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VIA ECFS

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:

Google Fiber continues to be pleased that the record in the above-captioned proceeding reflects broad support for one-touch make-ready ("OTMR"). As the record has developed, Google Fiber has seen that even parties that initially opposed OTMR have begun to express tentative support. But that belated support has also come with requests for conditions and limitations that would have the practical effect of undermining OTMR.[1] Google Fiber encourages the Commission to consider these requests with extreme skepticism, and instead to adopt OTMR rules that will encourage investment in new broadband networks, while speeding deployment for all providers.

Google Fiber is particularly concerned by calls for broad, open-ended indemnification by attachers that elect to use OTMR.[2] Such indemnification is neither necessary nor appropriate and would be contrary to the public interest.

First, as Google Fiber has consistently argued,[3] the Commission should require providers electing to use OTMR to be directly liable for damage caused to poles or other attachments during make-ready. In this, all parties are agreed.[4] Of course, Google Fiber does not anticipate

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1 *See, e.g.*, Letter from Steve Morris, Vice President & Associate General Counsel, NCTA – The Internet & Television Association, to Marlene H. Dortch, WC Docket No. 17-84, at 2 (filed Nov. 8, 2017) ("NCTA encouraged the Commission's efforts to develop an approach that 'balances the legitimate needs and interests of new attachers, existing attachers, utilities, and the public' and explained that some proposals for 'one touch make ready' (OTMR) do not strike the necessary balance.") ("NCTA Ex Parte"); Letter from Ola Oyefusi, Director – Federal Regulatory, AT&T Services, Inc., to Marlene H. Dortch, WC Docket No. 17-84, Attachment at 2 (filed Aug. 17, 2017) ("AT&T supports a common sense / balanced OTMR approach, with safeguards.") ("AT&T Ex Parte").

2 *See, e.g.*, NCTA Ex Parte at 2; AT&T Ex Parte, Attachment at 6; Reply Comments of Comcast, WC Docket No. 17-84, at 11 (filed July 17, 2017).

3 *See, e.g.*, Reply Comments of Google Fiber, WC Docket No. 17-84, at 8 (filed July 17, 2017); Comments of Google Fiber, WC Docket No. 17-84, at 10 (filed June 15, 2017).

4 *See, e.g.*, NCTA Ex Parte at 2 (calling for indemnification of an existing attacher "in the event its facilities are damaged or services disrupted").

that OTMR would lead to frequent damage of other attachers' facilities. To the contrary, Google Fiber believes that the use of OTMR will result in less damage, as all work must be done by qualified and approved contractors, and will be completed with fewer trips to the pole. But where OTMR results in damage, the entity using OTMR should be liable for that damage. This allocation of risk not only puts responsibility for damage where it belongs, but is also consistent with how risk is allocated when attachers use the self-help remedy under the current rules.

But a broad indemnification obligation for third-party claims is another matter altogether. Those commenters proposing this obligation claim it is necessary to compensate them for losses due to not only damage to their facilities—which would be covered under Google Fiber's proposal for OTMR rules—but also for service disruptions.[5] This proposal would make new attachers liable for claims against existing attachers brought by third parties, including claims by third parties for economic losses resulting from network outages—even if the existing attachers' tariffs or customer agreements limit their liability for such losses.[6] If claims for economic losses by a third party were subject to indemnification by a new entrant, an incumbent provider would have a strong incentive to waive or not enforce its limitation of liability and allow the claim to go forward—with the competitive entrant taking on all of the costs.[7]

A broad third-party indemnification obligation could expose competitive entrants using OTMR to potentially unbounded liability. Without any capacity to negotiate the contours of indemnification, all risk would shift to the new attacher. Moreover, the specifics of the indemnification relationship would be unknown—what third-party claims and losses could be indemnified? What costs would be included? What is the role of contributory negligence? Who would control the defense? Terms that would ordinarily be addressed in a commercial agreement between parties would instead be imposed by rule, even though indemnification obligations are not amenable to one-size-fits-all provisions. Indeed, the Commission has previously declined to adopt rules imposing risk-shifting regimes, noting that such concerns are

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5 *See, e.g.*, *id.*; Comments of Comcast, WC Docket No. 17-84, at 19 (filed June 15, 2017) (calling for indemnification of "all liabilities resulting from service interruption").

6 In fact, it is generally true that service providers limit their liability for service outages to service credits. *See, e.g.*, AT&T Residential Service Agreement § 7(a), https://www.att.com/public_affairs/long_distance_news/product_reference_and_pricing_guide/RSA08-CA.pdf ("Your only and sole remedy for loss or damage caused by operation or use of any services provided under this agreement, or for the delay, malfunction or AT&T's partial or total failure to provide or perform any services under this agreement, shall not exceed the applicable credit specified in the relevant and applicable tariff or guidebook, or, if no credits are specified, shall be payment of an amount that does not exceed the charges paid or owed by you to AT&T for such services for the period such delay or failure to perform occurred."); Comcast Agreement for Residential Services § 11, https://www.xfinity.com/corporate/customers/policies/subscriberagreement ("In all other cases [other than circumstances beyond our immediate control] of an interruption of the Service(s), you shall be entitled upon a request made within 120 days of such interruption, to a pro rata credit for any Service(s) interruption exceeding twenty-four consecutive hours after such interruption is reported to us, or such other period of time as may be specifically provided by law.").

7 To be clear, limitation of liability clauses serve the public interest, as such clauses allows service providers to offer service to customers at a lower price. Indeed, where such provisions are included in a tariff, those clauses can be presumed have been approved by state public service commissions.

more properly left for commercial negotiations.[8] Imposing indemnification as suggested by some commenters in the record would make the use of OTMR infeasible from a risk standpoint. It is likely that such a requirement would result in very little use of a broadband network deployment process that is otherwise extremely beneficial for all stakeholders.

Nor would it make sense to require new attachers to negotiate separate indemnity agreements addressing third-party claims with each existing attacher, as that would undermine the Commission's goal of speeding up and encouraging new deployments. Such a requirement would give existing attachers (who would see no benefit in helping a potential new competitor into the marketplace) an enhanced ability to introduce delay and make unreasonable demands. It could be years before any such negotiations would be completed, during which time new attachers would be unable to use OTMR.

Google Fiber encourages the Commission to continue to refrain from adopting rules that would impose on users of OTMR liability for third-party claims against existing attachers that could exceed existing attachers' direct liability.[9] Forced indemnification for the lost profits or other economic losses of a service provider's customers would present incumbents with an opportunity to stifle OTMR by making new attachers liable for costs for which the incumbent limits its own liability. New attachers should not be obligated to assume liability for such claims.

Instead, the Commission should ensure that any new rules adopting OTMR require entities electing to use OTMR to bear the direct cost of damage to or destruction of facilities, but do not impose any obligations to indemnify existing attachers for third-party claims.

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[8] *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, 5261 ¶ 39 (2011) (responding to comments from, *e.g.*, AT&T, seeking indemnification by attachers lest they face "bottomless liability," Comments of AT&T, WC Docket No. 07-245, GN Docket No. 09-51, at 31-32 (filed Aug. 16, 2010), and concluding that "we presume that utilities could structure attachment agreements to . . . address liability or other concerns they might have in cases where they elect to perform make-ready themselves"). Today, of course, it is common for liability concerns to be addressed in pole attachment agreements, under which attachers routinely agree to indemnify pole owners for property damage, bodily injury, and death arising from their work on, and attachments to, utility poles.

[9] *Cf. id.*

Please do not hesitate to contact me with any questions.

Sincerely,

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