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Ex Parte

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

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

Dear Ms. Dortch:

Verizon continues to support the Commission's adoption of a one-touch make-ready (OTMR) option for new pole attachers, consistent with our filed comments and prior ex partes in this proceeding.¹ As the Commission has proposed,² adopting OTMR will be an important and critical step in promoting broadband deployment. Permitting new attachers to use a pole-owner approved contractor to perform all make-ready at one time increases efficiency and predictability, while also reducing disruptions for municipalities and residents.³ In short: the *Draft Order's* adoption of a robust OTMR process resolves the fundamental issues of delay and

¹ See, e.g., Verizon Comments (June 15, 2017) ("Wireline NPRM Comments") and Reply Comments (July 17, 2017) ("Wireline NPRM Reply Comments"), WC Docket No. 17-84; Verizon Comments (June 15, 2017) and Reply Comments (July 17, 2017), WT Docket No. 17-79 & WC Docket No. 17-84; Verizon Ex Parte Letter, WT Docket No. 17-79 & WC Docket No. 17-84 (Mar. 8, 2018) ("Verizon March Ex Parte"); Verizon Ex Parte Letter, WC Docket No. 17-84 (June 21, 2018) (Verizon June Ex Parte"); Verizon Ex Parte Letter, WC Docket No. 17-84 (July 2, 2018) ("Verizon July 2 Ex Parte") Unless otherwise specified, all other citations are to WC Docket No. 17-84.

² See *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Draft Third Report and Order and Declaratory Ruling, WC Docket No. 17-84 & WT Docket No. 17-79; FCC-CIRC1808-03 (rel. July 12, 2018) ("*Draft Order*").

³ See *id.* ¶¶ 22-23, 28.

uncertainties inherent in make-ready by multiple parties and will help open the way for greater broadband deployment.⁴

But some parties still seek to forestall the *Draft Order's* adoption of OTMR.⁵ The Commission should reject those attempts. Indeed, many of the providers objecting to OTMR here themselves already safely use contractors in de-facto or informal OTMR arrangements to reduce costs and speed attachments.⁶ The president of the Power & Communication Contractors Association recently stated, “[t]he vast majority of broadband work is contracted out and is performed safely and effectively by PCCA members. We work for all types of broadband carriers, including the ones who are badmouthing contractor performance.”⁷

The Commission’s proposed approach properly balances safety concerns with driving broadband deployment, appropriately finding that “the new attacher and its chosen contractor have an incentive to perform quality work in order to limit risk, keep workers safe, and avoid tort liability for damages caused by substandard work.”⁸ The *Draft Order* also adopts important safeguards to ensure that OTMR work is performed correctly and any damage is remedied promptly at the new attacher’s expense. The record fully supports the Commission’s adoption of the balanced OTMR policy in the *Draft Order*.

Below, we explain in more detail why the Commission should reject recent problematic proposals that seek to change the *Draft Order* in ways that would impede broadband deployment. We also suggest some minor revisions to the OTMR and overlashing sections to better clarify the Commission’s intent.

The Commission Should Reject Efforts to Undermine its OTMR Proposal

Most of the claims in recent opposing ex partes are nothing more than attempts to revive arguments that the Commission rejected in the *Draft Order*. The Commission should decline to

⁴ See Windstream Ex Parte Letter, at 1 (July 25, 2018) (“In general, the proposed ‘One-Touch Make Ready’ (OTMR) process will speed-up infrastructure deployment, reduce the overall costs associated with make-ready work and encourage the rollout of broadband.”).

⁵ See, e.g., NCTA Ex Parte Letter, at 1 (July 18, 2018) (“NCTA July 18 Ex Parte”) (expressing concern that the *Draft Order's* OTMR policy “would jeopardize the safety and reliability of existing cable networks”).

⁶ See Power and Communication Contractors Association Ex Parte Letter, at 2 (Nov. 30, 2017) ; CMA Strategy Consulting, “Perspectives on the Current State of Make Ready and the Potential Impact of a One-Touch Make-Ready Policy,” at 12, *attached to* Verizon Ex Parte Letter (Nov. 13, 2017).

⁷ See PCCA Supports FCC Draft Order to Facilitate Broadband Deployment, (July 24, 2018), <https://www.pccaweb.org/88-news/releases/194-pcca-supports-fcc-draft-order-to-facilitate-broadband-deployment>.

⁸ *Draft Order* ¶ 25.

revisit them now, as these arguments are belied by the record and would only undermine or eviscerate the effectiveness of OTMR.

The Commission should maintain its straightforward OTMR process and reject proposals to allow existing attachers to do their own make-ready as part of it. NCTA continues to argue that existing attachers should have an opportunity to complete their own make-ready during the OTMR notice period.⁹ The *Draft Order* properly rejects this and other non-OTMR solutions because they “would ‘do nothing to solve the numerous separate climbs and construction stoppages in the public-rights-of-way’ resulting from sequential make-ready.”¹⁰ The Commission’s proposed conclusion is amply supported by the record. As Verizon and others have explained, the defining characteristic of OTMR is that the new attacher has certainty that it can use an approved contractor to complete all make-ready on a pole at one time.¹¹ Proposals such as NCTA’s to remove this certainty and allow existing attachers to do their own make-ready are half measures that would “merely modify the current framework”¹² without solving the fundamental delays and uncertainties inherent in make-ready performed by multiple parties.¹³ The Commission should reject NCTA’s latest call to allow existing attachers to do their own make-ready under OTMR.

Reject calls to impose broad indemnification on OTMR. All parties agree, and the *Draft Order* finds, that new attachers should be responsible for damage to the pole or existing attachments caused by OTMR.¹⁴ Yet NCTA and CenturyLink continue to argue that the Commission should require broad third-party indemnification for consequential damages as a condition of using OTMR.¹⁵ The *Draft Order* correctly declines to do so based on a finding that the combination of existing contract and tort law “provides sufficient protection for existing attachers without broad federal regulatory intrusion.”¹⁶ As Verizon and others have previously explained – and as the *Draft Order* recognized – broad indemnification is neither legally required

⁹ See NCTA July 18 Ex Parte at 3-4 (proposing “right of existing attacher” to “mov[e] its own facilities during the [OTMR] initial notice period). See also, CenturyLink Ex Parte Letter, at 4 (July 23, 2018) (“CenturyLink Ex Parte”) (same).

¹⁰ *Draft Order* ¶ 30, quoting INCOMPAS Wireline NPRM Comments at 10.

¹¹ See Verizon July 2 Ex Parte at 4; Google Fiber July 26 Ex Parte at 2.

¹² See *Draft Order* ¶ 30.

¹³ See Verizon July 2 Ex Parte at 6; Google Fiber Ex Parte Letter, at 2 (July 26, 2018) (explaining that adopting NCTA’s proposal to allow existing attachers to do their own make-ready during the OTMR notice period “would eviscerate nearly all of the benefits of OTMR”); Google Fiber Ex Parte Letter, at 2 (Apr. 12, 2018) (explaining that a “shorter timeframe does nothing to ameliorate the . . . high, unpredictable costs incurred by existing attachers and charged back” to new attachers).

¹⁴ See *Draft Order* ¶ 65 (describing process for utility and existing attachers to inspect OTMR work, notify new attacher of any OTMR-caused damage, and make the new attacher remedy the damage at its own expense or pay for the utility’s or existing attacher’s remedial work).

¹⁵ See NCTA July 18 Ex Parte at 4; NCTA Ex Parte, at 2 (July 25, 2018); CenturyLink Ex Parte at 4.

¹⁶ *Draft Order* ¶ 68.

nor is it good policy.¹⁷ Such an approach seeks only to expose new attachers to liability for damages for which existing attachers are not currently liable and goes far beyond even the existing rules' requirements when a new-attacher uses self-help.¹⁸

Reject proposals for the existing attacher to be able to object to or veto the contractor's determination of "simple" versus "complex" make-ready. Under the *Draft Order's* OTMR process, the new attacher's "contractor determines whether make-ready work identified in the survey is 'simple or complex, subject to an electric utility's right to reasonably object to that determination.'" ¹⁹ Yet NCTA argues that existing attachers should have the right to object to a contractor's simple-make-ready determination²⁰ and some electric utilities argue that the "existing attacher, the new communications attacher and/or its qualified contractor" should be the final arbiter of whether make-ready is simple or complex.²¹ But the record, as the *Draft Order* correctly finds, demonstrates that the new attacher's contractor has the appropriate incentives to make the correct determination of simple versus complex whereas other parties might be incentivized to slow a new attacher's deployment by over-designating make-ready work as complex.²²

Reject proposals to allow existing attachers to object to or veto a contractor. The *Draft Order* declines to grant existing attachers objection or veto rights over the new attacher's contractor because of concerns that existing attachers would have the incentive to engage in competitive gamesmanship to delay the new attacher's deployment.²³ Yet NCTA continues to urge that an existing attacher should have the right.²⁴ As the record makes clear,²⁵ giving existing attachers objection or veto rights over approved contractors will delay broadband deployment and re-introduce uncertainty and inefficiencies back into the process.

Reject proposals to lengthen the Draft Order's 15-day OTMR notice period. Under the *Draft Order*, "[t]he new attacher may proceed with OTMR by giving 15 days' prior written

¹⁷ See Verizon July 2 Ex Parte at 5 (explaining that broad indemnification is not required by 47 U.S.C. § 224(i) and would have a chilling effect on use of OTMR); Google Fiber Ex Parte Letter, at 1 (July 23, 2018) ("Google Fiber July Ex Parte"); Google Fiber Ex Parte Letter, at 3 (March 14, 2018) ("Google Fiber March Ex Parte"); *accord Draft Order* ¶¶ 68-70.

¹⁸ Google Fiber March Ex Parte at 3.

¹⁹ *Draft Order* ¶ 50, quoting Broadband Deployment Advisory Committee, FCC, *Report of the Competitive Access to Broadband Infrastructure Working Group*, at 24 (Jan. 2018), <https://ecfsapi.fcc.gov/file/107030255502405/Competitive%20Access%20to%20Broadband%20Infrastructure%20Report.pdf> ("BDAC January 2018 Recommendations").

²⁰ See NCTA July 18 Ex Parte at 3.

²¹ See American Electric Power Service Corp., *et al.* Ex Parte Letter, at 1 (July 23, 2018) ("AEP July Ex Parte").

²² See *Draft Order* ¶ 50; See Google Fiber Wireline NPRM Reply Comments at 6; Verizon March Ex Parte at 5; INCOMPAS Ex Parte Letter, at 2 (Apr. 4, 2018) ("INCOMPAS Ex Parte").

²³ See *Draft Order* ¶ 41.

²⁴ See NCTA Chairman Pai Ex Parte Letter, at 2 (July 23, 2018); NCTA July 18 Ex Parte at 3.

²⁵ See Verizon June Ex Parte at 2; CenterPoint Energy, *et al.* Ex Parte Letter, at 2 (May 25, 2018); Fiber Broadband Association Ex Parte Letter, at 2 (Apr. 10, 2018); Google Fiber Ex Parte Letter, at 1-2 (Feb. 1, 2018); INCOMPAS Ex Parte at 2.

notice to the utility and all affected existing attachers.”²⁶ NCTA and CenturyLink argue that this notice period should be lengthened to 25 days as recommended by the BDAC.²⁷ The *Draft Order* explicitly departed from the BDAC’s recommendation, however, because a “25-day notice period . . . for OTMR is only five days shorter than the 30-day period recommended by the BDAC for existing attachers to complete complex make-ready work, which is not much time savings for an OTMR process that we adopt for simple work that is unlikely to cause safety issues.”²⁸ We agree. Fifteen days “strikes a reasonable balance between promoting fast access to utility poles” and providing enough time for utilities and existing attachers to “arrange to be present when OTMR is performed on their equipment.”²⁹ The Commission should retain the *Draft Order*’s 15-day OTMR notice period.

Adopt the Draft Order’s rules for self-help above the communications space. The Commission should reject requests to eliminate the *Draft Order*’s new self-help remedy for make-ready work above the communications space.³⁰ As the *Draft Order* notes, “the network infrastructure needed to support 5G cannot wait” and “extend[ing] the self-help remedy to attachments above the communications space closes ‘a significant gap in the Commission’s rules that leaves [attachers] without a meaningful remedy when the electric utility fails to perform make-ready in a timely fashion.’”³¹ The record amply supports these conclusions.³² The *Draft Order* adequately addresses electric utilities’ safety and reliability concerns by requiring new attachers to use a qualified contractor from the utility’s list of approved contractors for non-communications-space make-ready, noting that electric utilities can address safety and reliability concerns when they receive an attacher’s advance-self-help and post-completion notices, and allowing an electric utility to make the final determination when disputes arise between the electric utility and an attacher regarding self-help surveys or self-help make-ready work above the communications space.³³ Additionally, the Commission’s rules allow utilities – which includes electric utilities – to deviate from the Commission’s make-ready timelines based on good cause.³⁴ Finally, as the *Draft Order* notes, electric utilities can avoid the self-help remedy by completing their make-ready in a timely manner.³⁵ For these reasons, the Commission should adopt the *Draft Order*’s rules for self-help above the communications space.

Reject proposals to exclude strand-mounted antennas from overloading. In response to the *Draft Order*, CenturyLink renews its request that the Commission exclude “strand-mounted antennas and other RF-emitting devices, batteries and power supplies” from overloading.³⁶ This

²⁶ *Draft Order* ¶ 59.

²⁷ NCTA Commissioner Rosenworcel Ex Parte Letter, at 2 (July 23, 2018).

²⁸ *Draft Order* ¶ 60.

²⁹ *Id.*

³⁰ See, e.g., AEP July Ex Parte at 3; FirstEnergy Ex Parte Letter, at 1-3 (July 20, 2018).

³¹ *Draft Order* ¶¶ 91-92, quoting Crown Castle NPRM Comments at 19 (June 15, 2017).

³² CTIA NPRM Comments at 5 (June 15, 2017).

³³ See *Draft Order* ¶ 93; 47 C.F.R. § 1.1412(d).

³⁴ See 47 C.F.R. § 1.1420(h)(2).

³⁵ See *Draft Order* ¶ 93.

³⁶ CenturyLink Ex Parte at 1.

issue was addressed in comments on the FNPRM³⁷ but is not addressed in the *Draft Order*. If the Commission addresses the issue, it should find that overlashing applies to strand-mounted attachments. As we have previously explained, overlashing practice has for many years included cable television amplifiers, splice boxes, optical nodes, Wi-Fi antennas, and other equipment.³⁸ As with other types of overlashing, under the *Draft Order* a utility can impose an up-to-15-day advance notice requirement, which would be “sufficient to address safety and reliability concerns” with overlashing involving strand-mounted antennas or other equipment and would “provide[] utilities with the opportunity to conduct any engineering studies or inspections either prior to the overlash being completed or after completion.”³⁹

Reject proposal to shift responsibility to new attacher for remedying preexisting violations. The *Draft Order* clarifies that new attachers are not responsible for the costs of remedying poles or attachments that have preexisting violations of safety or construction standards,⁴⁰ “utilities may not deny new attachers access to the pole based on safety concerns arising from a pre-existing violation,”⁴¹ and “a utility cannot delay completion of make-ready while the utility attempts to identify or collect from the party who should pay” to correct the preexisting violation.⁴² While AEP purports to agree that a new attacher should not be responsible for the cost of remedying preexisting violations, AEP nevertheless seeks to shift responsibility to the new attacher by making it choose between “either (1) waiting for the corrective action process to run its course, or (2) covering the cost of correcting the violation, without recourse, if time is of the essence.”⁴³ The Commission should reject this proposal because new attachers should not be forced to choose between paying to remediate preexisting violations versus risking unpredictable and potentially significant deployment delays.

The Commission Should Consider Some Small Revisions to Better Implement Its Intent

The Commission should consider several minor revisions to its OTMR and overlashing sections to ensure there is no unnecessary confusion.

Revise definition of “complex” make-ready as it relates to wireless attachments. The *Draft Order* states that “relocation of existing wireless attachments” is complex make-ready.⁴⁴

³⁷ Compare Verizon Reply Comments, at 18-19 (Feb. 16, 2018) (“Wireline FNPRM Reply Comments”) (explaining that the Commission’s overlashing precedent applies to strand-mounted antennas); Crown Castle Comments, at 3 (Jan. 17, 2018) (“Wireline FNPRM Comments”) (explaining that Crown Castle has already relied on the Commission’s overlashing precedent to deploy 1,000 strand-mounted small cell antennas and plans to deploy 4,500 more this year) with CenturyLink FNPRM Comments at 7-10 (arguing that overlashing should be limited to wire-to-wire overlashing and should exclude strand-mounted antennas); CenterPoint/Dominion FNPRM Comments at 9-11 (same).

³⁸ See Verizon FNPRM Reply Comments at 18.

³⁹ See *Draft Order* ¶ 109.

⁴⁰ See *id.* ¶ 112.

⁴¹ *Id.* ¶ 113.

⁴² *Id.*

⁴³ See AEP July Ex Parte at 2-3.

⁴⁴ *Draft Order* ¶ 18.

But the relevant part of the *Draft Order*'s "complex make-ready" definition – which refers to "[a]ny and all wireless activities, including those involving mobile, fixed, and point-to-point wireless communications and wireless internet service providers"⁴⁵ – could be wrongly construed as prohibiting wireless providers from using OTMR⁴⁶ or as prohibiting use of OTMR on wireless providers' fiber backhaul facilities. The Commission should revise this portion of the *Draft Order*'s definition of "complex make-ready" so that it refers only to "moving existing wireless attachments."

Clarify that new attachers are not responsible for existing attachers' costs to attend a survey or to be present when make-ready is performed. The *Draft Order* allows existing attachers to attend an OTMR survey, OTMR work, and to do a post-OTMR inspection.⁴⁷ The *Draft Order* does not address whether an existing attacher may bill the new attacher for its costs for these activities. We agree with Google Fiber that the *Draft Order* should clarify that, in addition to the cost of repairing any damage to facilities during OTMR, a new attacher should not be responsible for an existing attacher's "elective" costs to attend the joint survey or the performance of make-ready.⁴⁸ Google Fiber's proposal is a reasonable division of costs and explicitly clarifying this division will reduce disputes. Contrary to NCTA's proposal,⁴⁹ the plain text of 47 U.S.C. § 224(i) – which states that an existing attacher cannot "be required to bear any of the costs of rearranging or replacing its attachment" to accommodate another attacher's facilities – does not require reimbursement of an existing attacher's costs of attending a survey or attending the performance of make-ready.⁵⁰

Modify the draft overloading rule to clarify that third-party overloading is permitted. Verizon supports the *Draft Order*'s codification of the Commission's "longstanding policy that [a] utilit[y] may not require an attacher to obtain its approval for overloading."⁵¹ But, as AT&T notes,⁵² the relevant draft rule refers only to an existing attacher "overload[ing] its existing wires on a pole,"⁵³ whereas the Commission's precedent includes situations in which a

⁴⁵ See *Draft Order* at Appx. A, 47 C.F.R. § 1.1402(p) (definition of "complex make-ready"); *Draft Order* ¶ 18, quoting BDAC January 2018 Recommendations at 21-22, 27.

⁴⁶ See also Crown Castle Ex Parte Letter, at 4 (July 25, 2018) ("As an initial matter, defining all wireless activity within the communications space as "complex" is an overly conservative approach that will put wireless providers at a competitive disadvantage compared to other communications providers.").

⁴⁷ See *Draft Order* ¶¶ 49, 61, 64.

⁴⁸ See Google Fiber July Ex Parte at 2.

⁴⁹ See NCTA July 18 Ex Parte at 4.

⁵⁰ See 47 U.S.C. § 224(i) ("An entity that obtains an attachment to a pole, conduit, or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment, if such rearrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment sought by any other entity (including the owner of such pole, duct, conduit, or right-of-way).")

⁵¹ *Draft Order* ¶ 107.

⁵² See AT&T Ex Parte, at 3 (July 23, 2018).

⁵³ *Draft Order* at Appx. A, 47 C.F.R. § 1.1416(a).

third-party overlashes a host attaching entity's attachment.⁵⁴ To avoid confusion, the Commission should revise the *Draft Order*'s rule to clarify that third-party overlashing is permitted.

* * * * *

Adopting a robust, unfettered OTMR option – as the Commission has proposed – will help promote rapid and efficient broadband deployment. Resolving the fundamental issues of delay and uncertainties inherent in make-ready by multiple parties is a critical step as parties work to continue to build fiber to support existing and new technologies. Please contact me if you need any additional information.

Very truly yours,



Katharine R. Saunders

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⁵⁴ See *Amendment of Commission's Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12,103, ¶ 75 (2001) ("We affirm our policy that neither the host attaching entity nor the third-party overlasher must obtain addition g other than the approval obtained for the host attachment"), cited in *Draft Order* ¶ 107 n.347.