

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

COMMENTS OF INCOMPAS

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INCOMPAS respectfully submits these comments in response to the Commission’s Notice of Proposed Rulemaking in the above referenced proceeding.¹

INTRODUCTION AND SUMMARY

INCOMPAS applauds the Commission’s initiative to seek comment on actions to accelerate deployment of next-generation networks and services and thereby promote much needed facilities-based competition. Our membership consists of aggressive competitive network builders that have made substantial investments in infrastructure and innovative technologies to offer consumers of all types—from mom and pop businesses to Fortune 100 companies with locations across the country, anchor institutions and residential consumers—cutting-edge service offerings at affordable prices. These entities benefit from the innovation and affordability only robust competition can produce. The provision of affordable, competitive, next generation communication services to business and residential consumers—including broadband Internet access service and dedicated broadband services—is critical to our growth and development as a nation. Indeed, 48 U.S. Senators, in a bi-partisan letter to President

¹ *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, WC Docket No. 17-84, FCC 17-37 (rel. Apr. 21, 2017) (“Notice” or “NPRM”).

Trump, stated that “policies that reduce barriers to investment in communications infrastructure and streamline the deployment process will play a key role in expanding economic growth.”²

And, economists have found that competition causes both competitive carriers and incumbents to increase investment, employ more workers, and foster innovation in new technologies.³

As Chairman Pai has stated: “Without rules that keep costs low and encourage deployment, the RG Fibers and Southern Lights and Rocket Fibers won’t get off the ground—and consumers will never benefit from the competition they’re trying to bring to the broadband marketplace.”⁴ And the benefits are considerable. Rocket Fiber, for one, is offering residential customers 10-gigabit Internet service.⁵ INCOMPAS members in general have extensive experience deploying middle-mile infrastructure, residential and enterprise fiber, and wireless networks in order to reach their customers. Our members have also experienced first-hand the barriers to extending their deployment, including unreasonable delays and costs associated with

² See Letter to President Donald J. Trump from U.S. Senate (Jan. 31, 2017), *available at* <https://prodnet.www.neca.org/publicationsdocs/wwpdf/2217congress.pdf>. Similarly, 71 Members of the House of Representatives sent a letter to the President encouraging an infrastructure proposal that will ensure broadband availability and affordability for rural America. See Letter to President Donald J. Trump from Congress of the United States (Jan. 30, 2017), *available at* http://welch.house.gov/sites/welch.house.gov/files/Telecom%202017.01.30%20Letter%20to%20Pres%20Trump%20re.%20broadband_0.pdf

³ See e.g., Susan M. Gately and Helen E. Golding, *The Benefits of a Competitive Business Broadband Market* (Apr. 2013), *available at*: <http://static1.1.sqspcdn.com/static/f/1155704/22398096/1365450250003/benefits-of-broadband-competition.pdf?token=zYeeaULyVgkeXQp3xCLJcIZfxDM%3D>

⁴ Statement of Chairman Ajit Pai, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, NPRM, FCC 17-37.

⁵ See Ian Thibodeau, “Rocket Fiber on-line in Detroit, announces 10-gig option for home internet,” Nov. 12, 2015, *available at*: http://www.mlive.com/business/detroit/index.ssf/2015/11/rocket_fiber_on-line_in_detroi.html.

access to poles, conduits, local permitting processes, and access to multi dwelling units.⁶ The market for next-generation communications services needs federal, state, and local agencies to work in concert with industry to lower the barriers to deployment in order to flourish and, as a result, spur widespread economic growth.

In these comments, INCOMPAS discusses steps the Commission should take to reduce barriers to deployment related to pole attachments. Specifically, the Commission should adopt rules that 1) provide new attachers the option to invoke a one-touch make-ready (“OTMR”)⁷ process for pole attachments and 2) exclude capital costs from the pole attachment rates. In order to minimize disruptions faced by competitors and their customers, as a result of the loss of facilities or services that are key to the provision of competitive service offerings, the Commission should maintain the current notification requirements for the retirement of copper facilities and network changes. The Commission should also strengthen existing regulations promulgated under Section 214(a) for the discontinuance of carrier-customer services.

I. POLE ATTACHMENT REFORM

Network builders’ ability to timely add equipment on reasonable terms and conditions to a utility pole, duct, conduit, or right-of-way, *i.e.*, pole attachments,⁸ is a critical factor in their

⁶ See *e.g.*, Declaration of Dane Jasper, CEO of Sonic.net, *In the Matter of Petition for Preemption of Article 52 of the San Francisco Police Code Filed by the Multifamily Broadband Council*, MD Docket No. 17-91, at ¶ 15, May 17, 2017 (“Jasper Declaration”); See also, Ex Parte Notice of Ronald W. Del Sesto, Jr., Counsel for Southern Light, LLC and Uniti Group Inc., to Marlene H. Dortch, FCC, attachment at 12, WC Docket Nos. 17-84, 17-79, filed May 15, 2017.

⁷ OTMR is sometimes also referred to a “Climb-Once.”

⁸ See *NPRM* at n. 3 (Section 224(a)(4) of the Act defines a pole attachment as any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility. 47 U.S.C. § 224(a)(4)).

deployment of new networks.⁹ Congress, the Commission and the Courts have recognized that, due to factors such as zoning restrictions, environmental regulations, and start-up costs, utilizing space on existing poles is generally the only feasible means for network deployment.¹⁰ Pole owners and existing attachers, however, generally lack the incentive to provide access to poles on reasonable terms and conditions, especially when they compete with those seeking access in downstream retail markets. As such, Congress directed the Commission to “regulate the rates, terms, and conditions of pole attachments to provide that such rates, terms, and conditions are just and reasonable.”¹¹ Additionally, the Commission has a duty to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing . . . measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.”¹²

While the Commission has taken some steps in an attempt to meet the objectives Congress put forth as they relate to pole attachments, as discussed below, modification of the Commission’s policies are necessary to provide more affordable, timely and efficient

⁹ See “White Paper on Pole Attachments Rates Applicable to Competitive Providers of Broadband Telecommunications Services” Time Warner Telecom, Inc., RM-11293 and RM-11303, at 3, Jan. 16, 2007 (“TWT Pole Attachment Rate White Paper”) (“Although they currently receive little attention in the discourse concerning the nation’s telecommunications infrastructure, pole attachments are a critical input for the deployment of wireline broadband facilities.”)

¹⁰ See *Gulf Power Co. v. FCC*, [208 F.3d 1263](#) (11th Cir.2000) (“[C]able television industry has attached its cables to the utility poles of power and telephone companies. . . .because factors such as zoning restrictions, environmental regulations, and start-up costs have rendered other options infeasible. . . .[Additionally,] utility poles afforded [telecommunications providers] the only feasible means for stringing their wires.’); See also S. Rep. No. 580, 95th Congress, 1st Sess. at 13 (1977) (1977 Senate Report), *reprinted in* 1978 U.S.C.C.A.N. 109.

¹¹ 47 U.S.C. §224(b).

¹² 47 U.S. C. §1302(a).

construction of competitive networks and to minimize inconvenience and safety concerns experienced by the public. In particular, INCOMPAS urges the Commission, pursuant to its authority, to adopt rules that 1) provide new attachers the option to invoke an OTMR process for pole attachments and 2) exclude capital costs for the pole attachment rates. Additionally, to the extent the Commission may lack necessary authority over poles owned by government entities and railroads, the Commission should ask Congress to fill the gap or otherwise clarify its authority.¹³ As Chairman Pai has explained, numerous providers have complained that “many pole-attachment disputes arise from these particular pole owners, who may have little interest in negotiating just and reasonable rates for private actors to access their rights of way.”¹⁴

A. The Commission Rules Should Provide for OTMR

Make-ready work entails adjusting or rearranging existing wires and equipment that are attached to utility poles to make space for new attachments. It involves coordination amongst numerous parties—the pole owner, the new attacher, existing attachers, and possibly local authorities—with variant, and often conflicting, interests. Unfortunately, as the Commission has discussed, existing attachers have little incentive to cooperate, especially if the applicant will be a competitor, and this can hamper the pole owners’ ability to provide new attachers timely access

¹³ See Remarks of FCC Commissioner Ajit Pai, "A Digital Empowerment Agenda," at The Brandery, Cincinnati, Ohio, at 7-8, Sept. 13, 2016 (“Congress should also expand the Commission’s authority over pole attachments. Right now, we don’t have jurisdiction over poles owned by government authorities, whether federal, state, or local, nor poles owned by railroads. . . This is a gap that Congress could easily fix.”).

¹⁴ *Id.* at 8 (“Unsurprisingly, I have heard from ISPs that many pole-attachment disputes arise from these particular pole owners, who may have little interest in negotiating just and reasonable rates for private actors to access their rights of way.”).

to a pole.¹⁵ Moreover, the pole owner is often a competitor of the new attachers and therefore has its own incentive to impede access to the pole.¹⁶ As a result, the make-ready process is a frequent source of delay in the deployment of new pole attachments and, accordingly, a delay in the deployment of new networks.¹⁷ Indeed, a single delayed pole can interrupt INCOMPAS members from deploying and beginning to serve an entire area for many months. Finding a “pervasive and widespread problem of . . . delays in make-ready performance, delays caused by a lack of coordination among existing attachers, and other issues” the Commission, in 2011, adopted a four-stage timeline for access to space on utility poles, which included a generally 60-day time interval for make-ready work.¹⁸ The Commission’s actions were designed to improve access to poles for new attachers.¹⁹

The existing rules, while adopted with the right objectives, are insufficient for modern infrastructure. The advancement of fiber optics, wireless technology and the Internet of Things have led to more competitor attachments in public rights-of-way and technology upgrades from

¹⁵ *Implementation of Section 224 of the Act*, Order and Further Notice of Proposed Rulemaking, WC Docket No. 07-245, FCC 10-84, ¶ 41 (2010) (2010 Pole Attachment Order).

¹⁶ *2010 Pole Attachment Order* at ¶86 (“a utility that competes with the attacher may calculate that the cost of defending an access complaint before the Commission, even if it receives an adverse ruling, may be justified by the advantage the pole owner has gained by delaying a rival’s build-out plans.”).

¹⁷ See OMNIBUS BROADBAND INITIATIVE, FEDERAL COMMUNICATIONS COMMISSION, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN at 111 (2010), available at <http://download.broadband.gov/plan/national-broadband-plan.pdf> (“National Broadband Plan”)(“Rearranging existing pole attachments or installing new poles—a process referred to as “make-ready” work—can be a significant source of cost and delay in building broadband networks. . . reform must address the obligations of existing attachers as well as the pole owner.”).

¹⁸ *Implementation of Section 224 of the Act*, Report and Order and Order on Reconsideration, WC Docket No. 07-245, FCC 11-50, ¶¶ 21-22 (2011) (2011 Pole Attachment Order).

¹⁹ See *id.* at ¶ 19.

existing attachers. Under the Commission’s current make-ready regime, each existing service provider, or “attacher,” moves their equipment and attachments individually and often sequentially. The Commission has recognized that the average number of attaching entities in a service area can be up to five.²⁰ Others have cited to cases where a single pole has up to fourteen attachments on it.²¹ As a result, the make-ready process under the current regime can require numerous separate climbs and construction stoppages in the public-rights-of-way. And, because each attacher generally waits for another to begin and complete their work to move attachments to make room for new attachers, a multitude of make-ready time intervals can be stacked on top of each other. Additionally, the lack of an adequate enforcement mechanism, *e.g.*, shot clock, leads to frequent noncompliance with the intervals. INCOMPAS members report that some existing attachers take more than 90 days to complete their make-ready work.²²

Delays in this process also are caused by inaccurate entries or failures to update the “National Joint Use Notification System” (NJUNS). NJUNS is used to notify the next existing attacher in line that they should commence the make-ready process. Pole make-ready generally follows a top down approach, power->fiber->cable tv->telco. When power make-ready is complete, for example, the NJUNS ticket is updated and a notification is sent to the fiber provider, and so on. If one link in the chain contains wrong information, then problems cascade downwards. At times, make-ready work has been completed and not updated in NJUNS. The

²⁰ *Implementation of Section 224 of the Act*, Order on Reconsideration, WC Docket No. 07-245, FCC 15-151, ¶ 2 (2015) (2015 Reconsideration Order).

²¹ Defendants’ Response in Opposition to Plaintiffs’ Motions for Summary Judgement, *In the United States District Court for the Middle District of Tennessee at Nashville*, Case 3:16-cv-02509, Doc. 58, at 24 (filed Jan. 25, 2017).

²² See Letter of Chip Pickering, CEO of INCOMPAS, to Chairman Pai, FCC, WC Docket Nos. 16-132, 05-25, 16-143, WT Docket No. 16-138, PS Docket No. 16-128, IB 16-131, RM-10593, at 2-3, Feb. 9, 2017.

converse is also true: NJUNS sometimes shows that work has been completed when it has not been. As a result, pole attachers may need to physically visit a site to ensure make-ready has been completed. These delays add up quickly and drag out the entire process, creating unnecessary and costly uncertainty for competitors.

INCOMPAS urges the Commission to amend its pole attachment rules to address these issues by authorizing OTMR—whereby a contractor approved by the pole owner could complete all make-ready work at one-time.²³ Louisville, Kentucky²⁴ and Nashville, Tennessee²⁵ have adopted OTMR policies, with the Mayor of Nashville calling the city’s ordinance a “common-

²³ To the extent that the pole owner has authority over the third-party contractor in performing the make-ready work, contractually or otherwise, the Commission should establish a shot-clock for completion of the make-ready work. The shot-clock should not exceed 30-days for completion of all make-ready work and a sufficient fine should be established to deter non-compliance. For example, in Michigan the metropolitan extension telecommunications rights-of-way oversight act or METRO Act, 2002 PA 48, which governs the process by which municipalities must provide access to rights-of-way, authorizes fines for violations that can amount to up to \$20,000.00 per day for an entity in violation of the right-of-way access rules, and up to \$40,000.00 per day for subsequent violations, Mich. Comp. Laws § 484.3118. To the extent the utility has control over the make ready fees charged by the third-party contractor, the Commission should require the utility to publish a schedule of the charges. Unpredictable or unverifiable charges make it difficult for competitors to plan their builds and accurately predict construction. By requiring pole owners to provide a statement of charges for make-ready work for poles, competitive providers will be able to more accurately plan for the costs to construct their competitive networks.

²⁴ Louisville Ordinance No. O-427-15, Series 2015, Chapter 116 of the Louisville Metro Code, §§ 116.70(J), 116.72(D). This ordinance is being challenged in federal district court. *See BellSouth Telecomms., LLC v. Louisville/Jefferson Cty. Metro Gov’t*, No. 3:16cv00124 (W.D. Ky. 2016), consolidated with *Insight Kentucky Partners II, L.P. v. Louisville/Jefferson Cty. Metro Gov’t*, No. 3:16cv00124 (W.D. Ky. 2016).

²⁵ Nashville Ordinance No. BL2016-343, Title 13 of the Metropolitan Code, § 13.18 *et seq.* This ordinance is also being challenged in federal district court. *See BellSouth Telecommuns., LLC v. Metro. Gov’t of Nashville & Davidson Cty., Tenn.*, No. 3:16cv2794 (M.D. Tenn. 2016), consolidated with *Comcast of Nashville I, LLC, v. Metro. Gov’t of Nashville & Davidson Cty, Tenn.*, No. 3:16cv2794 (M.D. Tenn. 2016).

sense way of speeding up deployment of high-speed Internet.”²⁶ The Commission has called OTMR laws “consonant with the goals of federal telecommunications policy” and noted that they encourage “timely deployment of advanced telecommunications services to all Americans.”²⁷

OTMR also minimizes the negative impact the make-ready process has on a community by allowing a new attacher to complete all necessary make-ready using a single construction crew approved by the pole owner, thereby eliminating multiple work crews from entering a neighborhood, street or yard; significantly reducing the number of times traffic is tied-up and pedestrians are detoured; minimizing exposure of crews to safety risks; decreasing scheduling and paperwork requirements; and limiting the need for municipal oversight of repetitive construction projects.²⁸ In short, Commission adoption of an OTMR policy will reduce costs to consumers, competitors and municipalities, will improve safety, and will speed deployment of broadband networks

²⁶ *Mayor Barry Statement on One Touch Make Ready Ordinance*, NASHVILLE.GOV (Sep. 20, 2016), <https://www.nashville.gov/News-Media/News-Article/ID/5686/Mayor-Barry-Statement-on-One-Touch-Make-Ready-Ordinance.aspx>.

²⁷ Letter from Howard J. Symons, General Counsel, Fed. Comm’n, to Benjamin C. Mizer, Principal Deputy Assistant Attorney General, Civil Division, U.S. Dep’t of Justice, 5-6 (Oct. 31, 2016), *available at* <https://assets.documentcloud.org/documents/3211861/Fcc-Att-Louisville.pdf> (requesting that the DOJ file a Statement of Interest in BellSouth’s litigation with the city and county explaining that there is no conflict between federal pole attachment regulations and Louisville’s one touch make-ready ordinance).

²⁸ *See* Fiber to the Home Council, “Role of State and Local Governments in Simplifying the Make-Ready Process for Pole Attachments,” at 3-4, November 2015, *available at*: http://www.ct.gov/broadband/lib/broadband/ctgig_project/attachment_c_ftth_council_makeread_ywhitepaper25october2015.pdf *Id* at 3-4. *See also* Defendants’ Memorandum of Law in Support of Motion for Summary Judgement, *In the United States District Court for the Middle District of Tennessee at Nashville*, Case 3:16-cv-02509, Document 78, at 3, 29-30 filed Feb. 8, 2017 (“Nashville Memorandum of Law”).

and the offering of competitive services to consumers by reducing how long it takes for a new attacher to install its facilities.

As the Commission notes, an alternative pole attachment proposal is being advanced—referred to as “right-touch, make-ready” (RTMR)—in which existing attachers would be provided 45 days to complete make-ready work. Existing attachers that fail to meet that deadline would be charged \$500 per pole per month until required make-ready work is complete.²⁹ Such a make-ready process would do nothing to solve the numerous separate climbs and construction stoppages in the public-rights-of-way or separate time intervals. If there are, for example, five existing attachers on a pole, operating sequentially, it could take well over six months to complete the make-ready process. That is over six months of delay in deployment and over six months where the public is faced with disruption of their rights-of-way. Moreover, RTMR does little, if anything, to alter existing attachers incentive or actions to impede competition. A \$500 penalty is minimal—merely the cost of doing business and a drop in the bucket to a major corporation that would rather not have more competition in a market. Delayed attachment to one pole can disrupt the ability to serve an entire area. For instance, if the pole is at the beginning of the street it would prevent a competitor from reaching the rest of the poles on the street. Avoiding individual poles would require re-engineering the whole network.

B. Pole Attachment Rates Should Not Include Capital Costs

As noted by the National Broadband Plan, the cost of deploying a broadband network depends significantly on the costs that service providers incur to access poles and other infrastructure.³⁰ Thus, it is critical that the Commission fulfill its statutory obligation to “ensure

²⁹ *NPRM* at ¶ 25.

³⁰ *National Broadband Plan* at 109.

that a utility charges just, reasonable, and nondiscriminatory rates for pole attachments.”³¹ The Commission should reduce charges associated with pole attachments by excluding capital costs from the pole attachment rate, because these costs are already sufficiently recovered from attachers through the make-ready process.

INCOMPAS agrees with the Commission’s proposal to ensure capital expenses already recovered via make-ready fees are excluded from pole attachment rates.³² The Commission’s rules already provide for the attacher to incur all capital costs arising from the make-ready process. Importantly, the Commission has concluded that it is likely that the attacher is the “cost causer” for, at most, a *de minimis* portion of all remaining costs.³³ Accordingly, the Commission should exclude *all* capital costs from the pole attachment rates. This is consistent with Section 224(e), as Time Warner Telecom, Inc. pointed out in a white paper submitted to the Commission:

Section 224(e), however, does not require the calculation of rates or costs based on “the sum of the operating expenses and actual capital costs.” Instead, Section 224(e)(2) only requires that utilities apportion “the cost of providing space on a pole” other than usable space. Section 224(e)(3) requires utilities to apportion “the cost of providing usable space.”³⁴

Exclusion of capital costs from pole attachment rates also is consistent with Congress’ intention that the Commission not embark upon a large-scale ratemaking proceeding to establish pole rental rates, particularly since it would be performing this “detailed cost analysis to identify the

³¹ 47 U.S.C. § 224(e)(1).

³² *NPRM* at ¶ 38.

³³ *2010 Pole Attachment Order* at ¶ 135.

³⁴ *TWT Pole Attachment Rate White Paper* at 18-19.

likely *de minimis*, if any, capital costs.”³⁵ Furthermore, as NCTA has explained, a “no capital cost” approach, designed to limit what attachers pay to the costs they actually cause, “is precisely the type of adjustment needed to establish appropriate economic signals and incent broadband deployment . . .”³⁶

II. THE COMMISSION MUST MAINTAIN CURRENT COPPER RETIREMENT AND NETWORK CHANGE NOTIFICATION PROCESSES AND STRENGTHEN THE DISCONTINUANCE PROCESS PERTAINING TO CARRIER CUSTOMER END-USERS.

The Commission’s copper retirement, network change notification, and service discontinuance rules are of critical importance to competitive providers of telecommunications services and their customers. Many, if not most, competitive carriers, including traditional competitive LECs, incumbent LEC affiliates operating out of region, and MSOs expanding their business data services footprint beyond their franchise borders, as well as competitors serving residential customers, use ILEC-provided TDM wholesale inputs to serve as the “last-mile” access to their customers. Hundreds of thousands of such connections are in place today. The timing of the loss of these critical facilities and services, in addition to hampering competitors’ ability to continue to serve their existing customers, can have a major impact on the deployment agenda of these companies. As one INCOMPAS member has recently attested, while relying on copper loop from the incumbent LEC to reach its customer’s premise and establish a foothold in the market, it has “spent significant resources on constructing its network” and initiated a trial of a fiber-to-the-premise Gigabit Fiber Fusion product that uses fiber loops that it has built and

³⁵ *2010 Pole Attachment Order* at ¶ 135.

³⁶ Comments of the National Cable and Telecommunications Association, In the Matter of *Implementation of Section 224 of the Act, Amendment of the Commission’s Rules and Policies Governing Pole Attachments*, WC Docket No. 07-24, GN Docket No. 09-51, at 13-14, filed Aug. 16, 2010.

owns.³⁷ It is critical for these competitive providers to receive reasonable notice, as required by Section 251(c)(5), of an incumbent LEC's intent to retire copper facilities, and be provided sufficient time to plan and execute the transition of customers currently served over ILEC facilities once an incumbent LEC initiates a discontinuance under Section 214.

A. Copper Retirement Notification Rules

The Commission should retain the current definition of copper retirement.³⁸ As competitive providers have previously discussed, replacement of copper feeder can have the same harmful consequences as removal or replacement of home run copper loops and subloops, which are expressly encompassed by the current copper retirement rules. Incumbent LECs should not be permitted to avoid the notice requirements of Section 251(c)(5) by simply failing to maintain existing copper facilities.³⁹ Eliminating Section 51.332(a) would, therefore, deprive competitive providers of telecommunications services the reasonable public notice required by Section 251(c)(5).

The Commission should not adopt any of its proposals to reduce the notice periods associated with copper retirement. The current 180-day notice period was adopted in order to strike “an appropriate balance between the planning needs of interconnecting carriers and their customers and the needs of incumbent LECs to be able to move forward in a timely fashion with their business plans.”⁴⁰ If anything, 180 days is inadequate notice. An entity that is providing

³⁷ *Jasper Declaration* at ¶¶ 6 and 10.

³⁸ 47 CFR § 51.332(a).

³⁹ *See* Comments of Birch, Integra, and Level 3, GN Docket No. 13-5 *et al.*, at 34-36 (filed Feb. 5, 2015); 47 CFR § 51.332(a).

⁴⁰ *Technology Transitions, Policies and Rules Governing Retirement Of Copper Loops by Incumbent Local Exchange Carriers, Special Access for Price Cap Local Exchange Carriers, AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier*

service over a leased copper loop needs sufficient time to engage with its customers and the incumbent LEC to identify the nature and technical characteristics of the service that will be provided over the replacement fiber facilities and to obtain, install, test, and turn-up the equipment and interfaces necessary to deliver uninterrupted service to the customer. By contrast, there is no evidence – perhaps beyond bare assertions by incumbent LECs – that the need to provide 180-day notice of copper retirements actually hinders incumbent LEC network upgrade efforts. As the Commission observed, “the transition from copper to fiber has been occurring for well more than a decade now,” and incumbent LECs have had the better part of two years to build the additional 90 days of notice required under the *2015 Technology Transitions Order* into their network upgrade plans.⁴¹

The Commission should, however, take this opportunity to clarify that an incumbent LEC’s fulfillment of its obligations to provide reasonable public notice of the retirement of copper facilities under Section 251(c)(5) in no way constitutes approval to discontinue the services that were provided over those facilities. To the extent that a competitive provider has purchased DS-1 or DS-3 circuits from an incumbent LEC, under tariff or other arrangement, in an area where the incumbent is retiring copper, the incumbent must continue to make those services available at least until the Commission approves an application to discontinue those services under Section 214. The incumbent LEC may, of course, with the cooperation of and coordination with its wholesale customers, transition copper-based circuits to replacement fiber facilities on the same rates, terms and conditions as the circuit that was on the discontinued copper. Incumbent LECs may not, however, use the retirement of copper to justify a *de facto*

Rates for Interstate Special Access Services, Report And Order, Order On Reconsideration, and Further Notice of Proposed Rulemaking, GN Docket No. 13-5, FCC 15-97, at ¶ 29 (rel. Aug. 7, 2015)(“*2015 Technology Transitions Order*”).

⁴¹ *NPRM* at ¶ 62.

discontinuance of service. Incumbent LECs should not be provided a means to act on their incentive to conduct targeted copper retirements specifically to force competitive LECs to breach contracts with existing customers and their own obligations to obtain discontinuance approval under Section 214. Such conduct by the incumbent LEC would be inconsistent with Sections 214 and 251, and constitute an unjust and unreasonable practice under Sections 201 and 202.

B. Network Change Notification Rules

The Commission should not eliminate Section 51.325(c), which prohibits incumbent LECs from disclosing any information about planned network changes to affiliated or unaffiliated entities prior to providing public notice.⁴² To the extent that “useful information” disclosed by an incumbent LEC might be found by the incumbent LECs affiliates and preferred business partners to be “particularly helpful in planning their own business operations would improve the free flow of information,” that information likely would be of equal utility to unaffiliated competitive LECs that the incumbent might well have the incentive to discriminate against.⁴³ If an incumbent LEC releases information prior to providing formal public notice of a network change, such information should either (a) itself be made available to the general public by an appropriate process at the Commission or (b) be delivered, in writing, to all of the incumbent LECs potentially affected customers at the same time it is provided to the incumbent LECs affiliates.

C. Discontinuance of Services

The Commission seeks comment as to the application of Section 214(a) of the Act to the retail end-user customers of that carrier’s wholesale carrier-customers—the application of which

⁴² *NPRM* at ¶ 67.

⁴³ *Id.*

the Commission previously confirmed. There can be no doubt that the protections of Section 214 apply to the incumbent LECs' wholesale customers, including independent competitive LECs. As INCOMPAS and others have argued before the United States Court of Appeals for the District of Columbia Circuit, the contents of which we incorporate here by reference, the statutory text necessitates the interpretation that (a) Section 214 requires approval for wholesale changes to ILEC facilities and services that would impair or eliminate functionality on which consumers rely, and (b) Section 214 approval is required for changes that reduce or impair service to any customer—including competitive LEC customers—not just incumbent LECs' own direct customers.⁴⁴

The protections for competitive providers set forth in Section 214 cannot be circumvented by unrealistically short timelines. A number of competitors have previously advocated that incumbent LECs be required to provide at least 12 months notice before filing a discontinuance application, and that incumbent LECs be required to grandfather existing DSn special access circuits leased by competitive LECs to be discontinued for the longer of 36 months from the grant of the discontinuance application or the remaining duration of the term applicable to a circuit.⁴⁵ This extended timeline for circuits in service will cause no economic harm to the incumbent LECs, as the revenue generated from the sale of the circuit should be, by definition, sufficient to maintain that circuit during its contracted life. Conversely, the extended notification is critical to competitors.

⁴⁴ Joint Brief of Intervenors Public Knowledge, INCOMPAS, and 10 Competitive Carriers, *U.S. Telecom Assoc. v. Fed. Comm'n's Comm'n*, No. 15-1414 (D.C.C., Sept. 19, 2016).

⁴⁵ See Comments of Birch, Integra, and Level 3, GN Docket No. 13-5, at 10-11 (filed Feb. 5, 2015).

CONCLUSION

As part of its overall deployment agenda, the Commission should reduce barriers to deployment related to pole attachments. Specifically, the Commission should adopt rules that 1) provide new attachers the option to invoke an OTMR process for pole attachments and 2) exclude capital costs for the pole attachment rates. To minimize disruptions faced by competitors and their customers from the loss of facilities or services key to the provision of competitive service offerings, the Commission should maintain current notification requirements for the retirement of copper facilities and network changes. The Commission should also strengthen existing regulations promulgated under Section 214(a) for the discontinuance of carrier-customer services.

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