

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

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

**COMMENTS OF
THE USTELECOM ASSOCIATION**

Its Attorneys:

Jonathan Banks
Diane Holland
Kevin Rupy
607 14th Street, NW
Suite 400
Washington, D.C. 20005
(202) 326-7300

June 15, 2017

TABLE OF CONTENTS

I.	POLE ATTACHMENT REFORMS.....	2
A.	Introduction.....	2
B.	Compelling Public Policy Reasons Exist for the Commission to Implement Meaningful Reforms to its Broadband Pole Attachment Regulations.....	5
C.	The Commission Should Adopt its Proposal to Implement a Presumption of “Just and Reasonable” Rates Using the Most Recent Telecommunications Formula for ILECs.	8
D.	The Commission Should Address Prohibitive Pole Attachment Rates Charged by Municipalities and Cooperatives.	11
E.	If Reforms Are Necessary, the Commission Could Implement Targeted Reforms to its Make Ready Process	17
F.	The Commission Should Adopt a “Shot Clock” For Resolving Pole Attachment Complaints.....	19
G.	The Commission Should Adopt its Proposal to Ensure Reciprocal Access to Poles for ILECs.	20
II.	COPPER RETIREMENT AND NETWORK CHANGE REFORMS.	21
A.	The Commission Should Revise Rules Adopted in 2015 That Impose Unnecessary Burdens on Copper Retirement.....	22
1.	The Commission should revise any of its rules that will slow down transition efforts.	22
2.	The Commission should reverse the expanded definition of copper retirement that includes the feeder portion of copper loops and subloops and <i>de facto</i> retirement.	25
3.	Effective date of network changes should be triggered by carrier filing date.	27
B.	The Commission Should Further Streamline to Reduce Burdens on Network Changes Wherever Possible.	28
1.	The Commission should accelerate copper retirements that will not affect existing customers.	28
2.	ILECs should be allowed to disclose information about planned network changes.	29
3.	ILECs seeking to retire copper should not be required to ensure continuing terminal equipment operation.	30
III.	SERVICE DISCONTINUANCE REFORM.	31
A.	Applications to Grandfather Legacy Services Should be Streamlined.....	31
1.	The burden on carriers seeking to discontinue and grandfather legacy services should be minimized.	31

2.	Only legacy low-speed services should be subject to section 214 discontinuance applications.....	33
3.	No special rules are necessary to accommodate government users, especially where their services will be grandfathered.....	34
4.	Applications to discontinue previously grandfathered legacy services carry even less risk of harm to customers.....	35
B.	The Commission’s Clarification Regarding Carrier-Customers’ End Users was Improper and Unlawful.....	36
C.	The Commission should further streamline discontinuances provisions in Part 63.....	37
IV.	THE COMMISSION SHOULD USE ITS PREEMPTION AUTHORITY AS APPROPRIATE TO ACCELERATE BROADBAND DEVELOPMENT.....	39
V.	THE COMMISSION MUST REVERSE ITS REDEFINITION OF SERVICE UNDER SECTION 214.	41
A.	The “functional test” standard is unlawful.	41
B.	“Service” to a Community Is Not Limited to a Single Offering.	43

* * *

SUMMARY

The best way to ensure that broadband is available to every business and consumer throughout the nation is with a light-touch regulatory environment that supports innovation and the development and deployment of modern, fiber and IP-based technologies. Removing regulatory barriers at the federal, state, and local level will spur broadband providers to build, maintain, and upgrade networks. We are pleased that with this Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment (Notice), the Commission apparently seeks to impose only those regulations necessary to create the right incentives, in a minimally regulatory environment, that will allow providers to help achieve the nation's reasonable broadband deployment goals.

The Commission's proposal to adopt reforms that reduce pole attachment costs would remove significant barriers to broadband infrastructure deployment and create a more balanced competitive landscape to the benefit of broadband consumers. Adoption of certain of the Commission's targeted reforms to its current pole attachment framework would be a crucial step towards realizing more robust broadband deployment.

If we are to fully enjoy the greater benefits that modern, all-IP networks will make possible, providers must also be given a meaningful opportunity to upgrade their networks in a manner that will allow them to reap the benefits of their prudent investments in a timely manner. Consumers have systematically been moving away from copper to fiber networks for some time, and USTelecom members have followed suit. This shift is both prudent (given the cost of maintaining copper infrastructure, especially where fiber plant exists), and necessary if we are to have any chance of achieving broadband deployment consistent with the Commission's stated goals. Moreover, consumers and businesses have largely embraced newer technologies and services, and fewer than a fifth of Americans still rely to some extent on traditional, copper-based, wireline telephone service. Among those, most use other services such as wireless and over-the-top applications such as VoIP in addition to their legacy phone service. Clearly, it is time to move on.

Especially where providers are merely replacing legacy copper facilities with fiber but will provide the same service to its customers over fiber, there is no need to encumber that process with additional notice requirements. Even where facilities are being replaced and customers may experience some changes in the features and functionality they get with their legacy services, the Commission should not unreasonably delay such transitions under the guise of consumer protection because it is consumers who ultimately will benefit from having better services.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

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

**COMMENTS OF
THE USTELECOM ASSOCIATION**

USTelecom¹ is pleased to submit its comments to the important issues raised by the Federal Communications Commission (Commission) on its rulemaking proceeding (Notice) proposing a number of actions designed to accelerate the deployment of next-generation networks and services by removing barriers to infrastructure investment.² These proposals include reforms to the Commission’s regulations governing pole attachments, expediting copper retirement and the change notification process, and streamlining the section 214 discontinuance process. USTelecom supports many of the Commission’s tentative conclusions contained in the Notice and urges it to move quickly to update its rules to reflect today’s competitive environment.

¹ USTelecom is the premier trade association representing service providers and suppliers for the telecommunications industry. USTelecom members provide a full array of services, including broadband, voice, data, and video over wireline and wireless networks.

² Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, *Notice of Proposed Rulemaking*, WC Docket No. 17-84 (rel. April 21, 2017) (*Notice*).

I. POLE ATTACHMENT REFORMS.

A. Introduction.

USTelecom is the nation's oldest and largest association for providers of wired communications, and the overwhelming majority of its members offer broadband in rural and urban areas across the United States. The industry has changed dramatically in the association's 120 years of existence, but members' shared goal of connecting Americans coast-to-coast remains the same. In the late 19th century USTelecom's members were focused on connecting American consumers to nascent telephony networks, but today, broadband is the engine that powers the global economy, and as the Commission recently observed, broadband access is "necessary for even basic participation in our society and economy."³

USTelecom agrees with the Commission's observation in its Notice that "reforms which reduce pole attachment costs and speed access to utility poles would remove significant barriers to broadband infrastructure deployment and in turn increase broadband availability and competition in the provision of high-speed services."⁴ The Commission should therefore move forward with certain aspects of the rulemaking by adopting important but targeted reforms to its pole attachment framework.

In 2011, the Commission took positive steps towards reforming pole attachment rates in a more equitable and positive way. Among other things, it implemented reforms that brought greater parity to pole attachment rates between telecommunications providers and cable providers, and afforded incumbent local exchange carriers (LECs) an opportunity to file pole attachment complaints if they believed a particular rate, term or condition was unjust or

³ Lifeline and Link Up Reform and Modernization, *Order*, 30 FCC Rcd 7818, ¶ 5 (Jun. 22, 2015) (*Lifeline Order*).

⁴ *Notice*, ¶ 3.

unreasonable. The Commission also established guidance regarding its approach to evaluating such complaints, and what the appropriate rate should be.⁵ In its subsequent 2015 *Rate Parity Order*, the Commission also expanded the modification of the telecommunications rate formula so that the cost adjustment factor was interpolated based on average attaching entity count instead of the fixed values in the 2011 order.⁶

While these changes have been beneficial, USTelecom maintains that further reforms are necessary to ensure the presence of greater rate parity among all categories of broadband providers. With the current Notice, the Commission appropriately seeks to establish greater rate parity, and adoption of certain of its proposals will help to ensure that the shared goal of accelerating wireline broadband deployment is best achieved.

Even with the Commission's 2011 and 2015 reforms, the general rate structure for pole attachment rates remains in a silo-based framework that does not adequately address the realities of today's converged broadband marketplace. While cable and telecommunications attachers benefit from a more uniform attachment rate under the 2011 and 2015 orders, ILECs remain at an artificial regulatory pricing disadvantage regarding access to essential critical infrastructure. Moreover, the Commission's decision to resolve ILEC pole attachment complaints on a case-by-case basis has proven to be unwieldy, ineffective and has burdened ILEC attachers and the Commission with an unnecessary and cost and time-prohibitive complaint-based framework for resolving pole attachment pricing issues for ILECs.

⁵ Implementation of Section 224 of the Act, *Report and Order and Order on Reconsideration*, 26 FCC Rcd 5240 (April 7, 2011) (*2011 Pole Attachment Order*).

⁶ Implementation of Section 224 of the Act, *Order on Reconsideration*, 30 FCC Rcd 13731 (2015) (*Rate Parity Order*) .

Creating a presumption for “just and reasonable” rates for ILECs, while shifting the evidentiary burden to pole owners, will greatly enhance broadband infrastructure deployment by removing uncertainty from the marketplace, while decreasing the burdens associated with the current complaint process. These narrow reforms will introduce greater parity and certainty into the Commission’s current pole attachment framework, while further improving the Commission’s initial 2011 and 2015 reforms.

The Commission should also address the difficulties encountered by broadband providers in accessing poles, ducts, conduits, and rights-of-way owned by entities that are not subject to section 224 of the Communications Act (Act), such as municipalities and electric cooperatives.⁷ Such barriers exist in today’s marketplace, and are increasingly problematic and acute for broadband providers. These pricing barriers are particularly severe with respect to rates charged to ILECs by electric cooperatives in order to attach to their utility poles.

USTelecom also supports certain limited reforms to the Commission’s make-ready process. While meeting current make-ready timelines remains a challenge for pole-owners, limited adjustments that balance the legitimate needs of pole owners, with the Commission’s desire to speed the process, may be appropriate. In addition, USTelecom strongly supports the Commission’s proposal to adopt a shot-clock for pole attachment complaints relating to both utility pole attachment rates and access. Increased broadband deployment is a shared goal of the Commission and USTelecom’s members, and adoption of certain of the Commission’s targeted reforms to its current pole attachment framework would be a crucial step towards realizing more robust broadband deployment.

⁷ Notice, ¶¶ 100–112.

B. Compelling Public Policy Reasons Exist for the Commission to Implement Meaningful Reforms to its Broadband Pole Attachment Regulations.

Broadband deployment has been – and remains – a federal policy priority for Congress, the Commission, the Executive Branch and industry, and the Commission should view further pole attachment reforms through the prism of these longstanding policies that promote broadband deployment and empower more consumers with the multitude of benefits stemming from increased broadband access. As the Commission has previously observed, one of its “central missions” is to make “available ... to all the people of the United States ... a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges.”⁸ The Commission has further noted, that broadband services have “become crucial to our nation’s economic growth, global competitiveness, and civic life.”⁹

Through its current proceeding, the Commission seeks to meet Congress’ express goal of ensuring ubiquitous deployment of high speed broadband communications networks to all Americans. The increasing availability of, and value from, broadband infrastructure is a direct result of federal policies that promote the deployment and adoption of broadband to, and by, all

⁸ 47 U.S.C. § 151. *See also*, Federal Communications Commission, Connecting America: The National Broadband Plan, at xi, 3 (rel. Mar. 16, 2010) (*National Broadband Plan*); *see also* Connect America Fund, *et al.*, *Report and Order and Further Notice of Proposed Rulemaking*, 26 FCC Rcd 17663, ¶ 2 (2011) (*USF-ICC Transformation Order*).

⁹ *USF-ICC Transformation Order*, ¶ 3. Today, Americans spend an average of more than three hours per day online while at home, with that total rising rapidly as broadband penetration grows and internet use displaces traditional media and other activities. *See, e.g.*, Leichtman Research Group, Inc., *Research Notes: Actionable Research on the Broadband, Media & Entertainment Industries*, at 5 (4Q 2014) (available at: http://www.leichtmanresearch.com/research/notes12_2014.pdf) (visited June 8, 2017). The average U.S. consumer now spends less than \$500 per year to access the internet, and in return receives an average annual benefit of approximately \$3,000. *See, e.g.*, David Dean et al., Boston Consulting Group, *The Internet Economy in the G-20*, at 50 (Mar. 2012) (available at: <https://www.bcg.com/documents/file100409.pdf>) (visited June 8, 2017).

Americans.¹⁰ Given that the internet has become our core platform for communications, it is clear that the Commission should seek additional market-oriented reforms that further this federal policy goal.¹¹

USTelecom agrees with the Commission that reducing pole attachment costs and speeding access to utility poles will “remove significant barriers to broadband infrastructure deployment and in turn increase broadband availability and competition in the provision of high-speed services.”¹² The Commission should therefore adopt its proposal to create a “presumption” for “just and reasonable” ILEC rates calculated using the most recent telecommunications rate formula. Such a presumption will introduce greater rate parity, while also removing the substantial uncertainty surrounding the Commission’s current case-by-case approach. Establishing a formula for just and reasonable ILEC rates will greatly improve the Commission’s current complaint framework, which is a time-consuming, costly and highly adversarial Commission process that is the sole recourse for ILECs seeking to obtain reasonable pole attachment rates.

¹⁰ See, e.g., 47 U.S.C. § 1302 (directing the FCC and state commissions with regulatory jurisdiction over telecommunications services to affirmatively “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms.”)).

¹¹ See, e.g., *Lifeline Order*, ¶ 4 (stating that “broadband is essential to participate in society,” and that “[d]isconnected consumers . . . are at an increasing disadvantage as institutions and schools, and even government agencies, require Internet access for full participation in key facets of society.” See also, *id.*, ¶ 5 (stating that “[b]roadband is necessary for even basic communications in the 21st Century,” and that “[b]roadband access thus is necessary for even basic participation in our society and economy.”); see also *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, 2016 Broadband Progress Report*, 31 FCC Rcd 699, ¶ 2 (rel. Jan. 29, 2016) (stating that “Americans continue to turn to advanced telecommunications capability for every facet of daily life, and use fixed and mobile services for distinct but equally important purposes. . . . Fixed and mobile broadband services are both critical means by which Americans communicate.”).

¹² *Notice*, ¶ 3.

While the Commission’s existing pole attachment framework has brought greater uniformity between cable and CLEC attachers, ILEC attachers do not currently benefit from this rate parity. The lack of regulatory parity between ILECs and their cable and CLEC counterparts in the provision of broadband services complicates investment decisions for ILECs and has undoubtedly inhibited broadband deployment in the United States. The Commission’s Notice appropriately focuses on establishing a closer technology-neutral and ownership-neutral approach to pole attachment rate regulation, which USTelecom maintains will help to spur accelerated broadband penetration rates in the United States.

In broadband related proceedings, the Commission has focused on regulatory parity as the linchpin for deployment. For example, in the *Wireline Broadband Order*, the Commission eliminated legacy restrictions for facilities-based wireline broadband Internet access service providers. In arriving at its decision, the Commission emphasized its intent to “regulate like services in a similar manner so that all potential investors in broadband network platforms, and not just a particular group of investors, are able to make market-based, rather than regulatory-driven, investment and deployment decisions.”¹³

Parity in pole attachment rate regulation is the best way for the Commission to ensure that providers of wireline broadband services compete on an even playing field, all to the ultimate benefit of consumers. The Commission’s proposal for greater pole attachment rate parity will help to eliminate the artificial pricing inequity in pole attachment rates paid by different classes of providers, despite their deployment of identical services. There is simply no sound policy basis for maintaining such an inequitable pricing mechanism that is hindering

¹³ Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, *Report and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd 14853, ¶ 45 (rel. Sep. 23, 2005) (*Wireline Broadband Order*).

competition in the broadband marketplace through unbalanced regulatory treatment of certain classes of broadband providers over others.

USTelecom agrees that all providers of like services should be treated in the same manner regardless of the technology that they employ. Establishing such parity among all providers of broadband services will help ensure increased broadband competition to the ultimate benefit of consumers in the form of lower prices, increased consumer choices and availability of more advanced services. USTelecom therefore encourages the Commission to move forward with certain of its pole attachment reforms in as expeditious manner as possible.

C. The Commission Should Adopt its Proposal to Implement a Presumption of “Just and Reasonable” Rates Using the Most Recent Telecommunications Formula for ILECs.

Given today’s highly competitive broadband marketplace, there is simply no logical policy basis on which to justify forcing ILECs to pay higher pole attachment rates than those paid by their cable and telecommunications competitive counterparts. From a consumer policy perspective, such an approach is indefensible as it denies consumers the benefits of a level competitive playing field. It can hardly be challenged that “just and reasonable rates” should mean the same thing for providers of fundamentally identical services making fundamentally similar attachments. As the Commission has repeatedly emphasized, similar services should be regulated similarly.¹⁴

¹⁴ See, e.g., *Wireline Broadband Order*, ¶ 45 (quoting statement by the Commission regarding an intention to “regulate like services in a similar manner so that all potential investors in broadband network platforms, and not just a particular group of investors, are able to make market-based, rather than regulatory-driven, investment and deployment decisions”); Statement of Commissioner Ajit Pai, *Assessment and Collection of Regulatory Fees for Fiscal Year 2015*, Notice of Proposed Rulemaking, Report and Order, and Order, 30 FCC Rcd 5354 (2015) (noting that intermodal competitors faced radically different fee requirements based on little more than historical accident, which “violates the bedrock principle that similar services should be regulated similarly.”).

The time is therefore ripe for the Commission to end the “repeated disputes” and longstanding “controversy” surrounding the disparate pole attachment rates paid by ILECs, and to expeditiously adopt its proposal for a “just and reasonable rate” charged to ILEC attachers.¹⁵ USTelecom agrees with the Commission that any just and reasonable rate charged to ILEC attachers should be based on a rate using the most recent telecommunications rate formula.¹⁶ The Commission should also adopt its proposal that an ILEC would receive the telecommunications rate unless the utility pole owner can demonstrate with “clear and convincing evidence” that the benefits to the ILEC far outstrip the benefits accorded to other pole attachers.¹⁷

After declining to adopt a pole attachment rate formula for ILECs in its 2011 Pole Attachment Order,¹⁸ the Commission opted instead to evaluate ILEC complaints on a case-by-case basis. As discussed later in greater detail, the Commission’s approach has resulted in a lengthy, unpredictable and costly complaint process that creates a substantial drag on broadband deployment efforts. The Commission’s proposal for a just and reasonable rate is far more preferable than its current case-by-case approach applicable to ILECs.

A presumptive just and reasonable ILEC rate will introduce greater certainty into the marketplace for ILEC attachers, investor-owned utility pole owners and the Commission. The Commission’s current case-by-case approach creates an unforgiving marketplace for ILEC attachers by forcing them to choose between two unsatisfactory options: agree to the disparate (and exorbitant) pole attachment rates charged by investor-owned utilities (IOUs), or partake in

¹⁵ *Notice*, ¶¶ 44–45.

¹⁶ *Id.*, ¶ 45.

¹⁷ *Id.*

¹⁸ *2011 Pole Attachment Order*, ¶ 8.

the Commission’s lengthy (and costly) complaint process. While the former choice leads to increased infrastructure costs for ILECs that may ultimately be passed on to consumers, the latter often results in extensive delays to broadband infrastructure deployments. Neither of these choices is efficient, and in both instances consumers lose – whether through delayed broadband deployments, increased consumer costs, or potentially both.

In light of these marketplace realities, the Commission should adopt its proposal to afford ILEC attachers the telecommunications rate unless the utility pole owner can demonstrate with “clear and convincing evidence” that the benefits to the ILEC far outstrip the benefits accorded to other pole attachers.¹⁹ USTelecom maintains that such an approach would limit the complaint burdens on both industry and Commission staff by appropriately narrowing potential disputes only to those supported by the “clear and convincing” standard. Whereas the Commission’s “case-by-case” approach resulted in an ambiguous and broader standard for making a determination on whether to file a complaint, the proposed clear and convincing standard provides much-needed certainty to all relevant stakeholders.

The Commission also seeks comment on what evidence would be sufficient for an IOU pole owner to show that an ILEC attacher should not be entitled to the telecommunications rate formula.²⁰ USTelecom encourages the Commission to establish appropriate and relevant bright-line tests. Such established standards will help to dissuade IOU pole owners from engaging in unnecessary and frivolous litigation. One such criterion could entail the Commission’s proposal

¹⁹ *Id.*

²⁰ *Notice*, ¶ 45.

that an ILEC owning a majority of poles would constitute a reasonable standard for clear and convincing evidence.²¹

Where the utility pole owner can demonstrate with clear and convincing evidence that the benefits to the ILEC far outstrip the benefits accorded to other pole attachers, the resultant ILEC rate should be no higher than the pre-2011 telecommunications rate. USTelecom maintains that establishment of such an upper bound will provide further certainty within the pole attachment marketplace, and help to further limit pole attachment litigation.

D. The Commission Should Address Prohibitive Pole Attachment Rates Charged by Municipalities and Cooperatives.

In its Notice, the Commission seeks comment on difficulties encountered by broadband providers in accessing poles, ducts, conduits, and rights-of-way owned by entities that are not subject to section 224, such as municipalities and electric cooperatives.²² Although section 224 does not apply in such instances, the exclusion in federal law has unfortunately enabled electric cooperatives to increasingly charge excessive pole attachment rates when ILECs and other broadband providers seek to attach to their owned or controlled poles or conduit.

As the Commission observed in its National Broadband Plan, the cost of deploying a broadband network hinges on the “costs that service providers incur to access conduits, ducts, poles and rights-of-way on public and private lands. Collectively, the expense of obtaining permits and leasing pole attachments and rights-of-way can amount to 20% of the cost of fiber optic deployment.”²³ The economics of a carrier’s deployment in an area served by a

²¹ *Id.*

²² *Id.*, ¶ 30.

²³ *National Broadband Plan* at 109.

cooperative are no different than in areas where an investor owned utility or a local exchange carrier own the poles.

While the unreasonable rates charged by electric cooperatives have long been an issue for broadband providers, the problem has recently become increasingly acute. In particular, despite federal policies promoting broadband deployment, recent actions by the Tennessee Valley Authority (TVA) are knowingly undermining these important federal policy goals. The TVA's recent actions are particularly ironic given it is a federally owned corporation in the United States created by congressional charter.²⁴

TVA is impeding broadband deployment through its decision last year to adopt a board resolution that substantially increased its pole attachment rates.²⁵ The rates adopted by the TVA Board of Directors are several times those that are federally regulated, and requires all of its participating TVA cooperatives to charge these rates. TVA's action increases pole attachment rates to an average of \$30/pole, involve more than 150 rural electric cooperatives covering seven

²⁴ See TVA website, *About TVA* (available at: <https://www.tva.gov/About-TVA>) (visited Jun. 15, 2017) (noting that the TVA is a "corporate agency of the United States."); see also, GAO Report, *Tennessee Valley Authority, Full Consideration of Energy Efficiency and Better Capital Expenditures Planning Are Needed*, GAO 12-107 (Oct. 2011) (noting that the TVA is a "federally owned electric utility") (available at: <http://www.gao.gov/assets/590/586006.pdf>) (visited Jun. 15, 2017).

²⁵ TVA Board Resolution (available at: https://www.tva.gov/file_source/TVA/Site%20Content/About%20TVA/Guidelines%20and%20Reports/tva_determination_on_regulation_of_pole_attachments.pdf) (visited Jun. 7, 2017) (*TVA Board Resolution*).

states,²⁶ and will impact more than 9 million consumers.²⁷ Several USTelecom member companies have already been approached by TVA-related coops seeking to renegotiate existing agreements. These actions by the TVA will have a broad and negative impact on millions of consumers across multiple states.

Moreover, given the location of electric cooperatives, it will have a particularly acute impact on rural consumers. As the Commission noted in its *2015 Rate Parity Order*, “large and sudden” pole attachment rate increases can “destabilize[e]” broadband deployment plans.²⁸ It was “particularly mindful” of these harms in rural areas, where the Commission noted are the “least served areas in the nation, and where the most additional pole attachments are needed to reach additional customers.”²⁹

The TVA’s decision is directly contrary to well-established federal policy and acts as a significant barrier to broadband deployment, particularly in rural areas where faster speeds are especially needed. Indeed, the TVA expressly acknowledges its dismissal of federal broadband policy, by noting that while the Commission’s pole attachment formulas are “designed to further the policy goal of encouraging broadband investment, particularly in rural areas,” the formulas “do not appropriately compensate the electric utility for the attachment.”³⁰ Such dismissiveness

²⁶ See TVA Website, *TVPPA Membership* (available at: <http://www.tvppa.com/membership/member-directory/regular-members/>) (visited Jun. 13, 2017); see also TVA Website (available at: https://www.tva.gov/file_source/TVA/Site%20Content/Energy/tva_lpc_map.pdf) (identifying the TVA cooperative members’ service territories covering seven states: Kentucky, Tennessee, Mississippi, Alabama, Georgia, Virginia, and North Carolina) (visited Jun. 13, 2017).

²⁷ See TVA Website, *About TVA* (available at: <https://www.tva.gov/About-TVA>) (visited Jun. 13, 2017).

²⁸ *Rate Parity Order*, ¶ 27.

²⁹ *Id.*

³⁰ *TVA Board Resolution*, Attachment B, at 1.

by a federally chartered agency is astounding, given that the Supreme Court and numerous appellate courts have repeatedly found that the Commission's pole attachment rate formulas are both reasonable and sufficiently compensatory for pole owners.³¹

Moreover, in addition to its decision to substantially increase pole attachment rates for broadband providers throughout its seven state service territory, the TVA also subsequently approved a \$300 million strategic fiber initiative that will expand its fiber capacity.³² The initiative will take five to 10 years to complete and will include 3,500 miles of fiber to enable broadband connections for more of TVA's generating plants and as well as more of its customers. In essence, as the TVA takes affirmative steps to price broadband competitors out of the market, it seeks to deploy its own competitive broadband service.

Further, the Commission has expended substantial time and resources in promoting efficient and carefully targeted broadband deployment in rural areas through its Connect America Fund (CAF).³³ These efforts, which are now beginning to bear fruit, are properly focused on stimulating investment by making available public funds necessary to deploy broadband in areas that would be otherwise uneconomic to serve. The higher rates charged by

³¹ See, e.g., *Alabama Power Co. v. FCC*, 311 F.3d 1357, 1370–71 (11th Cir. 2002), cert. denied, *Alabama Power Co. v. FCC*, 540 U.S. 937 (2003) (“[A]ny implementation of the [Commission’s cable pole attachment rate] (which provides for much more than marginal cost) necessarily provides just compensation.”); *FCC v. Florida Power Corp.*, 480 U.S. 245, 253–54 (1987) (finding that it could not “seriously be argued, that a rate providing for the recovery of fully allocated cost, including the actual cost of capital, is confiscatory”).

³² TVA Website, *TVA Board Approves \$300 Million Strategic Fiber Initiative*, May 11, 2017 (available at: <https://www.tva.com/Newsroom/Press-Releases/TVA-Board-Approves-300-Million-Strategic-Fiber-Initiative>) (visited Jun. 7, 2017).

³³ *USF-ICC Transformation Order*, ¶ 1 (noting the Commission’s goal to establish a “framework to distribute universal service funding in the most efficient and technologically neutral manner possible.”); see also *Connect America Fund, et al., Report and Order and Further Notice of Proposed Rulemaking*, 29 FCC Rcd 8769 (2014).

TVA electric cooperatives will detrimentally impact these CAF broadband deployment efforts by forcing broadband providers to pay exorbitant and unreasonable rates to these cooperatives in order to obtain access to essential infrastructure. As a result, the unreasonable rates expended for access to cooperative poles for any CAF buildouts substantially increases the cost and reduces the funds available for additional broadband deployment.

To address the adverse actions of the TVA, USTelecom strongly encourages the Commission to coordinate with appropriate federal agency stakeholders and legislative committees holding TVA oversight. While the TVA asserts that its sole obligation is to ensure that electric rates be kept “as low as feasible”³⁴ for electric ratepayers, such rates should not come at the expense of the broader federal policy goal of increased broadband deployment. The Commission should therefore work with other federal stakeholders to ensure that the shared federal goal of increased broadband deployment is not derailed by the narrower goals of a single federal entity.

Finally, USTelecom agrees with the Commission’s assertion that its authority under section 253 of the Act can be used to regulate access to municipally-owned poles when the actions of the municipality are deemed to be prohibiting or effectively prohibiting the provisions of telecommunications service.³⁵ Section 253(a) stipulates that “[n]o State or local statute or regulation, or other State or local legal requirement, *may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.*”³⁶ The only obligation for the Commission to exercise such preemption is to provide

³⁴ *TVA Board Resolution*, Attachment B, at 1.

³⁵ *Notice*, ¶ 109.

³⁶ 47 U.S.C. § 253(a) (emphasis added).

“notice and an opportunity for public comment,”³⁷ subsequent to which it may “preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.”³⁸

Municipal control of local rights-of-way and critical infrastructure such as poles often translates into onerous rules at the local level that add additional expense and delay to broadband infrastructure projects – rules that are ripe for Commission action. Just last year, Chairman Pai stated that “where states or localities are imposing fees that are not ‘fair and reasonable,’” the Commission should preempt them, and “where local ordinances erect barriers to broadband deployment” the Commission “should eliminate them.”³⁹

Moreover, such concerns are not merely theoretical. As then-Commissioner Pai pointed out when discussing Google Fiber’s deployment in Kansas City, “too many providers who try to obtain [rights of way] are confronted with daunting sets of federal, state, and/or municipal regulations that often delay and sometimes deter infrastructure investment and broadband deployment.” AT&T also experienced considerable regulatory interference with the roll-out of its U-verse service at the hands of localities in California and Connecticut – among others.⁴⁰ The

³⁷ 47 U.S.C. § 253(d).

³⁸ *Id.*

³⁹ See Remarks of FCC Commissioner Ajit Pai at the Brandery, “A Digital Empowerment Agenda,” Cincinnati, Ohio, p. 7 (Sep. 13, 2016) (available at: https://apps.fcc.gov/edocs_public/attachmatch/DOC-341210A1.pdf) (visited Jun. 8, 2017).

⁴⁰ See Comments of AT&T, WT Docket No. 11-59, at 5-7 (filed Jul. 18, 2011) (noting that “[t]he practices of many local jurisdictions continue to hinder and delay carrier access to rights of way, and other sites needed to expand broadband capacity and coverage”); *see also* Comments of Verizon & Verizon Wireless, WC Docket No. 11-59, at 16-25 (filed Jul. 18, 2011) (detailing localities’ “abuse [of] their authority over public rights-of-way” and other onerous regulations that “result in unreasonably high compliance costs”).

Commission should therefore exercise its authority under section 253 in instances where the municipality is deemed to be prohibiting or effectively prohibiting the provisions of broadband.

E. If Reforms Are Necessary, the Commission Could Implement Targeted Reforms to its Make Ready Process

Make ready timelines are already a challenge to meet for pole owners and attachers, especially ILEC pole owners who own a small percentage of poles and whose core business is unrelated to pole ownership. While USTelecom supports the important efforts to reform the broader pole attachment framework, it encourages the Commission to carefully balance the need for reforms to its make ready framework, with the legitimate concerns and interests of pole owners. To the extent the Commission believes reforms to its make ready process are necessary, such reforms should be implemented only in a narrow and targeted manner. While narrowly tailored reforms may be necessary, the Commission should nevertheless be cautious about further expediting its proposed timelines.

Commission rules allow pole owners to assert a right to an additional 15 days to complete make-ready work that existing attachers failed to complete within the required timeframe.⁴¹ In many instances, this extra time is not used and adds complexity without benefit. The Commission could therefore consider reducing the make-ready timeline by eliminating the 15-day period for a pole owner to complete make-ready work after an existing attacher fails to meet its make-ready deadline. Instead, at that point, the new attacher could invoke its self-help remedy and perform the make-ready work with a pole owner approved contractor.

USTelecom takes no position regarding the Commission's proposal to mandate one-touch make-ready.⁴² However, in considering whether such an approach would be advisable, the

⁴¹ 47 C.F.R. § 1.1422(e)(1)(iv).

⁴² Notice, ¶¶ 21–24.

Commission must consider several issues relevant to any one-touch make-ready framework. For example, paramount to the Commission's consideration of one-touch make-ready is how best to address liability issues for make-ready work done by contractors. Given the potential that non-compliant, or improperly installed attachments can threaten the safety of linemen as well as the general public, the Commission would need to clearly delineate which party (*i.e.*, the new attacher or the contractor) would assume liability in such instances.

In addition, the Commission would need to ensure the presence of a thorough and robust process for confirming that any make-ready contractors have received suitable and sufficient training. Make-ready processes can be extremely complex and technical in nature with separate and exacting requirements established by the National Electrical Safety Code (NESC), state public utility commissions and public service commissions. Such codes often govern a broad range of issues, such as the manner in which lines and equipment are to be attached, to how many inches of separation must exist between wires and equipment. Given the importance of satisfying these stringent and important make-ready requirements, the Commission would need to ensure that suitable training has been completed by authorized contractors operating under a one-touch make-ready framework.

USTelecom also opposes any proposal that would require pole owners to provide potential new attachers with a schedule of common make-ready charges.⁴³ The Commission's proposal ignores the reality that make-ready rates often vary depending on a broad range of factors. For example, is the utility pole being replaced anchored in soil (less expensive), or bedrock (more expensive)? Are the attachments needing make-ready work attached to a pole on a suburban street (more accessible; less expensive), a remote fire-trail (less accessible; more

⁴³ *Id.*, ¶ 33.

expensive), or a highly trafficked road (more accessible; increased safety requirements; more expensive)? Each of these examples could feasibly occur in a single service provider's territory, and illustrates the multiple factors that can go into any given make-ready work order. Given the complexity of make-ready charges, the Commission should reject proposals that would require pole owners to provide potential new attachers with a schedule of common make-ready charges.

F. The Commission Should Adopt a “Shot Clock” For Resolving Pole Attachment Complaints.

The Commission should adopt its proposal to establish a 180 day shot clock for pole attachment complaints, and such a process should apply to complaints regarding both access to poles, and pole attachment rates.⁴⁴ The Commission's current complaint process – which is not subject to any timeline – creates a substantial burden on wireline broadband providers, and results in unnecessary costs and delays to broadband deployment.

The Commission's current complaint process is far too lengthy, and drawn-out complaint proceedings are a substantial drag on broadband deployment efforts. ILECs availing themselves of the Commission's current complaint framework must dedicate substantial financial and personnel resources to participate in lengthy complaint proceedings. These proceedings can often times drag on for lengthy periods – sometimes spanning years.⁴⁵

Such inordinate delays have substantial impacts on broadband providers' planned deployments of wireline broadband infrastructure, with the ultimate impact felt by consumers. Even assuming that complaint proceedings are sometimes stayed, the absence of any established

⁴⁴ *Id.*, ¶¶ 47, 51.

⁴⁵ *See, e.g.*, Comcast Cable Communications Mgmt., LLC, *Order of Dismissal*, 26 FCC Rcd. 5158 (2011) (dismissing a pole attachment complaint after almost five years after the parties settled); *Cable Television Ass'n of Georgia, et. al., Order*, 17 FCC Rcd. 13807, ¶ 6. (2002) (complaint filed in 1998, and decision not issued until almost four years later); *Cable Texas Inc.*, 14 FCC Rcd. 6647, ¶ 2 (1999) (taking almost two years to resolve).

time horizon for resolving pole attachment complaints has a substantial negative impact on planned broadband deployments. The Commission’s adoption of a 180-day shot clock will provide a much needed degree of certainty and urgency to resolving pole attachment complaints. Even in instances where the shot clock is paused for brief periods, such a framework will also provide wireline broadband providers with a general time estimate for broadband deployment purposes.

Regarding circumstances under which the shot clock could be stopped,⁴⁶ the Commission should utilize similar circumstances used during the agency’s merger review process.⁴⁷ For example, as recommended in the Notice, the Enforcement Bureau could be afforded authority to stop the shot clock in instances where parties need additional time to provide “key information” requested by the Bureau.⁴⁸ Similarly, the shot clock could be paused in instances where additional information is necessary for the Commission to adequately consider the merits of a particular complaint.

G. The Commission Should Adopt its Proposal to Ensure Reciprocal Access to Poles for ILECs.

USTelecom supports the Commission’s inquiry into whether section 224(a) prevents ILECs from gaining access to CLEC-controlled infrastructure. Although the Commission previously examined this issue during its implementation of the 1996 Act in the *1996 Local Competition Order*, it determined that section 251 cannot “[restore] to an incumbent LEC access

⁴⁶ Notice, ¶ 49.

⁴⁷ See Federal Communications Commission Website, *Informal Timeline for Consideration of Applications for Transfers or Assignments of Licenses or Authorizations Relating to Complex Mergers* (available at: <https://www.fcc.gov/general/informal-timeline-consideration-applications-transfers-or-assignments-licenses-or>) (visited Jun.14, 2017).

⁴⁸ Notice, ¶ 49.

rights expressly withheld by section 224.”⁴⁹ USTelecom agrees with CenturyLink’s assessment that the disparate treatment between ILECs and CLECs dampens the incentives for all local exchange carriers to build and deploy the infrastructure necessary for advanced services.⁵⁰

USTelecom maintains that the Commission’s current interpretation of section 224 creates asymmetrical burdens on ILECs by allowing CLECs (including those affiliated with cable companies) to demand access to ILEC-constructed poles, ducts, conduits, and rights-of-way while denying ILECs reciprocal access to such infrastructure. CenturyLink correctly observed in its recent biennial review comments that “[w]hatever public interest justifications may have been mustered for these one-sided obligations in the past, they are no longer valid.”⁵¹ USTelecom agrees that ILECs have no special advantages in deploying poles, ducts, conduits, and rights-of-way, and that “perpetuating the current asymmetric obligations to provide access to this infrastructure disserves the public interest and harms consumers by distorting both ILEC and CLEC incentives to construct infrastructure that can be used to provide advanced services.”⁵²

II. COPPER RETIREMENT AND NETWORK CHANGE REFORMS.

In the Notice, the Commission proposes changes to its Part 51 rules to allow greater flexibility to providers seeking to make network changes, including copper retirement, and seeks comment on those proposals. Legacy networks that rely on copper and TDM technology are fast

⁴⁹ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, ¶¶ 1226 – 1231 (1996). The Ninth Circuit Court of Appeals disagreed in dicta, noting that sections 224 and 251 could “be read in harmony” to support a right of access for ILECs on other LEC poles. *US West Communications, Inc. v. Hamilton*, 224 F.3d 1049, 1053-54 (9th Cir. 2000).

⁵⁰ CenturyLink Comments, WC Docket No. 16-132, at 12-13 (Dec. 5, 2016) (*CenturyLink Biennial Comments*).

⁵¹ *Id.*, at 13.

⁵² *CenturyLink Biennial Comments*, at 13.

becoming relics, serving fewer and fewer telecommunications users as newer broadband services and technologies systematically replace them. There is little to be gained by maintaining or adopting rules that make it harder for providers to make a timely transition. To the contrary, the Commission must enable them to reallocate resources that otherwise would be used to maintain aging and obsolete systems and use them to build systems capable of meeting our current and future broadband needs.

A. The Commission Should Revise Rules Adopted in 2015 That Impose Unnecessary Burdens on Copper Retirement.

USTelecom generally supports the repeal of recently adopted rules that inject unnecessary delay, resulting in wasteful capital expenditures on legacy infrastructure without a commensurate consumer benefit, and a return to prior short-term network change notification rules in place prior to adoption of the *2015 Technology Transitions Order*. There is scant evidence, anecdotal or otherwise, that the “fear” expressed by competitive LECs⁵³ that ILECs will use technology transitions to thwart competition is warranted, or that increasing the burden on ILECs to build new facilities while at the same time maintaining facilities used by a small and decreasing number of customers serves the public interest.

1. The Commission should revise any of its rules that will slow down transition efforts.

ILECs need flexibility as they upgrade and replace legacy networks. In seeking comment on whether to eliminate all or part of new section 51.332,⁵⁴ the Commission opens the door to allowing more flexibility to ILECs to again use the streamlined network change provisions in

⁵³ See *Technology Transitions, et al.*, 30 FCC Rcd 9372, ¶ 15 (2015) (*2015 Tech Transitions Order*).

⁵⁴ 47 C.F.R. § 51.332.

section 51.333⁵⁵ for copper retirement notices of less than six months. We support such a change. The short-term notification provisions incorporate adequate safeguards, including early direct notice to interconnecting service providers, to ensure that no competitor is denied an opportunity to adequately prepare for the impending retirement.

We likewise support a return to the pre-2015 timeframe for ILECs to implement copper retirements 90 days after notice rather than 180 days.⁵⁶ The Commission need not, however, reverse its decision to eliminate the process by which competitors could object to and delay copper retirements merely because it restores the shorter implementation time frame. To the contrary, the Commission must reaffirm its commitment to notice-based procedures for copper retirement and other network changes; allowing competitors to object to and seek to delay an ILEC's copper retirement plans is counterproductive to such a commitment. Elimination of the objection process was reasonable, given that competing providers could use it to engage in anticompetitive behavior by delaying copper retirements whether they had a sound basis for doing so or not.⁵⁷ Measureable costs to ILECs associated with prolonged maintenance to legacy networks are clear; less measurable are costs associated with delay in implementing much needed upgrades to offer better services. Both likely far outweigh any short-term benefits gained by competitors in putting off the inevitable.

Another potential cause of delay in the copper retirement process is the expansion of entities to which carriers seeking to retire copper must give direct notice. Given the overall

⁵⁵ See 47 C.F.R. § 51.333.

⁵⁶ Notice, ¶ 59; 47 C.F.R. § 51.332(f).

⁵⁷ Although an objection ultimately could only delay but not prevent copper retirement. See, *2015 Tech Transitions Order*, ¶ 28 (also explaining “that objections are deemed denied absent Commission action”).

increasing awareness that technology transitions are well underway, and the widespread acceptance and adoption of services based on newer technologies, it is not clear that providing direct notice to the Secretary of Defense, public utility commissions, state governors, and Tribal authorities has enhanced awareness among affected entities or otherwise improved the copper retirement process in a meaningful way. To be clear, we are not opposed to enhanced notice requirements where they improve the process for affected customers, but given the additional cost to ILECs they should be retained only if they can be shown to provide some measure of benefit that outweighs those costs.

Also, while we agree that communication during the transition process is important, written direct notice to generally more sophisticated non-residential retail customers may be more burdensome than warranted. We therefore encourage the Commission to allow carriers some flexibility in providing notice to all non-residential customers, but in particular to wholesale customers and interconnecting carriers with whom they typically have long-term contractual agreements that often include customer-specific termination provisions and the like. For these customers, ILECs should be able to provide notice via website posting. For the same reasons, we also support restoration of the requirement to provide notice only to telephone exchange service providers that directly interconnect rather than to every entity in the affected area.⁵⁸

Another adjustment that could ease ILEC burdens by giving them more flexibility in managing the copper retirement process is in the timing of the current certification required by the Commission, which must be made no later than 90 days after the Commission's public

⁵⁸ If the FCC retains portions of section 51.332, it should in any event restore this notice requirement only as to directly interconnecting carriers. *See Notice*, ¶ 63.

notice, regardless of the date of planned or actual copper retirement. The Commission should allow carriers to certify compliance with notice requirements at any time prior to the date of actual copper retirement. The certification is, in effect, a checklist, the completion of which does not trigger any other deadlines or actions, so this modification would ease compliance burdens on carriers without materially affecting the Commission's oversight.

2. The Commission should reverse the expanded definition of copper retirement that includes the feeder portion of copper loops and subloops and *de facto* retirement.

Another measure that likely has or will hamper transition efforts is the Commission's expansion of the definition of copper retirement to include *de facto* retirement.⁵⁹ Rather than "catalyz[ing] further fiber deployment," the Commission injected uncertainty into the copper retirement process with this provision, in particular for ILECs that continue to rely on their copper networks to provide service to customers. For these carriers, it would make little sense to allow those facilities to deteriorate or to stop servicing them before they are scheduled for retirement. That is not to say the occasional service issue does not arise, but there has been no broad finding that ILECs are deliberately and pervasively allowing their copper networks to deteriorate, as suggested by the Commission in adopting *de facto* definition.⁶⁰ ILECs continue to spend billions of dollars yearly to maintain these facilities,⁶¹ at the same time that they are also investing billions in new fiber infrastructure and at a time when only an estimated 16% of

⁵⁹ See 47 C.F.R. § 51.332(a) (defining *de facto* retirement is defined as "the failure to maintain copper loops, subloops, or the feeder portion of such loops or subloops that is the functional equivalent of removal or disabling").

⁶⁰ 2015 Tech Transitions Order, ¶ 90.

⁶¹ See, e.g., *Ex Parte Letter* from Melissa E. Newman, Senior Vice President, CenturyLink to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5, RM-11358 (Jul. 24, 2015).

Americans still rely on phone services that are using legacy copper facilities.⁶² Rather than adding complexity to copper retirement decisions, the Commission should be encouraging ILECs to retire and replace these little-used legacy facilities.

Expansion of the definition did not improve and does not facilitate the copper retirement process, but rather is a distraction. The Commission's existing enforcement rules are sufficient to address quality of service complaints for existing facilities that a carrier has no plans to retire, and for facilities that a carrier has decided to retire the expanded definition is largely irrelevant. In fact, we support the Commission's prior conclusion that carriers may address an individual customer's service quality issues by migrating that customer from its copper facilities to existing fiber facilities without submitting a copper retirement notice.⁶³

Moreover, in particular if the Commission decides to fully harmonize the different treatment between copper retirement and other network changes, it should consider doing away with a separate definition – expanded or otherwise – for copper retirement altogether. Copper retirement is merely one type of network change, and thus one set of rules could seamlessly be established to apply to all network changes. The fact that copper retirements have been occurring for more than a decade and fiber is becoming more prevalent, the need for copper retirement-specific rules will only diminish further with time.

⁶² See Patrick Brogan, USTelecom Research Brief, *Voice Competition Data Support Regulatory Modernization*, at 1, Nov. 25, 2014 (available at: http://www.ustelecom.org/sites/default/files/documents/National%20Voice%20Competition%202014_0.pdf) (visited Jun. 15, 2017) (*USTelecom Research Brief*).

⁶³ See *2015 Tech Transitions Order*, ¶ 93.

3. Effective date of network changes should be triggered by carrier filing date.

Another recurrence that can erect a barrier to infrastructure investment and deployment is the delay in issuance of public notice by the Commission. Under current rules, the implementation date and effective dates for copper retirement and other network changes must occur a specified number of days after issuance of the Commission's own public notice of the planned change. Thus, where the Commission does not act in a timely manner to issue such notice, ILECs can find themselves in a holding pattern, unable to execute planned changes until the Commission takes action. This can be a significant barrier to carriers' efforts to implement transitions even in instances where there are few or no customers utilizing the facilities at issue.

One way to address such presumably inadvertent delay to the copper retirement process would be to measure the required waiting period from the time of public notice by the carrier seeking to retire copper, rather than from the time of Commission public notice. That is, the deemed effective date would be no more than 90 days⁶⁴ after the implementing carrier provides the requisite notice. A carrier filing trigger would have the benefits of eliminating uncertainty and inconsistency that can occur when there is no established mechanism to ensure prompt Commission action, such as a shot clock, which the Commission should adopt if it does not move to a carrier filing trigger.⁶⁵ Having the option of not issuing a public notice for every planned copper retirement would have the added benefit of decreasing staff workload.

Moreover, because customers would still be provided the other safeguards established in the

⁶⁴ Specifically, we support repeal of the rule establishing approval of an ILEC's implementation date 180 days after public notice. 47 C.F.R. § 51.332(f).

⁶⁵ A self-imposed FCC public notice deadline of 10 business days, for example, after carrier notice to the FCC would not likely be unduly burdensome to staff. A shot clock combined with automatic trigger in the absence of FCC action would be especially helpful for notice under the short term notice provisions, given the abbreviated time frames therein. *See* 47 C.F.R. § 51.333.

Commission's rules, those benefits would not be outweighed by any harms or burdens to consumers.

The Commission could make customer notification even more meaningful by granting flexibility to carriers to notify customers a minimum of 90 days prior to when they will be migrated or can expect to experience a service modification resulting from a copper retirement. This would be especially helpful in instances where a planned copper retirement does not occur as soon as originally scheduled.

B. The Commission Should Further Streamline to Reduce Burdens on Network Changes Wherever Possible.

The frequency and prevalence of network changes, primarily in the form of migration from copper to fiber, make for a very different marketplace than when the Commission last revisited its network change rules in 2004.⁶⁶ Approximately 84% of Americans will not be affected by any future rules adopted to address copper retirement because they have transitioned away from telephone service that utilizes legacy ILEC facilities. For the other 16%, many likely will voluntarily transition in the future to take advantage of new services and capabilities rather than wait for their carrier to make a network upgrade. It is important to keep this perspective in mind as the Commission plans and regulates for a future in which copper retirements will become a rare occurrence.

1. The Commission should accelerate copper retirements that will not affect existing customers.

We strongly support an accelerated and streamlined procedure for copper retirements that will not affect any existing customers. For example, no carrier should have to wait more than 30 days (or less, as appropriate) after providing notice to the Commission to retire copper facilities

⁶⁶ See Notice, ¶ 66.

where no customers are using the facilities. Likewise, copper retirements necessitated by natural disasters and other unforeseen emergency events should be subject to accelerated and streamlined procedures to allow restoration of service using replacement facilities to occur as quickly as possible.

2. ILECs should be allowed to disclose information about planned network changes.

The prohibition in section 51.325(c)⁶⁷ on ILECs disclosing information about planned network changes to affiliated or unaffiliated entities prior to providing public notice is an unnecessary restriction on the carriers' ability to adequately plan and prepare customers for network replacements and upgrades. Often (unless necessitated by natural disaster or other unexpected emergency event) carriers plan far in advance for network replacements and upgrades, and would, if allowed, give early notice to customers and others that might be affected when or if those changes happen. The potential disadvantage to entities such as federal government agencies is especially notable because they claim to have budgeting constraints that prevent them from purchasing new equipment or changing internal systems without significant lead time.⁶⁸

Robust competition from multiple service providers has eliminated the need for this restriction. The Commission therefore should eliminate the prohibition on ILECs discussing planned network changes prior to the required notice period with any person or entity to which disclosure may be useful, at the carrier's discretion.

⁶⁷ 47 C.F.R. § 51.325(c).

⁶⁸ See Petition for Reconsideration or Clarification of the National Telecommunications and Information Administration, GN Docket No. 13-5, WC Docket No. 13-3, RM-11358, at 3-4 (Oct. 12, 2016) (explaining that some federal government agencies "can convert their networks and services only in stages and only after considerable planning, prioritizing, and testing").

3. ILECs seeking to retire copper should not be required to ensure continuing terminal equipment operation.

Innovative companies routinely upgrade their offerings in response to technological advances, regulatory requirements, and customer preferences. For example, Microsoft every few years comes out with a new Windows operating system and, after a brief transition period, stops providing support for previous versions. Their customers are notified *en masse*, and each user responds by installing the new operating system, or suffering the consequences of not having full compatibility and the latest offerings and protections for their computer or other device.

ILECs (whose services are subject to substantially more competition from multiple providers than Microsoft's operating system) seeking to upgrade their facilities and offerings are held to a very different standard. They must first glean whether any customer's equipment will become incompatible after a network change,⁶⁹ and if so then separately notify those customers and give them "an opportunity to maintain uninterrupted service" before executing the change.⁷⁰ That is not how Windows upgrades work, nor is it how the real world works.

It is inevitable that antiquated, analog-based equipment will become obsolete and incompatible with newer networks. But that eventuality need not stop technology transitions in their tracks. An obsolete fax machine can easily be replaced with a cellphone camera and a text or email message. Alarm and medical monitoring systems that are now largely web-based can replace systems that still rely on wired telephone service.

Rather than looking backward, the Commission can embrace the inevitable by relieving ILECs seeking to replace legacy facilities with new technology of these obligations, which no

⁶⁹ The FCC has never adequately explained how a carrier would know or reasonably predict which customers have terminal equipment that will become incompatible after a network change.

⁷⁰ 47 C.F.R. § 68.110(b).

longer make sense from a marketplace perspective. The Commission must eliminate section 68.110(b) to send an unequivocal message that it will not favor a few isolated customers to the detriment of carriers that are focused on achieving ubiquitous broadband deployment.

III. SERVICE DISCONTINUANCE REFORM.

For the same reasons the Commission must eliminate regulations that unreasonably hamper ILECs in their efforts to replace and upgrade their legacy copper networks, streamlining discontinuance of legacy services must also be prioritized. Requiring “exit approval” may have made sense decades ago at a time when ILECs held telephone monopolies, there was no or nascent wireless service, and cable providers only offered video services. But that is no longer the case. Widespread competition for voice and data services warrants a different regulatory approach to govern providers that must seek approval to discontinue legacy services if the goal is to make sure they continue to invest in broadband infrastructure.

A. Applications to Grandfather Legacy Services Should be Streamlined.

As discussed earlier, more and more ILECs are retiring copper facilities and migrating to modern facilities that are capable of providing higher-speed voice and data services. As a result, demand for the low-speed services that typically are provided over legacy networks is decreasing as consumers demand more robust high-speed services to meet their broadband needs. The Commission therefore should make it easier for carriers seeking to replace their legacy services with much-desired higher-speed services, especially to the extent that such discontinuances and transitions do not harm those using the services, as is the case with grandfathering.

1. The burden on carriers seeking to discontinue and grandfather legacy services should be minimized.

The section 214 discontinuance provisions are intended to protect existing communities by ensuring they are not subject to severe service disruptions or loss of service. But they are not

intended as a means to force providers to continue providing legacy services forever. As competition continues to grow and carriers and others provide new and better services over modern broadband facilities, it is less likely that customers will experience a harmful service loss or be unable to secure a reasonable substitute service. Therefore, to the extent an ILEC seeks section 214 authority to discontinue offering a legacy service but seeks to maintain or grandfather the service for existing customers, the discontinuance process should be streamlined and simplified.

It would be appropriate, therefore, to reduce the public comment to 10 business days (or less) for all applications that seek to grandfather low-speed legacy services.⁷¹ There is no apparent rationale for granting disparate relief between so-called “dominant” and non-dominant” carriers, given national marketplace trends that show ILECs face widespread competition from intermodal competitors.⁷² The Commission also seeks comment on whether higher-speed services should be afforded the same treatment.⁷³ Because those services likely face even more competition from non-ILEC providers, there is no apparent reason not to reduce notice periods for all discontinued services that will be grandfathered as well.⁷⁴

Significantly, because current customers are not subject to a service loss with grandfathering, they would have little reason to complain about or oppose such applications. Moreover, although non-customers, as potential future customers, would be precluded from later

⁷¹ See *Notice*, ¶ 73 (proposing a uniform 10-day public comment period for all applications seeking to grandfather low-speed services).

⁷² Cf. *Technology Transitions, et al., Declaratory Ruling, Second Report and Order, and Order on Reconsideration*, 31 FCC Rcd 8283 (2016) (*Declaratory Ruling*) (declaring that ILECs are non-dominant in their provision of interstate switched access services).

⁷³ *Notice*, ¶ 75.

⁷⁴ But see *infra* § III.A.2., proposing that only lower-than DS-1 legacy services be subject to any section 214 discontinuance procedures.

purchasing the service, providers have no duties with regard to those potential customers, thus they would have standing to complain or oppose a service discontinuance.

We also support streamlining of the period after which an application would be automatically granted. The proposed auto-grant period of 25 days should provide ample time for the Commission to review these applications, which will largely if not entirely be unopposed by affected customers. In fact, the Commission should consider adopting a shorter period in instances where no comments opposing the discontinuance are filed. For the same reasons it makes sense to start the notice and auto-grant periods for copper retirements with the carrier filing date, the Commission should consider counting the discontinuance notice and auto-grant periods from the carrier filing date, and/or should self-impose a shot clock to ensure that ILECs seeking to discontinue a service do not experience unreasonable delays.

Given that discontinuances in which services are grandfathered pose no harm to existing customers, it would be appropriate to further lessen the burden on providers under certain circumstances by requiring less information in the application or even eliminating the requirement to file a section 214 application altogether. For example, where reasonable alternative service from any provider is available, regardless of technology (fiber, IP-based, wireless), there will be no actual reduction or impairment of service to a community, and thus there should be no need for a section 214 application.

2. Only legacy low-speed services should be subject to section 214 discontinuance applications.

Because of widespread competition among providers, especially for higher speed services, the Commission should limit the scope of services for which a section 214 application must be filed. The Commission asks whether any streamlined discontinuance process should apply only to grandfathered TDM services at lower-than-DS1 speed (1.544 Mbps), or whether

streamlining should also apply to higher-speed legacy copper-based or TDM services. As a general matter, carriers that provide these higher-speed legacy services should not have to seek discontinuance authority for services equivalent to those their competitors can and routinely do provide over newer facilities.⁷⁵ Thus, rather than subject higher-than-DS1 speed services to streamlined discontinuance, those services should be exempt, through forbearance or otherwise, from the application process.

3. No special rules are necessary to accommodate government users, especially where their services will be grandfathered.

Despite any “particular challenges” faced by federal government agencies and any other government customers of legacy telecommunications services, concerns about these users experiencing service disruptions without reasonable warning are unwarranted. In the normal course of business, our member companies discuss service changes with their government customers that will impact them well before the changes are implemented. In this regard, repeal of the restriction in section 51.325(c) prohibiting ILECs from disclosing information about planned network changes prior to providing public notice would eliminate the need for any government-specific notice and communication provisions.⁷⁶

In particular where services subject to discontinuance are being grandfathered, existing government and other customers will not be subject to a loss of service.⁷⁷ Grandfathering has the

⁷⁵ We note that ILECs are the most prevalent providers of legacy services over copper and TDM-based facilities, so most of the burden to file for discontinuance of these services disproportionately falls on them.

⁷⁶ See *supra* § II.B.2.

⁷⁷ See, e.g., Petition for Reconsideration or Clarification of the National Telecommunications and Information Administration, GN Docket No. 13-5, WC Docket No. 13-3, RM-11358 (filed Oct. 12, 2016) (describing concerns about the harm federal government customers may face when services are discontinued without ample notice).

added advantage of putting customers on notice that, at some point in the future, the service will no longer be available, which in turn allows these customers to begin transition planning well in advance of an eventual service discontinuance.

ILECs that provide services supporting mission-critical activities like safety, emergency preparedness and response, and national security are well aware that they do. Contract terms and agreements with government customers routinely cover mission-critical requirements including continuity of service, and routine communications about proposed network changes and plans to ensure continuity already occur on a case-by-case basis as needed. Government customers that have experienced service disruptions affecting their mission-critical activities without sufficient notice should demonstrate on the record that a specific problem exists, after which the Commission can properly assess whether it needs to take remedial action. In the alternative, instead of adopting additional rules that may be overly restrictive and unnecessary in all but a small number of instances, the Commission could develop best practices for governing carrier-government customer communications when legacy services used to support mission-critical activities are subject to discontinuance.

4. Applications to discontinue previously grandfathered legacy services carry even less risk of harm to customers.

As noted above, grandfathering a service is the ultimate notice mechanism. When a customer is informed that a legacy service he or she subscribes to will no longer be offered to new customers because it is being discontinued, there is no mystery about the provider's future plans regarding that service. With technology transitions well underway, no customer will reasonably be surprised by the eventual discontinuance of grandfathered legacy services to make way for newer services and technologies. Thus, the Commission's proposal to streamline notice, comment period, and auto-grant for all carriers and legacy services previously grandfathered is a

reasonable and necessary response that balances the protection of customers with the need to encourage ILECs to keep investing in broadband infrastructure. For the same reasons discussed in the previous section, the Commission need not adopt special rules to apply to carrier-government customer relationships, although some additional notice where demonstrated harm to mission-critical activities, the public interest, or safety is at stake may be appropriate.

B. The Commission's Clarification Regarding Carrier-Customers' End Users was Improper and Unlawful.

The Commission's expansion of the scope of end users that a carrier must consider in determining whether to seek section 214 discontinuance authority was inconsistent with statutory intent and contrary to Commission precedent, and thus unlawful. As explained in USTelecom's brief to the D.C. Circuit court in a challenge to this and other rules adopted by the Commission in the 2015 Technology Transitions Order,⁷⁸ Congress, in enacting section 214, was concerned with ensuring continuity of service to a community, not to ensuring particular carriers an enduring source of wholesale supply.⁷⁹ Yet the Commission imposed this new obligation without regard to whether a discontinuance would leave a community without service, insisting that a section 214 application and Commission approval are required if a carrier-customer's end users would be affected, even when those end users can readily switch to other providers.⁸⁰

Under the Commission's rules, each carrier seeking to discontinue a service is required to file a section 214 application and to notify its customers of the planned discontinuance.⁸¹ ILECs

⁷⁸ See Brief for Petitioner USTelecom, Case No. 15-1414, D.C. Cir. (filed Jun. 14, 2016) (*USTelecom Brief*). The FCC rightly (and tellingly) asked the court to hold in abeyance a court challenge by USTelecom and others to give it an opportunity to revisit that ill-conceived ruling.

⁷⁹ See *USTelecom Brief* at 41.

⁸⁰ See, 2015 *Tech Transitions Order*, ¶ 116.

⁸¹ See 47 C.F.R. § 63.71; see also 47 U.S.C. § 251(c)(5).

are also required to notify competing carriers when they will make changes that will affect the interoperability of competitors' facilities and networks, ostensibly to enable them to comply with section 214 by providing notice to their own customers.⁸² The Commission never adequately explained how the obligation to seek discontinuance falls on the ILEC rather than on the carrier-customer when the carrier-customer's end users are affected. Nor can it explain how, because there is no such obligation in the Act, or in the Commission's rules or precedent. A carrier-customer discontinuing a service must fulfill its § 214(a) obligations to its own retail customers, even if the discontinuance results from an ILEC discontinuing a wholesale input used by carrier-customer to provide service to its own retail customers. The Commission should therefore adopt its proposal to interpret section 214(a) to require a carrier to take into account only its own end user customers when evaluating whether a discontinuance application must be filed.

C. The Commission should further streamline discontinuances provisions in Part 63.

Under the plain language of section 214(a), the availability of one or more alternative services to a community or part of a community should obviate the need to file a discontinuance petition. We support a finding by the Commission that discontinuance of a legacy service will not adversely affect the public convenience and necessity where a fiber, IP-based, or wireless alternative service is available to the affected community.⁸³ Given the widespread adoption by consumers of these alternative services,⁸⁴ there is no basis for requiring an alternative service be identical to or provide the exact same features and functionality as legacy services. Consumers

⁸² 47 C.F.R. § 51.325(a) (requiring an ILEC to provide public notice of any network change that will affect a competing provider's service).

⁸³ *Notice*, ¶¶ 95-96.

⁸⁴ USTelecom estimates that only 16% of customers still subscribe to legacy voice services. *See USTelecom Research Brief*, at 1.

have overwhelmingly already chosen wireless and other services based on new technology over legacy services, thus they should be deemed adequate substitutes on that basis alone.

At most, the Commission could adopt some guidelines to determine what services would be deemed adequate substitutes for legacy services. For example, services that support voice and other real-time applications should be deemed adequate. Moreover, a service should not be disqualified merely because it may not support analog terminal equipment and functionality; such a condition would discourage technology transitions. A provider seeking to discontinue a legacy service where one or more other services are available should be able to submit a streamlined application describing the services that will be available to the community after discontinuance with an abbreviated public notice period (e.g., 10 business days).

We likewise support the Commission's proposal to allow streamlined discontinuance for services that have had no customers for 6 months.⁸⁵ Applications for discontinuance of such services should have an abbreviated notice period of no more than 60 days. We also urge the Commission to revise section 63.71(i) to allow auto-grant discontinuance to CLECs that must discontinue due to ILEC copper retirement after a notice period of no more than 6 months. We also support retaining modifications to section 63.71(a) and (b), which permit carriers to provide email notice to customers.

Finally, we encourage the Commission to support and work toward regulatory parity in recognition of the competitive nature of today's telecommunications markets. Not all carriers are not required to seek approval to enter and exit the marketplace. Any action the Commission can take, using forbearance or other means, to eliminate this disparity by removing barriers inherent to the discontinuance process, which disproportionately affects ILECs because they

⁸⁵ Notice, ¶ 97.

provide most of the existing legacy services subject to technology transitions, would encourage and likely accelerate broadband deployment.

IV. THE COMMISSION SHOULD USE ITS PREEMPTION AUTHORITY AS APPROPRIATE TO ACCELERATE BROADBAND DEVELOPMENT.

In the *Notice of Inquiry*, the Commission seeks comment on whether to enact rules to promote broadband infrastructure deployment “by preempting state and local laws that inhibit broadband development.”⁸⁶ Use of the express authority provided in section 253 of the Act may be necessary to prevent unreasonably burdensome restrictions on carriers seeking to build new and expand existing network footprints. But, as recently demonstrated by the reversal of a Commission order purporting to preempt state provisions restricting municipalities from expanding their broadband services beyond their own territories,⁸⁷ the Commission’s preemption power is not unfettered. The Commission nevertheless should be vigilant about the need to ensure that states and municipalities are not erecting barriers by establishing additional conditions and restrictions for carriers to comply with after they have met Commission requirements.

We generally support the Commission’s efforts to identify potential state and local barriers by seeking comment on issues such as deployment moratoria and excessive fees.⁸⁸ In addition to those issues, our member companies have experienced other state and municipal restrictions that the Commission should be aware of in case the need arises to take preemptive action. These include road move legislation requiring 100% carrier contribution; unfunded state

⁸⁶ *Id.*, ¶ 100.

⁸⁷ *State of Tennessee, et al. v. Federal Communications Commission*, 32 F.3d 597 (6th Cir. 2016).

⁸⁸ *See Notice*, ¶¶ 102-108.

carrier of last resort (COLR) obligations; and mandatory state pole databases. We also believe the Commission has authority to adopt rules to prospectively define the scope of state and local laws that would prohibitively erect barriers to broadband deployment,⁸⁹ although it is doubtful that such rules could entirely replace the need to review some preemption petitions on a case-by-case basis.

State laws and local ordinances also may prevent incumbent carriers that seek to retire copper from doing so, even if they meet Commission requirements. Where such requirements impact copper maintenance or retirement by requiring more or different actions by carriers, they can serve as barriers to broadband deployment, especially if carriers are forced to delay or change plans to move forward with fiber deployment. In such instances, the Commission should step in to the extent it has authority.

The Commission seeks comment on whether section 253 provides the requisite authority to preempt state and local laws and regulations governing service quality, facilities maintenance or copper retirement when they serve as barriers to broadband deployment.⁹⁰ The scope of that preemption appears to be limited to correcting violations or inconsistencies in state or local provisions that prohibit or have the effect of prohibiting an entity from providing telecommunications service.⁹¹ There are also exceptions that limit the Commission's authority to preempt requirements imposed on a competitively neutral basis by states and localities to protect the public interest and manage public rights of way.⁹²

⁸⁹ *Id.*, ¶ 109.

⁹⁰ *Id.*, ¶ 114.

⁹¹ *See* 47 U.S.C. § 253(a).

⁹² *See* 47 U.S.C. § 253(b), (c).

Copper retirement involves the removal of infrastructure, so it is unclear how the Commission could plausibly argue that restrictions on removing facilities inhibit, rather than enable, the provision of telecommunications. Should the Commission determine that it is without authority to preempt state and local restrictions on copper retirement, it should endeavor to work collaboratively with states and localities, including through the newly-formed Broadband Deployment Advisory Committee, to create consensus in the form of best practices and model codes to help eliminate barriers that may stymie broadband deployment efforts.

V. THE COMMISSION MUST REVERSE ITS REDEFINITION OF SERVICE UNDER SECTION 214.

A. The “functional test” standard is unlawful.

In holding that a “service” may no longer be defined by its provider (in, for example, a tariff or product guide), but instead should now be defined using an amorphous “functional test that takes into account the totality of the circumstances from the perspective of the relevant community or part of a community,”⁹³ the Commission introduced uncertainty into section 214 discontinuance process. ILECs have been left guessing whether particular changes they may make to their services – or changes they may make to their facilities that have ancillary effects on their services – trigger a Section 214 application process. The resulting uncertainty complicates and will almost certainly impede the ongoing process of upgrading consumers to next-generation networks and services.

⁹³ *Declaratory Ruling*, ¶ 117.

USTelecom filed a petition for reconsideration,⁹⁴ which was denied by the Commission, followed by application for review in the D.C. Circuit court of appeals.⁹⁵ The arguments raised in those two challenges, which we will not reiterate here, make clear that the functional test is a new rule. An agency cannot change existing rules simply by adopting a new test or by issuing guidance under the guise of a clarification or interpretation, as the Commission has attempted to do here.

There is no question that in this instance, the Commission has changed the rules of the game. The Commission did not “clarify” existing rules or interpretations; it substantively changed the rules by adding presumptions and factors to the section 214 process, including (for the first time) in the definition of “service” features and functionalities not included in the tariff definition that “the community or part of a community reasonably would view as the service provided by the carrier.”⁹⁶ With this never-before articulated or applied test, the Commission overturns the long held view that a provider offering a “service” is the one that defines that service. Instead, the service will now be defined by post hoc determinations based on the presence of third-party services and devices that a provider may not even know exist.

The Commission must reverse this amorphous standard and reinstate the long-standing principles regarding what constitutes a service for section 214 discontinuance purposes. This effective rule change was improperly adopted by declaratory ruling, so the Commission can reverse in the same manner.

⁹⁴ Petition for Reconsideration of the United States Telecom Association, PS Docket No. 14-174, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25, RM-10593 (filed Dec. 23, 2014) (*USTelecom Petition for Recon*).

⁹⁵ A notice of appeal was filed on November 12, 2015.

⁹⁶ *USTelecom Petition for Recon*, at 4.

B. “Service” to a Community Is Not Limited to a Single Offering.

USTelecom and its member companies have consistently advocated for relief from discontinuance restrictions where no actual loss of service to a community or part of a community would occur, a concept that is dictated by the statutory text in section 214.⁹⁷ Strict adherence to the statutory text would require the Commission to define “service” to mean all offerings in a particular community or part of a community such that no application for discontinuance would be necessary if another service will be available in the community following discontinuance, whether from the carrier seeking discontinuance or a competitor.⁹⁸ Interpreting “service” to mean a single offering or product is inconsistent with the statute, and is an unnecessary restriction on carriers’ ability to retire legacy services in favor of newer services capable of supporting and providing broadband. The Commission therefore should adopt its proposed interpretation as another step toward removing barriers to broadband investment and deployment. Because the Commission’s interpretation would involve construction of a statutory provision for the purpose of “terminating a controversy or removing uncertainty,”⁹⁹ it could properly act by declaratory ruling.

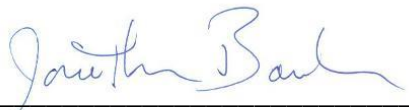
⁹⁷ See 47 U.S.C. § 214(a).

⁹⁸ We acknowledge that the Commission has authority to determine whether a particular service is of similar enough type and quality to be considered an adequate substitute for the service being discontinued. See *supra* § III.C.

⁹⁹ 47 C.F.R. §1.2.

Respectfully submitted,

UNITED STATES TELECOM ASSOCIATION

By: 
Jonathan Banks
Diane Holland
Kevin Rupy

Its Attorneys

607 14th Street, NW, Suite 400
Washington, DC 20005
(202) 326-7300

June 15, 2017