

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the Matter of

Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment

WC Docket No. 17-84

REPLY COMMENTS OF LUMOS NETWORKS INC., LUMOS NETWORKS OF WEST VIRGINIA INC., AND LUMOS NETWORKS LLC

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Lumos Networks Inc., Lumos Networks of West Virginia Inc., and Lumos Networks LLC (collectively “Lumos”) by their attorneys, hereby file these reply comments in the above-referenced proceeding.

I. INTRODUCTION AND SUMMARY

The overwhelming majority of commenters in this proceeding recognize that investment in and timely deployment of broadband services will almost certainly foster continued economic growth and technological innovation across all segments of society in the United States. Today, broadband is the vehicle that spurs the development of innovative services and capabilities such as the cloud, smart homes and communities, distance vocation and education, rural healthcare and telemedicine, as well as contributing to law enforcement and national security applications. On a prospective basis, broadband will likely serve as the precursor for the technologies of the future, such as 5G, and the applications that will rely on 5G speeds and latency.

In order to continue to move forward in a reasonable timeframe with the deployment of facilities necessary to deliver broadband services, competitive providers like Lumos require the placement of facilities on poles owned by other entities who oftentimes have a business incentive to either slow roll Lumos' pole attachment applications or otherwise make pole access very difficult. As the record in this proceeding demonstrates, there are several critical areas in which the Federal Communications Commission's ("Commission") existing pole attachment regulatory regime requires reform or improvement. The manner in which the Commission addresses these areas will have a significant effect on the extent to which facilities-based service providers like Lumos are able to efficiently and expeditiously deploy broadband service to its customers.

One of these critical areas involves the timely processing of pole attachment applications. As noted in its initial Comments, the Commission took a huge positive step forward in establishing the current four stage timeline in the *2011 Pole Attachment Order*,¹ but with the benefit of the time and actual real world experience gained since then, it is clear to Lumos that a further shortening and/or consolidation of the current four stage timeline is not only warranted, but absolutely necessary in order to foster the continued deployment of broadband facilities.

Similarly, make ready work and the costs associated therewith continue to be a barrier to the successful deployment of broadband facilities. Although so-called one-touch make ready is a concept worthy of further consideration and examination by the Commission, it is not without controversy. Rather than to get mired in this controversy in the context of the instant proceeding, however, Lumos believes that the shortening and/or consolidation of the current four stage pole attachment processing timeline, in conjunction with the expanded utilization of outside

¹ Lumos Comments at p. 4.

contractors to complete overdue survey and make ready work, would be an acceptable immediate step that yields tangible benefits to broadband providers today.

Further, Lumos believes that the make ready process could be improved significantly if make ready costs were more readily available and verifiable. In this regard, Lumos continues to advocate for pole owner development of standardized price lists covering routine and common make ready activities, and also for more detailed up front invoicing of make ready charges by pole owners, which is unfortunately not a standard practice of most pole owners today.

Next, Lumos is strongly in favor of a shot clock governing the timely resolution of formal pole attachment complaints coming before the Commission, and also for the establishment of similar timeframes corresponding to some of the pre-complaint activities that must take place before a formal pole attachment complaint can even be filed with the Commission. The adoption of these reforms will provide greater certainty to pole owners and potential attachers alike.

Finally, Lumos fully supports reforms centered on the Commission's statutory authority under Section 253(a) and 253(d) as it relates to the current regulation of public rights-of-way by state and local governments. In Lumos' experience, many state and local jurisdictions demand arbitrary usage fees or in-kind donations of fiber facilities and other services in exchange for access to the public rights-of-way with no demonstrable nexus to actual management costs incurred by these state and local jurisdictions. As a result, Lumos encourages the Commission to clarify that all such state and local fees and requirements be transparent, non-discriminatory, applicable to all entities utilizing the public rights-of-way, and be based on the actual underlying costs borne by these state and local jurisdictions in relation to Lumos' network facilities. An immediate emphasis on non-discriminatory terms and conditions would go far in resolving this

issue. In this regard, Lumos has found that localities are reluctant to share what fees, gifts in kind, etc. are received from the ILEC in the area. When such information is ultimately discovered, Lumos oftentimes finds that it has been treated very differently.

II. ALTHOUGH ONE TOUCH MAKE READY IS A PROMISING CONCEPT THAT IS WORTH FURTHER CONSIDERATION, THE COMMISSION CAN IMPROVE ACCESS TO POLES ON A MORE EXPEDIENT BASIS BY ADOPTING THE SHORTENED TIMEFRAMES BEING PROPOSED TO THE CURRENT FOUR-STAGE PROCESS ESTABLISHED IN THE 2011 POLE ATTACHMENT ORDER.

One of the more controversial items raised in the NPRM is the concept of one-touch make ready.² One-touch make ready would essentially allow attachers to utilize approved contractors to perform make-ready work instead of having the existing attacher(s) perform such work.³ Under this concept, a new attacher would hire an approved contractor to move all the facilities on a pole at one time, thereby “reduc[ing] the disruption, inconvenience, and delay that come from having work performed by multiple crews while also,” lowering make-ready costs, and “improv[ing] safety and pole integrity.”⁴

Although the majority of the larger ILECs are generally opposed to the use of one-touch make ready primarily due to potential facility damage and liability concerns, Verizon takes the opposite view and is in support of the concept.⁵ As it relates to these ILEC’s concerns related to potential damage and liability, Verizon opines that “any legitimate concerns can be addressed

² See NPRM at Paragraph 21.

³ See *NPRM* at Paragraphs 18, 21.

⁴ Ex Parte Letter from Austin Schlick, Google, to Marlene H. Dortch, FCC, *Implementation of Section 224 of the Act*, WC Docket No. 07-245, *et al.* (July 19, 2016).

⁵ See, Verizon Comments at p. 5.

through appropriately crafted rules”, and further that “the benefits of one-touch make-ready far outweigh these concerns.”⁶

Without a doubt, the successful completion of required make-ready work, which normally involves the replacement or modification of poles or lines or the installation of certain equipment (e.g., guys and anchors) to accommodate additional facilities, presents the greatest likelihood for the occurrence of problems and delay during today’s pole attachment four-stage process. This is because make-ready work requires coordination between the pole owner, the potential attacher, and any existing attachers. At present, each existing attacher is typically responsible for moving its own facilities. Thus, multiple visits to the same pole or pole line may be required to simply attach a new cable. The activities of the multiple entities that may potentially be involved increases the length of the make-ready process, drives up costs, and can potentially compromise pole integrity while presenting a safety risk to attacher employees, contractors, and the public at large.

Although Lumos believes there is a lot of merit to the concept of one-touch make ready, Lumos also recognizes that it is not without controversy. In the NPRM, the Commission specifically cited to the Louisville, Kentucky and Nashville, Tennessee pole attachment regimes that include elements of the aforementioned one-touch make ready concept.⁷ However, both the Louisville and Nashville one-touch make ready regimes have been or currently are under legal challenge. Thus, even though one-touch make ready would likely reduce the time and cost associated with the completion of the pole attachment process, it may be premature for the

⁶ Id.

⁷ See *NPRM* at ¶¶ 21-23.

Commission to enthusiastically embrace elements of either the Louisville or Nashville one-touch make ready regimes until these legal challenges have been completely resolved by the courts.

Instead, as stated in its initial Comments, Lumos is of the opinion that the Commission would be better served at this time to simply move forward with the proposals proffered in the NPRM intended to shorten the current four-stage pole attachment timeline. These include a graduated timeframe for pole owners to decide whether or not to grant access following the receipt of an attacher request based upon the number of poles involved in the request;⁸ a reduction in the current 14 day timeframe for the presentation of a cost estimate to 7 days;⁹ the adoption of a “best practice” make-ready period of 30 days or less for small pole attachment requests and 45 days for medium-size requests;¹⁰ and the implementation of new rules permitting prospective attachers to perform make-ready work in lieu of the pole owner or existing attacher(s) performing such work, especially in situations in which the required make-ready work is routine or commonplace.¹¹

Additionally, Lumos is in agreement with AT&T that the 15 days currently afforded to pole owners to complete make-ready work that existing attachers fail to complete in the required timeframe should be eliminated.¹² Lumos further agrees with AT&T that the potential addition of this extra 15-day period as currently provided for in 47 C.F.R. § 1.1420(e) merely adds

⁸ See Lumos Comments at p. 5.

⁹ See Lumos Comments at p. 8.

¹⁰ Id.

¹¹ See Lumos Comments at p. 6.

¹² AT&T Comments at p. 13.

complexity to the pole attachment process without any tangible benefit.¹³ The Commission should thus eliminate this 15-day period in favor of allowing the new attacher to invoke its self-help remedy and perform the make-ready work with an approved contractor as soon as an existing attacher fails to do so within the timeframe currently allotted.

In short, while the Commission lets the legal dust settle on the concept of one-touch make ready, the adoption of these time shortening pole attachment proposals now, as Lumos has recommended, would significantly expedite the deployment of needed broadband infrastructure projects that in Lumos experience currently take an average 4-6 months to successfully complete.¹⁴

III. THE COMMISSION SHOULD ADOPT RULES PROHIBITING THE IMPOSITION OF EXCESSIVE FEES, COSTS AND OTHER REQUIREMENTS BY STATE AND LOCAL JURISDICTIONS THAT MAY NEEDLESSLY DELAY OR HAVE THE EFFECT OF PROHIBITING THE TIMELY DEPLOYMENT OF BROADBAND SERVICE.

In addition to modifications intended to improve access to pole attachments, the Commission correctly identified other areas that could be reformed in order to improve broadband deployment. One such area involves the Commission's authority under Section 253 to effectively preempt state and local regulations that seek to inhibit the timely and cost effective deployment of broadband services. Over the past several years, Lumos has found that its dealings with state and local government have presented significant barriers to the timely deployment of broadband services.

¹³ Id.

¹⁴ See Lumos Comments at p. 9.

As Lightower Fiber Networks correctly noted in its initial comments, Lumos believes that the Commission has the requisite authority to adopt such rules pursuant to the language of Section 253 and its corresponding authority under 47 U.S.C. 201(b) to “*prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions*” of the Telecommunications Act of 1934.¹⁵ Likewise, Lumos would assert that the adoption of general rules pertaining to Section 253(a) is not inconsistent with the provisions of Section 253(d) permitting the Commission to preempt the enforcement of particular state or local statutes, regulations, or requirements “*to the extent necessary to correct such violation or inconsistency,*” in that rules implementing and interpreting Section 253(a) will provide clarification on what constitutes a state or local regulation or practice that may prohibit or have the effect of prohibiting the provision of telecommunications service.¹⁶

For example, near the end of 2014, Lumos publicly announced plans for a significant expansion of its fiber optic network in key markets of Richmond and Norfolk in eastern Virginia. As part of this expansion, Lumos planned to deploy approximately 665 total route miles of fiber optic facilities. This particular fiber network expansion project involved an extremely aggressive timetable for completion, and required Lumos to construct facilities within multiple local municipalities in Virginia – each of which had different legal requirements governing the use of their public rights-of-way (“PROW”) for the fiber build activity planned by Lumos.

One such legal requirement inevitably involved the securing of an appropriate franchise or license agreement permitting Lumos to utilize the PROW within the involved municipality. In Lumos’ experience, it took anywhere from four to six months on average to negotiate and gain

¹⁵ See Lightower Comments at p. 17.

¹⁶ Lightower Comments at pp. 17-18.

approval of a local franchise or license agreement from these local municipalities. This is important to note because the involved municipalities would not allow Lumos to proceed with actual broadband deployment activities until said franchise or license agreement was successfully negotiated, presented to, and approved by city council.

In addition to the rather lengthy approval process as noted hereinabove, the terms and conditions embodied in these individual franchise/license agreements were not at all consistent. For example, some local municipalities requested annual monetary compensation from Lumos for the use of their PROW, while others did not. For those local municipalities seeking monetary compensation, the calculation and amount of the requested compensation were likewise inconsistent. Some local municipalities proposed a fee assessed per linear foot of fiber facilities placed with the municipality's PROW with the proposed fee ranging anywhere from \$0.25/linear foot to \$3.25/linear foot. Other local municipalities required PROW compensation to be based upon a percentage of Lumos' annual gross earnings achieved from the provision of telecommunications services to customers located within the municipality.

In some instances, not only was annual monetary compensation necessary, but certain local municipalities also required Lumos to provide fiber optic facilities and other outside plant services directly to the municipality for its exclusive benefit. These fiber optic facilities and corresponding outside plant services were either required to be donated to the involved municipality free of charge or simply provided at cost. Either way, the fact that Lumos had to plan and provision extra fiber optic facilities and services for the exclusive benefit of the local municipality only served to delay the overall completion of Lumos' fiber optic installation project.

Moreover, these types of wildly divergent requirements in local municipal franchise/license agreements raise a more fundamental concern regarding competitive fairness and neutrality. Although Lumos does not contest the ability of a local municipality to manage access to its PROW, the municipality's management nonetheless needs to be fair, non-discriminatory, and competitively neutral in accordance with federal law and Commission regulations. Specifically, 47 U.S.C. § 253(c) retains for state and local governments the authority to manage their public rights-of-way, but requires that management of public rights-of-way be "*competitively neutral and nondiscriminatory*" and that any fees assessed be "*fair and reasonable*." In Lumos' experience, however, local municipal application of the proposed PROW use fees and requests for the donation of fiber facilities are not applied in a competitively neutral and nondiscriminatory manner – especially at it relates to the ILEC serving that particular municipality. More often than not, Lumos suspects that local municipalities do not require of the ILEC what it subsequently requires of competitive LECs like Lumos with regard to the execution of formal franchise/license agreements, the assessment of PROW usage fees, and requests for fiber donations in exchange for the privilege of utilizing the municipality's PROW.

Accordingly, Lumos is in agreement with Lightower that any forthcoming Commission rules interpreting Section 253(a) clearly specify that all state and local jurisdictional fees associated with the placement of telecommunications infrastructure in PROW be based on or otherwise verifiably connected to the actual costs incurred by the state and local jurisdiction to regulate telecommunications providers' use of the same.¹⁷ Additionally, as noted earlier, there is often no available evidence that all telecommunications providers are being charged in an equitable manner, so it is equally important that any rules implementing Section 253(a) likewise

¹⁷ Lightower Comments at p. 22.

require full cost transparency so that competitive providers can ascertain whether or not they are being treated fairly and in the same manner as the ILECs or other similarly situated providers.

Lastly, given that broadband infrastructure is becoming exceedingly important to the continued prosperity of state and local governments as well as the consumers and the businesses located therein, the delay associated with negotiating and granting franchise/license agreements, which place unfair and extraordinary requirements on the competitive telecommunications provider, constitutes a significant broadband deployment barrier today. In order to remove this barrier, the Commission should also adopt rules placing time limits on state and local consideration of applications for telecommunications franchise/license agreements, and further that the requirements of these franchise/license agreements be applicable to all entities, including the ILEC, that utilize the a municipality's PROW. In this regard, Lumos concurs with the recommendation made by Lightower that a state and local review period of 90 days be adopted for consideration of typical telecommunications deployment proposals.¹⁸

IV. THE COMMISSION SHOULD ADOPT A SHOT CLOCK TO ENSURE THE TIMELY RESOLUTION OF POLE ATTACHMENT COMPLAINTS.

In addition to the targeted shortening of the current four stage timeline for the processing of pole attachment applications, the Commission should also adopt the proposal in the NPRM to establish a shot clock or deadline for timely resolution of pole attachment complaints. Although the Commission's rules include a variety of measures that certainly help to minimize the need for the filing of formal complaints, it should not be surprising to anyone even at this late date that pole owners and potential attachers can and often do have sincere good faith disagreements about

¹⁸ Lightower Comments at p. 20.

the requirements of applicable law and the interpretation of the terms of their pole attachment agreements. In short, formal complaints are still going to occur.

While the Commission's previous retention of the "sign and sue" rule as part of the *2011 Pole Attachment Order* somewhat reduces the urgency surrounding the expedited disposition of pole attachment complaints by allowing parties to attach facilities despite the existence of the underlying dispute, the mere fact that such a complaint is pending still produces a degree of uncertainty and anxiety that may very well serve as a deterrent to the continued deployment of broadband facilities in certain circumstances. Adding a shot clock governing the completion of the complaint process would ensure a timely resolution of any disputed issues, which should logically be of benefit to all of the parties involved in the complaint.

While the Commission and several ILEC commenters have expressed support for a 180 day shot clock,¹⁹ Lumos believes that even a 180 day timeframe, especially given all of the procedural steps that must be completed before a formal complaint can even be filed with the FCC as per §1.1404(k), is still too long. Consequently, Lumos is in agreement with Lightower and would thus recommend that the Commission adopt a 90-day shot clock, which would be triggered at the time the complaint is filed.²⁰ Given Lumos' recommendation for a further reduction in the timeframe initially proposed in NRPM, Lumos would not object to "pauses" or limited extensions of its proposed 90-day shot clock for good cause shown, provided all of the parties to the underlying complaint agree.

In addition to the implementation of a complaint completion shot clock, Lumos would also recommend that the Commission give serious consideration to establishing defined

¹⁹ NPRM at Paragraph 47; Frontier Comments at p. 14; Verizon Comments at p. 15; AT&T Comments at p. 25.

²⁰ Lightower Comments at p. 16.

timeframes in §1.1404(k), as it relates to the outlining of the allegations comprising the complaint, the response thereto provided by the pole owner, and especially the subsequent holding and completion of executive-level discussions by the parties to the dispute. The executive-level discussion aspect of the current process outlined in §1.1404(k) is particularly vulnerable to manipulation by pole owners. Consequently, Lumos would recommend that the timeframe afforded for response to the allegations after receipt of the same by the pole owner be no more than 10-days, with the initiation and completion of executive-level discussions thereafter being no greater than 30-days so as to prevent unwarranted delays by pole owners.

V. THE COMMISSION SHOULD REJECT ARGUMENTS IN OPPOSITION TO POLE OWNERS MAINTAINING A LIST OF COMMON MAKE READY CHARGES UNLESS AND UNTIL POLE OWNERS BEGIN PROVIDING DETAILED LINE ITEM INVOICING OF ITS MAKE READY CHARGES.

Despite the objections raised by several ILECs, including Frontier and AT&T,²¹ Lumos remains strongly in favor of requiring pole owners to maintain price lists of common make-ready charges. In addition, Lumos recommends that the Commission require pole owners to provide detailed make-ready estimates instead of single line invoices, which is the prevailing practice among pole owners today.²²

In objecting to the Commission's proposal regarding price lists, both Frontier and AT&T essentially argue that standard make ready price lists are impractical or even impossible to create because each utility operates in a different geographic areas, their pole networks are subject to different stresses and conditions, and that each requires flexibility to adjust make ready pricing to

²¹ See Frontier Comments at pp. 21-22 and AT&T Comments at p. 19.

²² Lumos Comments at p. 12.

account for such variables.²³ In other words, Frontier and AT&T argue that they should enjoy unlimited discretion to set their own make ready pricing essentially because they are large ILECs that provide pole attachment services across multiple states. In Lumos' view, these arguments, however well-intentioned, lack merit.

As an initial matter, Lumos acknowledges that the establishment of a comprehensive price list covering virtually each and every conceivable make ready activity is not realistic, but that is not what Lumos is proposing in this proceeding, and in Lumos' view, neither is the Commission. Rather, Lumos is advocating for the creation of a standard price list that would cover routine and commonplace make ready activities.²⁴ Raising or lowering existing attachments, replacing guy wires, and pole replacement to add additional height are but a few examples of routine, commonplace make ready work for which Lumos finds it hard to fathom that jurisdictional variances would be so significant as to make the creation of a standard price list impossible. The availability of such pole owner price lists would significantly reduce the amount of time that Lumos currently expends to investigate and ultimately evaluate the overall reasonableness of the pole owner's proposed make ready charges.

If, however, the Commission elects to adhere to current policy and not require the creation of standard make ready price lists by pole owners, it is then absolutely essential that the Commission make clear that pole owner invoicing for make ready work be presented with sufficient detail so as to enable the attacher to properly evaluate the reasonableness of the make ready charges. As Lumos noted in its initial Comments, pole owners often send bulk or single

²³ See Frontier Comments at p. 21 and AT&T Comments at p. 19.

²⁴ See Lumos Comments at p. 12.

line make-ready invoices without any explanation or cost detail.²⁵ Without clear itemization of the make ready invoices received, Lumos has no way to evaluate whether these charges are fair or accurate for the work required to be undertaken, which thereby forces Lumos to spend additional time and money internally in an effort to determine the same. If, however, specific cost detail for make ready invoicing was required to be provided by pole owners up front, there would likely be no need for the full 14-day period currently provided by Commission rules for the evaluation of such make ready estimates,²⁶ a reduction of which would no doubt further expedite both the pole attachment process and the deployment of broadband facilities.

VI. CONCLUSION

For all of the foregoing reasons, Lumos Networks' recommendations regarding modifications and improvements to the Commission's current pole attachment rules and regulations should be adopted as presented herein. As a competitive fiber provider working each and every day to build fiber facilities for the benefit of its customers, Lumos wishes to sincerely thank the Commission for taking on these critically important issues.

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²⁵ Lumos Comments at p. 13.

²⁶ 47 CFR § 1.1420(d)(1) and (2)