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VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
455 12th Street SW
Washington, DC 20554

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

Dear Ms. Dortch,

On July 16, 2018, Jennifer McKee and Steve Morris of NCTA – The Internet & Television Association (NCTA), Paul Glist of Davis Wright Tremaine, on behalf of NCTA, and Jennifer Prime of Cox Enterprises, met with Erin McGrath, Legal Advisor to Commissioner O'Rielly, to discuss the *Draft Third Report and Order* under consideration in the above-referenced proceeding.[1] On July 17, 2018, Ms. McKee, Mr. Morris, Mr. Glist, Barry Ohlson of Cox Enterprises, and Christianna Barnhart of Charter Communications, met with Jamie Susskind, Chief of Staff to Commissioner Carr, to discuss the same proceeding.

In the meetings, NCTA explained that cable operators are spending billions of dollars on new broadband deployment. We strongly support balanced reforms to the Commission's pole attachment rules that promote new investment in broadband while protecting the safety and reliability of existing networks. In particular, we explained that many of the decisions proposed in the *Draft Third Report and Order* would be helpful in promoting continued broadband deployment by cable operators, including codification of the Commission's overlashing policy, accelerating the processing of pole attachment applications, and the declaratory ruling regarding local construction moratoria.

We expressed concern, however, that the one touch make-ready (OTMR) policy proposed in the item does not strike the appropriate balance and would jeopardize the safety and reliability of existing cable networks. The fundamental problem is that the draft item would require that existing attachers surrender complete control over work on, and relocation of, their networks to a new attacher, but not require the new attacher to take complete responsibility for its work. We strongly disagree with the suggestion in the *Draft Third Report and Order* that Section 224 provides new attachers a greater right to move existing facilities than the company

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[1] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Third Report and Order and Declaratory Ruling, FCC-CIRC1808-03 (rel. July 12, 2018) (*Draft Third Report and Order*).

that owns those facilities.[2] The better and non-discriminatory approach is for existing attachers to be given the opportunity to move and protect their own networks in an expedited time frame, as proposed by NCTA.[3] That is essentially the approach the *Draft Third Report and Order* takes for non-OTMR situations and it should apply in all cases.[4]

The *Draft Third Report and Order* states that by providing existing attachers a limited opportunity to receive notice and to observe the work, it enables cable operators to adequately protect their networks. But the draft actually provides no meaningful vehicle for stopping problems before they occur, escalating disputes while they are in progress, or obtaining relief from the operational and financial issues that routinely and will inevitably arise. For example, we explained that existing attachers have no recourse in the following situations:

- A new attacher fails to give an existing attacher notice of a make-ready project;
- An existing attacher disagrees that proposed work should be classified as simple;
- An existing attacher believes a contractor is unqualified based on past experience or that a new attacher has improperly certified that a contractor is qualified;
- An existing attacher disagrees with determinations made during a survey;
- A new attacher fails to report an outage or damage to an existing network in a timely manner;
- A new attacher fails to repair an outage or damage to an existing network in a timely manner;
- A new attacher fails to reimburse an existing attacher for costs attributable to monitoring survey and/or make ready work; and
- A new attacher causes an outage that exposes an existing attacher to liability for damages, such as loss of service to a BDS customer or worse, a loss of 911 capability.

There is ample evidence in the record that a substantial number of incidents, including 911 outages, already have occurred even in the very limited implementation of OTMR to date.[5] The Commission should be far more concerned about the effect that nationwide authorization of OTMR will have on the safety and reliability of existing networks. The *Draft Third Report and Order* suggests that providing utilities the right to address *some* of these situations "addresses

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[2] *See id*. at ¶ 32 (suggesting that statutory right of existing attachers to move facilities is limited to make-ready triggered by pole owners, but identifying no statutory right of new attachers to move any existing facilities).

[3] NCTA Accelerated and Safe Access to Poles (ASAP) Proposal, attached to 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).

[4] *Draft Third Report and Order* at ¶ 80 (adopting 30-day period for existing attachers to move facilities before new attacher may exercise self-help). Similarly, the BDAC recommended a 25-day period before a new attacher can begin OTMR. Contrary to assertions made by Verizon, the BDAC recommendation did not prohibit existing attachers from moving their facilities during this window.

[5] *Draft Third Report and Order* at ¶ 26. The finding in the draft item that the Commission is "not persuaded" by this "anecdotal" evidence is arbitrary and should be reversed.

existing attachers' apprehension about unfamiliar contractors working on their facilities."[6] That statement is wrong. As the draft item acknowledges, "many utilities have indicated that they do not have the expertise to select contractors qualified to work in the communications space."[7] Given that explicit acknowledgement, allowing utilities to raise concerns is unlikely to be a meaningful remedy for existing attachers in the real world or an adequate substitute for the ability of cable operators to represent their own interests.

Accordingly, if the Commission adopts OTMR without requiring privity of contract between an existing attacher and the new attacher that is allowed to physically move the existing facilities, it is particularly critical that the Commission take explicit steps in its rules to hold new attachers responsible for the work performed by their contractors and accountable for complying with any new obligations imposed by the order. At a minimum, we suggested that the *Draft Third Report and Order* should be revised to include the following:

1. The right of an existing attacher to demand immediate correction of an outage in real time and an explicit statement in the rules that repairing outages to existing customers takes precedence over the completion of make-ready work. The suggestion in the *Draft Third Report and Order* that new attachers should be given 14 days to fix problems caused by their work ignores the urgent need to remedy an outage situation as quickly as possible;[8]
2. The right of an existing attacher to object during a survey to a determination that make-ready is simple (e.g., to assert that the work will involve splicing, is likely to cause outage, or is other "complex" work). As noted above, utilities have made clear that they may not have expertise regarding communications networks, and therefore limiting this objection right to utilities creates undue risk to cable operators and other existing attachers;[9]
3. The right of an existing attacher to disqualify a contractor selected by a new attacher if the existing attacher previously has terminated that contractor for poor performance. While there is no merit in the baseless suggestion in the *Draft Third Report and Order* that existing attachers will always act in bad faith to delay a project,[10] the right we propose here is sufficiently narrow that there is no possibility of this type of gaming.
4. The right of an existing attacher to avoid the risks associated with OTMR by moving its own facilities during the 15-day notice period. Permitting an existing attacher to move its

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6 *Draft Third Report and Order* at ¶ 27.

7 *Id. at ¶ 35.*

8 *Id.* at ¶ 63.

9 *Id.* at ¶ 35. The record makes clear this risk is significant. Charter demonstrated that roughly 20 percent of attachments in San Antonio were wrongly classified as simple rather than complex (in addition to a wide variety of other problems). Charter Comments at 41. Remarkably, the *Draft Third Report and Order* discounts Charter's very real problems in this community and instead finds that the experience in San Antonio demonstrates that "an OTMR process can work as intended to speed broadband deployment without sacrificing safety or network integrity." *Draft Third Report and Order* at ¶ 26.

10 *Id.* at ¶ 41.

own facilities during this window would speed broadband deployment by new attachers to exactly the same degree as the proposal in the *Draft Third Report and Order*. The draft item offers two reasons for denying existing attachers this right – "eliminating multiple trips to the pole and decreasing make-ready costs for new attachers"[11] – but the first has nothing to do with the pace of broadband deployment and the second is not supported by any meaningful evidence.

5. Reimbursement of "any of the costs" incurred by an existing attacher that are attributable to make-ready by a new attacher. The interpretation of Section 224(i) in the *Draft Third Report and Order* adds qualifying language to the phrase "any of the costs" that does not appear in the statute.[12] The Commission should explicitly require reimbursement of "any of the costs" attributable to make-ready by a new attacher, including the cost of being present at any field inspection conducted as part of the new attacher's surveys and one-touch make-ready work;

6. A requirement that new attachers indemnify existing attachers for liability attributable to outages caused by a new attacher that chooses OTMR. There is no defensible basis for any suggestion that an existing attacher should have to bear responsibility for liability attributable to shoddy work of OTMR contractors. In particular, the repeated suggestion that existing attachers have contractual remedies available is impossible to reconcile with the fact that the proposed OTMR regime does not require privity of contract between new attachers and existing attachers;[13]

7. A longer time frame for existing attachers (e.g., 60-90 days) to inspect make-ready work and raise claims about damage to existing networks. While accelerated time frames make sense as a way to speed deployment by new attachers, there is no reason for the same level of urgency once the new facilities have been deployed (outside of the outage situation identified above). The objective identified in the *Draft Third Report and Order* – identifying work that has the potential to cause harm or injury[14] – is a worthy one, but it is unfair to penalize existing attachers by establishing an unrealistically aggressive time frame for inspecting the unsafe work of a contractor they had no role in choosing; and

8. The right of an existing attacher to file a complaint against a new attacher for failure to meet its obligations under the Commission's rules. The *Draft Third Report and Order* imposes a variety of obligations on new attachers,[15] but those obligations are meaningless if there is no mechanism to enforce them.

Finally, we encouraged the Commission to specifically identify the portions of any new rules that would require approval by the Office of Management and Budget pursuant to the Paperwork Reduction Act.[16] Given the complex arrangements that must take place among

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[11] *Id.* at ¶ 62.

[12] *Id.* at ¶ 69 (suggesting that statutory language means "any *portion* of the costs" or "costs directly connected" to rearranging or replacing an attachment when the statute actually says "any of the costs") (emphasis in original).

[13] *Id.* at ¶¶ 68-70.

[14] *Id.* at ¶ 66.

[15] *Id.* at ¶ 27.

[16] *Id.* at ¶ 164.

multiple companies, it will be important for all affected to providers to be clear as to when various components of any new rules will take effect.

Respectfully submitted,

/s/ Steven F. Morris

Steven F. Morris

cc: Erin McGrath
Jamie Susskind