed complex make-ready may have a negative impact on their business, OTMR would allow them the option of performing the complex make-ready themselves. But existing attachers should not be permitted to use the prospect of service outages to indefinitely delay deployment by a new attacher. If existing attachers have not moved their own attachments

¹⁹ Decl. of Ashley Kroh ¶¶ 4–5.

within 30 days, an approved contractor should be allowed to complete any complex make-ready. The reality, of course, is that most make-ready is simple and does not carry any substantial risk of interruption to service.

OTMR also safeguards existing attachments by allowing incumbent attachers to conduct field inspections, at the new attacher's expense, after OTMR is complete so that they may confirm that their facilities were not damaged during make-ready. Furthermore, by requiring new attachers to correct any errors caused during make-ready, OTMR ensures that existing attachers will not bear the costs of another attacher's mistake.

III. OTMR ADDRESSES THE CONCERNS RAISED BY THE COMMISSION

The procedure outlined above achieves all of the Commission's goals for facilitating network deployments: it expedites make-ready, lowers costs, and protects existing attachers' investments and networks.²⁰ OTMR increases the efficiency of make-ready by placing responsibility in the hands of new attachers, who have the strongest incentive to finish make-ready and deploy their networks quickly. But while OTMR allows new attachers to manage most of the make-ready process, it also gives them the financial burden of guaranteeing that the work is done safely and accurately, consistent with industry requirements. Thus, OTMR strikes an appropriate balance among all interested parties and, above all else, works to the benefit of consumers. Alternative procedures proposed by the Commission would be less effective at achieving these goals. Finally, the Commission has the legal authority to adopt OTMR.

²⁰ See *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, FCC No. 17-37, WC Docket No. 17-84, ¶¶ 7–29 (rel. Apr. 21, 2017) (“NPRM”).

A. OTMR Is an Economically Sound Policy

OTMR is economically efficient.²¹ Because OTMR establishes a carefully balanced procedure, it lowers the burdens of make-ready for everyone involved and ensures that parties are incentivized to complete make-ready quickly and safely. In doing so, OTMR vastly improves upon the current make-ready rules to the benefit of consumers.

Under the current regime, a new attacher must notify a pole owner of a need for make-ready; the pole owner must separately notify and coordinate with each existing attacher; and each existing attacher may have to coordinate with other incumbent attachers and the new attacher. This constant coordination is time consuming for all of the entities involved. Additionally, because existing attachments often must be moved to make room for a new attachment, incumbent attachers effectively serve as gatekeepers for new network deployment. But these existing attachers often lack the incentive to move quickly, keep costs down, or even ensure costs are predictable, because doing so could usher a new competitor into the market.²² Finally, the current process requires multiple rounds of construction, resulting in lengthy periods of traffic disruption and inconvenience to property owners, as well as increased risk of injury to workers.²³

OTMR resolves these issues. OTMR gives notification and coordination duties to the party with the greatest incentive to complete make-ready quickly: the new attacher. After a pole owner approves a new attacher's application, the new attacher takes on the obligation of notifying existing attachers and arranging for the approved contractors to perform make-ready after the notice period expires. In most cases, that is the extent of planning needed for make-

²¹ See NPRM ¶ 21.

²² Decl. of Ashley Kroh ¶ 6.

²³ *Id.* ¶¶ 3–7.

ready to take place, and new attachers will move quickly to complete it. Certainly, there will be times when existing attachers want to voice concerns to the new attacher. But because all make-ready is centralized under the new attacher, these communications will be handled efficiently.

While OTMR incentivizes new attachers to move quickly to complete make-ready, it also ensures that the make-ready process is performed carefully. OTMR protects existing facilities from damage and prevents service outages in three ways.²⁴ First, OTMR requires make-ready in the pole's communications space to be performed by contractors approved by pole owners,²⁵ who have an interest in protecting the integrity of their poles and the attachments on those poles. Pole owners have every incentive to approve only contractors that are well qualified to conduct make-ready, which reduces the already-low risk that make-ready in the communications space will cause damage or a service outage. Second, by making new attachers liable for any damages, OTMR will motivate new attachers to carefully oversee make-ready and make sure that contractors do not damage existing communications facilities and that they perform make-ready safely. Third, and most significantly, OTMR requires only one trip to a pole to complete make-ready, which means that attachments will be disturbed fewer times, with less risk to workers and networks. It also reduces disruption of streets and sidewalks, minimizing risk and inconvenience to residents. Thus, OTMR strikes a careful balance between ensuring fast, safe deployment and protecting the interests of utilities and existing attachers, as well as local governments.

Finally, OTMR will give new attachers greater certainty over make-ready costs. Right now, costs for make-ready vary greatly between markets and among existing attachers. For example, Google Fiber has paid between \$540 and \$970 per attachment for make-ready in

²⁴ See NPRM ¶ 15.

²⁵ See 47 C.F.R. § 1.1422.

Raleigh, North Carolina, and up to \$1,125 per attachment in Atlanta, Georgia.²⁶ Existing attachers often fail to provide any explanation for differences in their costs between markets, and Google Fiber has been unable to discover a basis for them. This uncertainty makes it difficult for new attachers to accurately budget for new networks and increases their financial risk, which in turn discourages deployment. OTMR makes costs more predictable by giving new attachers control over costs. Using OTMR, new attachers can hire utility-approved contractors and establish costs before make-ready begins. This cost certainty will allow new attachers to plan their network expansions with greater confidence.

By making new attachers responsible for completing make-ready, moreover, OTMR increases competition in the marketplace. The current make-ready rules result in significant (and in some cases indefinite) delays while existing attachers move their facilities. The prospect of such delays and the associated costs discourages new providers from entering the market in the first place. Because OTMR allows new attachers to control the timing and cost of their deployments, it removes barriers that may discourage competition and reduce broadband availability and choice for consumers.

B. OTMR Is Superior to Alternative Proposals

In contrast, alternative proposals identified in the NPRM, like “right-touch make-ready,”²⁷ will not strike a healthy balance and will not solve the fundamental problems with the current system. For example, right-touch make-ready fines existing attachers for not meeting make-ready deadlines. But possible after-the-fact fines may not be enough to address the problems faced by new attachers: lengthy delays in completing make-ready, and a system that allows incumbent providers to be gatekeepers to new competition. When existing attachers

²⁶ See Decl. of Ashley Kroh ¶ 6.

²⁷ See NPRM ¶ 25.

delay make-ready, they forestall competition to their services and potentially discourage future entrants from pursuing a market, with benefits that may greatly outweigh the possibility of future fines.

For the same reasons, shortening the current make-ready deadlines would not solve the problem of delay. First, as long as make-ready is performed in sequential notice periods, the cumulative number of days of make-ready will continue to unreasonably postpone network deployment. Second, and more critically, shortening current deadlines without improving make-ready procedures is unlikely to result in faster deployment because of the substantial amount of coordination and planning required among existing attachers. Today, existing attachers struggle to meet the 60-day deadline; unless the Commission reforms its rules to streamline make-ready procedures themselves, shorter deadlines alone will not improve make-ready.

OTMR addresses these problems directly by establishing a predictable timeline and allowing new attachers to be responsible for planning and executing make-ready. These changes will make it easier for new attachers to enter new markets and expand network access for consumers. Only a policy that appropriately aligns incentives and responsibilities can resolve all of the concerns raised by the Commission and experienced every day in the marketplace.

C. The Commission Has the Authority to Adopt OTMR

Adoption of OTMR falls squarely within the statutory authority granted to the Commission under the Pole Attachment Act. OTMR, moreover, does not implicate constitutional concerns under the Takings Clause, either as to pole owners or incumbent attachers. The Commission is therefore free to adopt new rules permitting the use of OTMR without exceeding its legal authority.

1. The Pole Attachment Act Authorizes the Commission to Adopt Just and Reasonable Rates, Terms, and Conditions for Access to Utility Poles.

OTMR establishes a different process for ensuring that poles are made ready for new attachments than that set out in the *2011 Pole Attachment Order*, but it does not require the Commission to exercise any additional or different legal authority. Section 224 gives the Commission authority to issue regulations providing for “just and reasonable . . . rates, terms, and conditions” for pole attachments, as well as for nondiscriminatory access to poles.²⁸ The Commission has recognized that this “broad language . . . indicate[s] a delegation of comprehensive rulemaking authority over all attachment issues, including access.”²⁹ The Commission’s rules adopted pursuant to this authority impose obligations on utility pole owners and new attachers.

OTMR as proposed by Google Fiber is similar—it imposes no mandates on existing attachers, but puts all obligations on new attachers and (to a lesser extent) pole owners. Thus, the Commission’s legal authority to adopt OTMR is no different than its legal authority to adopt the 2011 make-ready timelines. Put simply, if the Commission had authority to adopt rules in 2011 governing make-ready, it has the authority to adopt OTMR now.

2. OTMR Is Not a Taking.

In addition, the Fifth Amendment’s Takings Clause does not limit the Commission’s authority to enact procedures like OTMR.³⁰ OTMR is not a physical taking of private property because it does not result in the government directly occupying or seizing any property.³¹ Thus,

²⁸ 47 U.S.C. § 224(b).

²⁹ *2011 Pole Attachment Order*, 26 FCC Rcd. at 5282 ¶ 91.

³⁰ NPRM ¶ 13.

³¹ *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005) (“The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of

the only question is whether OTMR is an uncompensated regulatory taking of pole owners' or attachers' property. Even under the most generous reading of relevant precedent, it is not.

OTMR does not violate the Takings Clause as to pole owners. While the Pole Attachment Act includes a mandatory access provision³² that has been found to be a permanent physical occupation of property (though not a violation of the Takings Clause),³³ make-ready procedures generally, and OTMR specifically, do not themselves result in such physical invasion of pole owners' property.³⁴ The make-ready rules do not give any attacher a right to place attachments on a pole, as they simply set out the procedures pole owners and new attachers must follow once the pole owner has granted access to the attacher. Thus, a pole owner cannot claim a taking merely because the Commission mandates certain make-ready procedures.

Similarly, OTMR is not a per se or other regulatory taking of existing attachers' property. OTMR does not authorize the "permanent physical occupation" of existing attachers' property.³⁵ It gives contractors only the temporary right to move and rearrange attachments. Thus, existing attachers have no grounds to claim a per se taking. And under the *Penn Central* regulatory-takings test,³⁶ OTMR does not financially harm existing attachers' property or affect attachers'

private property.").

³² 47 U.S.C. § 224(f)(1).

³³ *Gulf Power Co. v. United States*, 187 F.3d 1324, 1338 (11th Cir. 1999) ("[T]he Act is not facially unconstitutional under the Fifth Amendment, because, at least in most cases, it provides a constitutionally adequate process which ensures a utility does not suffer that taking without obtaining just compensation."); *see also id.* at 1331 (citing *Williamson Cty. Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985) ("The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation.")).

³⁴ *See FCC v. Fla. Power Corp.*, 480 U.S. 245, 251 (1987) (holding that a regulation that does not give an entity "any right to occupy space on utility poles" does not constitute a taking).

³⁵ *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1073 (1992).

³⁶ *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

investment-backed expectations because OTMR generally does not prevent existing attachers' property from serving customers. OTMR is no more likely to cause service outages than the current set of rules, which courts have upheld.³⁷ Under both OTMR and the current rules, only a small amount of make-ready work runs the risk of a service outage. In the unlikely event that existing attachers do experience extended outages under OTMR, the Takings Clause is not implicated for two reasons. First, existing attachers will retain the option of performing make-ready themselves if the work is reasonably expected to cause a service outage. And second, under either the current rules or OTMR, existing attachers have no reasonable investment-backed expectation that their networks will never experience disruptions.³⁸ OTMR is no more a taking of existing attachers' property than the Commission's current pole attachment regulations.

IV. OTMR LEAVES ROOM FOR STATES TO REGULATE THEIR RIGHTS-OF-WAY

Like the Commission's current make-ready rules—which allow for 60 days to complete most make-ready but encourage faster completion³⁹—OTMR will serve as a floor for encouraging network deployment. Thus, under OTMR, states will retain the authority to regulate local matters in ways that may affect pole attachments—even if those states have not reverse preempted the Commission's authority over pole attachments.⁴⁰ One key area of local regulation is rights-of-way management. States and municipalities have strong interests in reducing the disruption to their rights-of-way for extended periods of time and in ensuring the safety of their

³⁷ *Am. Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183 (D.C. Cir. 2013).

³⁸ *Penn Cent. Transp. Co.*, 438 U.S. at 124.

³⁹ See 47 C.F.R. § 1.1420(e) (requiring pole owners to “[s]et a date for completion of make-ready that is *no later than* 60 days after notification is sent”) (emphasis added); see also *2011 Pole Attachment Order*, 26 FCC Rcd. at 5252 ¶ 23 (adopting a maximum timeline for pole attachments while “recogniz[ing] that the necessary work can often proceed more rapidly”).

⁴⁰ See *Local Competition Order*, 11 FCC Rcd. at 16072–73 ¶ 1154.

residents on city streets and sidewalks. Neither OTMR nor the Commission's current rules preempt reasonable regulations that serve these purposes.

As the Commission has long recognized, states can regulate their rights-of-way in a manner that affects pole attachments. The Commission has repeatedly noted that "state and local requirements affecting attachments are entitled to deference even if the state has not sought to preempt federal regulations," as long as the local regulations do not "directly conflict[]" with the Commission's rules.⁴¹ OTMR will not affect states' longstanding authority in this area.

Make-ready disrupts a city's transportation and may create safety hazards, and cities should be able to mitigate these risks through regulation. Such regulation benefits city residents and often poses no impediment to make-ready. In fact, local regulation frequently works in conjunction with the Commission's rules to speed up the make-ready process for pole owners, existing attachers, and new attachers. By working with states and municipalities, the Commission can help local governments regulate their rights-of-way in a manner that coordinates with OTMR and other pole attachment rules.

To be clear, any local regulation must be consistent with the Commission's rules and policies.⁴² In particular, cities cannot erect barriers to deployment or effectively prohibit make-ready.⁴³ But cities should be able to pass regulations that minimize the disruption caused by make-ready if those regulations do not make it harder for pole owners, new attachers, and existing attachers to complete make-ready.

⁴¹ See *id.*; see also *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, Order on Reconsideration, 14 FCC Rcd. 18049 (1999); *2011 Pole Attachment Order* at 5246–47 ¶ 11 n.31 ("[S]tate and local requirements will be given deference if not in direct conflict with Commission rules.").

⁴² See NPRM ¶¶ 100–12.

⁴³ See NPRM ¶ 102.

Within existing rules, states and cities have the authority to regulate their rights-of-way. If the Commission adopts OTMR, the Commission should confirm that this authority remains intact.

V. CONCLUSION

OTMR fulfills all of the Commission's goals in its NPRM: it accelerates deployment by adopting shorter deadlines; it streamlines the make-ready process by placing responsibility in the hands of new attachers; and it protects the interests of all parties, including utilities and existing attachers. OTMR mitigates the problems that new attachers have encountered in make-ready and expedites the deployment of new networks. Adopting OTMR as a nationwide solution will expand access to broadband technology to consumers across the country. The Commission should adopt such rules.

Respectfully submitted,



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