

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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

**COMMENTS OF
THE PENNSYLVANIA PUBLIC UTILITY COMMISSION**

The Pennsylvania Public Utility Commission (Pa. PUC) files these Comments in accordance with the Public Notice (PN) in the above-captioned docket issued by the Federal Communications Commission (Commission) on May 16, 2017, which clarified the deadline for the filing of comments regarding the Commission’s proposed rules that would accelerate the deployment of next-generation networks and services by removing barriers to infrastructure investment. In the *Notice*, the Commission specified that comments on the item would be due 30 days after the date of publication in the Federal Register, and that reply comments would be due 60 days after the date of publication in the Federal Register.¹ The PN clarified the deadlines for the filing of comments and reply comments in response to the *Notice* and indicated that all comments in response to all parts of the *Notice* would be due 30 days from the May 16, 2017 Federal Register publication date.² Accordingly, Comments to the *Notice* are due June 15, 2017, to file comments in this proceeding, and July 17, 2017, to file reply comments.³

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

² See Federal Communications Commission, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, 82 Fed. Reg. 22000 (May 11, 2017), <https://www.gpo.gov/fdsys/pkg/FR-2017-05-11/pdf/2017-09541.pdf>; see also Federal Communications Commission, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, 82 Fed. Reg. 22453 (May 16, 2017), <https://www.gpo.gov/fdsys/pkg/FR-2017-05-16/pdf/2017-09689.pdf>.

³ See fn. 1.

Introduction and Summary

As an initial matter, these Comments should not be construed as binding on the Pa. PUC in any matter currently pending before the Pa. PUC. Also, these Comments could change in response to later events, including ex parte filings or the review of other filed reply comments and legal or regulatory developments at the state or federal level.

In its *Notice*, the Commission, among other things, states that it seeks to better enable broadband providers to build, maintain, and upgrade their networks by: (1) proposing to remove regulatory barriers to infrastructure investment at the federal, state and local level; (2) suggesting changes to speed the transition from copper networks and legacy services to next-generation networks and services; and (3) proposing to reform Commission regulation that increase costs and slow broadband deployment. The Commission seeks comment on these proposals.

The Pa. PUC supports the Commission's efforts to remove regulatory barriers to increase infrastructure investment and accelerate broadband deployment as long as such action does not impact competition, obviate state law or result in federal preemption of state laws, regulations, and practices.

The Pa. PUC is opposed to any proposals that would revise the current copper retirement process to eliminate advance notice or direct notice requirements regarding copper retirements. Interconnecting entities, competitors and other impacted parties, including states, should continue to receive advance notice of copper retirements before the Commission allows a carrier to remove legacy facilities and the existing services offered over those facilities from the marketplace.

Next, the Commission should retain the current copper retirement direct notice requirements for residential and non-residential customers as they educate subscribers regarding copper retirements that may affect them. The Pa. PUC supports the existing rules because they

address network change disclosures that reflect the needs of consumers for accurate information about the consequences of retirements of copper facilities. The rules properly continue to direct incumbent carriers to provide notice of planned copper retirements to retail customers when such retirements remove and replace copper network connections to the customers' premises, along with particular consumer protection measures.

The Pa. PUC is not opposed to the FCC's proposal to streamline the Section 214(a) discontinuance process where appropriate. However, the Pa. PUC asserts that a request to grandfather a legacy service pursuant to Section 214 should not impact an ILEC's COLR obligations and should avoid any result that obviates or supercedes independent state law. Where an ILEC continues to have carrier of last resort (COLR) obligations, an application to discontinue services and/or facilities may be subject to separate review under independent state law where such requirements may exist.

Additionally, the Pa. PUC disagrees with the Commission's proposal to reverse its clarification regarding Section 214 (a) of the Act, which stated that a carrier must obtain Commission approval before discontinuing, reducing, or impairing a service used as a wholesale input when the carrier's actions will discontinue, reduce, or impair service to end users, including a carrier-customer's retail end users. The Commission should not reverse this clarification as technology transitions should be neutral and should not be used as an impediment to meaningful, vibrant competition or result in a limitation on competitive wholesale access to network facilities and services, especially as envisioned under state and federal law. The Pa. PUC is not opposed to the Commission's streamlining certain aspects of the Section 214 Discontinuance application process.

Neither should the Commission preempt independent state laws that require carriers to provide adequate, safe, and reliable services while ensuring that their current networks are maintained while they are in use. The Pa. PUC particularly opposes any application of the Section 253(a) prohibition on local laws that are alleged to inhibit the provision of any intrastate or interstate telecommunications services. Such a prohibition does not and should not apply to Section 1501 of the Pennsylvania Public Utility Code (Utility Code), 66 Pa. C.S. § 1501. The Pennsylvania General Assembly enacted Section 1501 to require carriers to adequately maintain their *current* networks while they are in use and to require carriers to provide reasonably continuous services to the public regardless of the network technology used. As a technologically agnostic statutory provision, Section 1501 does not inhibit or prohibit an ILEC from transitioning its current network facilities to an all-fiber configuration providing various services including broadband access. Section 1501 operates to ensure service reliability, quality, adequacy and safety, regardless of the technology used to provide the service. These are important state objectives traditionally reserved to the states and properly exercised under the Pennsylvania General Assembly's police powers. The Pa. PUC respectfully submits that the *state* agency and legislature are better positioned to oversee service quality, reliability, adequacy, safety and other related issues affecting its citizens than a federal regulatory agency.

Lastly, the Pa. PUC agrees with the Commission's conclusion that Section 214 of the Act should apply when an ILEC seeks to decrease the availability, quality, or capabilities of *all* services on which customers rely, not just the services described in a carrier's tariff. Section 214(a) has nothing to do with tariffs or "schedules of charges."

A. The Commission Should Retain the Expanded Definition of Copper Retirement Adopted in the 2015 Technology Transitions Order and the Current Notice Requirements for Copper Retirements Set Forth in Section 51.322 of its Rules.

- 1. The Commission should retain the expanded definition of copper retirement in its rules as the current definition provides additional clarity and minimizes carrier uncertainty as to when the copper retirement notice requirements apply.**

In the *2015 Technology Transitions Order*, the Commission adopted an expanded definition of copper retirement that added (1) the feeder portion of copper loops and subloops, previously excluded, and (2) “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”—i.e., *de facto* retirement.⁴ In the *Notice*, the Commission seeks comment on whether it should retain this expanded definition.

The Pa. PUC recommends that the Commission retain the expanded definition so as to include the feeder portion of the loop within the definition of copper retirement. As we asserted in prior comments addressing technology transition issues, the Pa. PUC agrees that if the feeder portion of the loop is unavailable for unbundled access, the practical difficulty of obtaining wholesale access to the remaining portion of the loop essentially forecloses competitive access to the retail customer. Moreover, the Pa. PUC believes that a provider who makes the business decision to fail to maintain its copper network or to neglect it in such a fashion to the point where it is no longer reliably usable, creates a situation that is to the functional equivalent of a “disabling” of the copper network.” In the Pa. PUC’s view, such a situation should fall within the purview of a “copper retirement.” Accordingly, the Commission should retain the expanded definition of copper retirement.⁵

⁴ *2015 Technology Transitions Order*, 30 FCC Rcd at 9420, paras. 80; *see also Notice*, ¶ 60, at 19.

⁵ The Pa. PUC notes that a state may take its own actions to address any constructive abandonment issues that may arise as a result of a carrier’s actions with respect to its network.

2. The Commission should retain the current direct notice requirements for copper retirements and decline to return to a version of its pre-2015 copper retirement rules as it would reduce the number of direct notice recipients for planned copper retirements.

In the *2015 Technology Transitions Order*, the Commission revised the network disclosure rules to require ILECs to provide all interconnecting competitors within the affected service area advance notice setting forth additional information about the potential impacts of proposed copper retirements and also required direct notice to retail customers, state commissions, the Governors of the state, Tribal entities, and the Secretary of Defense, and expanded the types of information that must be disclosed to them.⁶

In the *Notice*, the Commission specifically seeks comment on eliminating some or all of the changes to the copper retirement process it adopted in 2015⁷ and returning to a more streamlined version of the pre-2015 *Technology Transitions Order* requirements for handling copper retirements subject to Section 251(c)(5) of the Telecommunications Act of 1996.⁸ Additionally, the Commission also seeks comment on streamlining and/or eliminating provisions of the more generally applicable network change notification rules.

The Pa. PUC disagrees with eliminating these copper notice requirements in the *2015 Technology Transitions Order*. The Pa. PUC believes that these notice rules ensure that all impacted parties have the information they need to adapt to an evolving communications environment. Particularly, absent adequate notice, interconnecting entities will be unable to accommodate the planned network changes without disruption of service to their customers. The Pa. PUC asserts that ILECs should continue to provide direct notification of planned copper retirements to each telephone exchange service provider or other user that interconnects with the

⁶ *2015 Technology Transitions Order*, 30 FCC Rcd at 9387-90, 9396-97, & 9411-13, paras. 24-25, 28-29, 39-40, & 70-71.

⁷ *2015 Technology Transitions Order*, 30 FCC Rcd 9372.

⁸ *See generally Notice*, ¶¶ 57-58, at 18-19.

ILEC's network and file a certificate of service to the Commission confirming the provision of such notice regardless of the timing of the retirement.

The Pa. PUC notes that one of the stated goals of the Commission in promoting technology transitions is to protect competitive opportunities and ensure consumer choice. Consequently, the Commission should ensure that this fundamental value is not impaired in its pursuit of allowing providers greater flexibility in the copper retirement process.

As ILECs continue with their planned technology transitions, competitive providers should be fully informed about the impact that copper retirements will have on their businesses so that retirement of the legacy copper network facilities will not harm their ability to compete. Because many competitors continue to use copper-based unbundled network facilities or interconnection (including the use of unbundled copper loops for the provision of retail broadband access services) to provide services to their customers, network disclosure rules should continue to require that ILECs provide an adequate description of the expected impact of the planned changes, including but not limited to any changes in prices, terms, or conditions that will accompany the planned changes. Moreover, the advance notice given by ILECs provides a competitor with sufficient lead time to plan for the necessary changes to their products as well as prepare their customers for changes to any offerings that may have been dependent upon ILEC last-mile facilities.

Additionally, the current notice rules ensure that *states* are adequately informed *prior* to planned technology transitions. The Commission has acknowledged that it is not the only governmental entity with important responsibilities with respect to technology transitions; states serve a vital function in safeguarding the values of the "Network Compact". Accordingly, the

Commission should retain its network disclosure rules regarding copper retirements so that states can fulfill their respective missions with respect to the ongoing technology transitions.

Also, any Commission decision regarding network changes must not explicitly or implicitly obviate independent state law. This is necessary to ensure that a state's jurisdiction over protected voice-grade service or other service that is provided under state or federal law is not indirectly obviated by a Commission decision. The Pa. PUC states that any concerns about technological changes should be addressed with the principle of cooperative federalism.

Furthermore, the current notice requirements help to minimize any customer confusion regarding the impact of planned copper retirements. Continuing to require ILECs to provide this information to their customers will allow for a smoother transition by minimizing the potential for consumer complaints arising out of a lack of understanding regarding the planned network change. Consumers and other retail customers need to understand what is and is not happening during a copper retirement, and they need to understand their choices about service. Also, consumers need to understand the ways in which copper retirement will *not* affect them; and absent such notice, consumers may not understand that they can retain their existing *service, with* equivalent functionalities, even when provided through more modern network technology, e.g., fiber optics. Thus, the notice requirements for copper retirements should continue to extend to retail customers.

In summary, the Commission should not attempt to advance technology transitions in a manner that thwarts competition from competitive LECs and fails to provide adequate notice to consumers. The Pa. PUC notes that various ILECs opposed the notice requirements and have characterized them as "burdensome," "onerous" or "restrictive." However, absent any compelling and demonstrable evidence in the record that the current notice requirements have

sufficiently delayed or impeded ILECs from replacing their copper facilities — and the Pa. PUC has no knowledge or information that this has transpired in Pennsylvania — the Commission’s current notice requirements for copper retirements should be retained as they preserve competition by promoting robust notice to competitors of planned copper retirements and minimize consumer confusion as customers will understand how they will be affected by the planned network change.

3. The Commission should allow incumbents the flexibility to provide their affiliates advanced notice of a planned copper retirement only to the extent the carrier makes such information available to all entities that would be entitled to direct notice of the network change in question.

In its *Notice*, the Commission seeks comment on its proposal to eliminate Section 51.325(c) of its rules, which prohibits incumbent LECs from disclosing any information about planned network changes to affiliated or unaffiliated entities prior to providing public notice.⁹ The Pa. PUC asserts that the Commission should retain this rule.

The Pa. PUC strongly believes that technology transitions should not be used as a pretext to limit competition or to allow incumbents to engage in anticompetitive behavior. By adopting the rule prohibiting ILECs from disclosing any information about planned network changes to affiliated or unaffiliated entities prior to providing public notice in the first instance, the Commission appropriately was concerned that ILECs might use their inherent market power against their competitors and act in an anticompetitive manner by providing preferential disclosure to their affiliates. Clearly, the existence of the rule itself indicates that the Commission has the authority to place conditions on, or define the scope of the relationship between, an incumbent and its affiliate especially in the context of an ILEC’s utilizing its market power in the local exchange to unduly advantage its affiliate’s operations.

⁹ *Notice*, ¶ 67, at 21.

In the alternative, if the Commission finds the prohibition is no longer necessary, the Commission should revise the rule accordingly. However, the Pa. PUC submits that this finding should occur only if there is compelling evidence that the marketplace now has adequate safeguards in place, and the Commission concludes that the risk of anticompetitive behavior by the incumbent LECs is low so that they are no longer compelled to favor their affiliates over their competitors. Moreover, any new rule should address simultaneous notice to the affiliates and competitors. One way to do this would require incumbents providing notices to their affiliates in an open and transparent fashion, such as through website postings that are easily available and accessible to interested stakeholders. If these criteria are satisfied, the Pa. PUC states that the Commission should revise the rule to permit disclosures to affiliated and unaffiliated entities, but only to the extent the carrier makes such information simultaneously available to all entities that would be entitled to direct notice of the network change in question.

B. The Commission Should Not Adopt Any Modifications to the Current Section 214 Application Process That Would Inhibit or Impair Competition.

Section 214(a) requires carriers to obtain authorization from the Commission before discontinuing, reducing, or impairing service to a community or part of a community.¹⁰ In its *Notice*, the Commission seeks comment on implementing measures to shorten the timeframes for the Section 214 application process in order to accelerate the transition to next generation IP-based networks.¹¹

¹⁰ 47 CFR § 51.332(d)(8).

¹¹ See generally *Notice*, ¶¶ 71-72, at 23.

1. The Pa. PUC is not opposed to streamlining the Section 214(a) discontinuance process for applications that seek authorization to “grandfather” low-speed legacy services for existing customers as long as the process allows adequate time for interested parties, including competitors, to review consider, and comment on discontinuance applications.

First, the Pa. PUC is not opposed to streamlining the public comment period for applications seeking Section 214(a) authority to discontinue “grandfathered” low-speed legacy services to existing customers. However, the Pa. PUC states that, at a minimum, the streamlining of Section 214 discontinuance application should only apply to grandfathered low-speed time division multiplexing (TDM) services at lower-than-DS1 speeds (below 1.544 Mbps), as these are services that are rapidly being replaced with more advanced or higher-speed IP-based services.¹²

Additionally, the Pa. PUC is not opposed to the FCC’s proposal to subject such applications from both dominant and non-dominant carriers to a uniform comment period. However, the Pa. PUC believes the proposed 10-day comment period is too short. Instead, the Commission should allow for a longer comment period such as 20 days so as to allow adequate time for interested parties to review and consider discontinuance applications from carriers and to file comments on these applications, if necessary.

Further,¹² the Pa. PUC is also not opposed to streamlining the auto-grant period for Section 214 applications seeking to grandfather low-speed legacy services so that such applications will be automatically granted on a set day after public notice unless the Commission notifies the applicant that such a grant will not be automatically effective. The Pa. PUC is not opposed to applying the Commission’s proposal to applications seeking to discontinue grandfather low-

¹² The Pa. PUC recognizes that the Commission is NOT requesting comments on whether ILECs have the authority to grandfather legacy services. Rather, it seeks comment on whether it should further streamline *the procedure* for grandfathering of a legacy service. Nevertheless, the Pa. PUC asserts that a request to grandfather a legacy service pursuant to Section 214 should not impact carrier of last resort (COLR) obligations and should avoid any result that obviates or supersedes such obligations under independent state law. Where an ILEC continues to have carrier of last COLR obligations, an application to discontinue services and/or facilities may be subject to separate review under independent state law where such requirements may exist.

speed legacy services from both domestic, dominant carriers and domestic, non-dominant carriers. But again, in light of the Pa. PUC's concern that interested parties be afforded sufficient time to receive notice of and file comments in response to the discontinuance applications, the Pa. PUC recommends that the Commission extend the auto-grant period to no less than 30 days after its filing unless the Commission notifies the applicant that the grant will not be automatically effective.¹³ However, if an objection from a potential customer or other interested party is received that calls into question whether a substitute or alternative service that satisfies all of the criteria the FCC adopts, then the Commission should not automatically grant the application.

For applications seeking to discontinue legacy data services that have previously been grandfathered, the Pa. PUC is not opposed to the Commission's proposal to streamline the discontinuance process for a period of no less than 180 days—adopt a streamlined uniform comment period of 10 days and an auto-grant period of 31 days for both dominant and non-dominant carriers. However, again, this proposed streamlined process should be restricted only to previously grandfathered legacy low-speed services at or below DS1 speeds with adequate notice and comment time frames.¹⁴ We also agree with the Commission's proposal to require carriers seeking this streamlined discontinuance processing for legacy data services to make a showing that they received Commission authority to grandfather such services at least 180 days previously in the form of a statement. If the applicant is unable to file such a statement, then the Commission should not automatically grant the application.

¹³ See generally 47 CFR § 63.71.

¹⁴ The Pa. PUC recognizes that the Commission is not requesting comments on whether ILECs have the authority to grandfather legacy data services. Rather, it seeks comment on whether it should further streamline the procedure for grandfathering a legacy data service. The Pa. PUC asserts that a request to grandfather a legacy data service pursuant to Section 214 should avoid any result that obviates or supersedes any related obligations under independent state law. The Pa. PUC points to the ongoing obligations of Pennsylvania ILECs to provide broadband access services under the applicable provisions of Chapter 30 of the Utility Code.

Further, whenever a carrier seeks to transition customers from an existing service to a replacement service based on a newer technology, the Commission should consider the availability of adequate replacement substitute services (whether from the applicant itself or a competitive provider) in evaluating its section 214 discontinuance application. This is existing precedent that should be maintained, and this criterion should be considered mandatory in order for an application to qualify for automatic granting under Section 214.

It is imperative that the applicant meets this criterion indicating that the replacement service is a functionally equivalent to the existing service that will be discontinued. This promotes innovation and competition. To these ends, the Pa. PUC submits that along with its Section 214 application, the applicant should be required to submit a certification identifying one or more alternative comparable data services available from the discontinuing provider or a third party provider at the same or higher speeds as the service being discontinued. The Pa. PUC agrees that, in this instance, the carrier should be required to submit information demonstrating the degree to which it meets or does not meet each factor, and the Commission should weigh this information in its evaluation of whether a replacement service offered by the applicant or an alternative service offered by another provider in the relevant service area qualifies as an adequate substitute for the existing service for which the carrier seeks discontinuance authorization. Again, if the applicant is unable to file such a certification, then the Commission should not automatically grant the application. Moreover, any filing or process adopted must provide adequate notice and sufficient time to respond along the lines set out by the Pa. PUC above.

2. The Commission should not reverse its “clarification” concerning the circumstances in which the statutory obligations of Section 214(a) of the Act apply to a carrier’s discontinuance of a service used as a wholesale input by one or more other carriers.

In the *2015 Technology Transitions Order*, the Commission “provided guidance and clarification” that Section 214(a) of the Act applies not only to a carrier’s *own* retail customers, but also to the retail end-user customers of that carrier’s wholesale carrier-customers.¹⁵ In its *Notice*, the Commission seeks comment on reversing its 2015 “clarification” of Section 214(a) that expanded the scope of end users that a carrier must consider in determining whether it is required to obtain Section 214 discontinuance authority.¹⁶

The Pa. PUC is opposed to the Commission’s proposal to reverse the 2015 interpretation and, going forward, interpret Section 214(a) to require a carrier to take into account only its own retail end users when evaluating whether the carrier will “discontinue, reduce, or impair service to a community, or part of a community.”¹⁷ The Pa. PUC agrees with the Commission’s clarification that when discontinuing service under Section 214(a), an applicant must also seek Section 214(a) discontinuance approval if its action will discontinue, reduce, or impair service to a community, or part of a community — including service provided to the community by the discontinuing carrier’s carrier-customer. Thus, in order to satisfy Section 214(a) of the Act, a carrier discontinuing service — whether that carrier is an incumbent or a competitive carrier — must carefully determine whether its actions will, in fact, discontinue, reduce, or impair service to all affected end users. The process ultimately adopted must also ensure adequate notice and realistic response time frames given the federal law’s emphasis on both upgrading the nation’s networks and reliance on competition as one of the means to pursue that goal.

¹⁵ *Id.*

¹⁶ *2015 Technology Transitions Order*, 30 FCC Rcd at 9428, para. 102.

¹⁷ 47 U.S.C. § 214(a).

It is critically important that technology transitions do no harm to the benefits of competitive access for retail customers or wholesale competitive providers. As a result, the Commission should continue to take into consideration consumer trends and competitive impact in determining what has become an adequate substitute in the marketplace. Moreover, the Pa. PUC notes that the discontinuance of wholesale services used by competitive LECs is likely to result in a discontinuance of service to retail end users, since competitive LECs use the facilities of incumbents to provide services. In light of this, the Commission should continue to consider how the action to discontinue, reduce, or impair service impacts a community or part of a community such that approval is necessary pursuant to Section 214(a).

However, this does not mean that the Pa. PUC supports permanent retention and operation of legacy facilities as technological change and innovation occur. It simply means that as the overall network is upgraded, the stakeholders using that network, whether incumbents, wholesale access providers, or competitors, must not be unlawfully precluded from providing their respective wholesale and/or retail services. Accordingly, the Pa. PUC asserts that, as a part of the Section 214 application process, ILECs that are seeking to discontinue, reduce, or impair a legacy service used as a wholesale input by competitive providers, should continue to be required to provide equivalent wholesale access on equivalent rates, terms, and conditions.

3. The Pa. PUC does not oppose the Commission's proposal to establish a rebuttable presumption that Section 214(a) discontinuances will not adversely affect the present or future public convenience and necessity, provided that fiber, IP-based, or wireless services are available to the affected community.

In its *Notice*, the Commission seeks comment on whether it would be appropriate for the Commission to conclude that Section 214(a) discontinuances will not adversely affect the present or future public convenience and necessity, provided that fiber, IP-based, or wireless services are available to the affected community. The Pa. PUC is not opposed to the Commission's granting a rebuttable presumption in this regard. In those instances where a discontinuing carrier's

service overlaps with an alternative fiber, IP-based, or wireless service, the Commission should streamline the process and allow for a shortened comment period and automatic grant timeframe. However, the applicant must be required to file proof that functionally equivalent fiber, IP-based, or wireless alternatives of equal or better adequacy and reliability (including 911/E911 calling and locational accuracy functionalities) are available to the affected community, along with the Section 214 application, including adequate notice and timely response periods.

C. Section 1501 of the Pennsylvania Public Utility Code Does Not Inhibit the Provision of Telecommunications Services in the State of Pennsylvania and Is Not a Barrier to the Deployment of Broadband Facilities or the Provisioning of Next-Generation Technology Services.

In the *Notice*, the Commission seeks comment on whether it should adopt rules that prohibit any state and/or local law that it determines inhibits broadband deployment.¹⁸ Specifically, the Commission seeks comment on whether there are state laws governing the maintenance or retirement of copper facilities that serve as a barrier to deploying next-generation technologies and services that the Commission might seek to preempt.

In seeking comment on this issue, the Commission cites to a portion of the Pa. PUC's enabling statute, Section 1501 of the Utility Code, 66 Pa. C.S. § 1501, as an example of how certain states require utilities or specific carriers to maintain adequate equipment and facilities.¹⁹ The Commission also notes that other states empower public utility commissions, either acting on their own authority or in response to a complaint, to require utilities or specific carriers to maintain, repair, or improve facilities or equipment or to have in place a written preventative maintenance program.²⁰

¹⁸ See generally *Notice*, ¶¶ 100-101, at 31-32.

¹⁹ See *Notice*, fn. 161, at 36.

²⁰ See *Notice*, fn. 162, at 36.

Section 1501 of the Utility Code in Pennsylvania provides in pertinent part:

Character of service and facilities

Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. Such service also shall be reasonably continuous and without unreasonable interruptions or delay. Such service and facilities shall be in conformity with the regulations and orders of the commission.

66 Pa. C.S. § 1501. Essentially, Section 1501 of the Utility Code merely sets forth the character of service and facilities that every public utility must provide. It mandates that every public utility "furnish and maintain adequate, efficient, safe, and reasonable service and facilities."

The Commission seeks comment on the impact of state legacy service quality and copper facilities maintenance regulations and asks whether such regulations are burdensome. The Commission also seeks comment on whether carriers are less likely to deploy fiber in states where such regulations exist versus those states that have chosen to deregulate fully and have no regulations that impose service quality and facilities maintenance requirements.

First, any characterization of Section 1501 as being burdensome or restrictive is erroneous and misplaced. The General Assembly's enactment of Section 1501 was not written to affect network modernization and does not have a detrimental impact on broadband facilities deployment nor does it in any way serve as a barrier to the provisioning of next-generation technologies in the Commonwealth of Pennsylvania. In Pennsylvania, network modernization to deploy broadband is specifically addressed through Chapter 30 of the Utility Code, 66 Pa. C.S. §§ 3011-3019.

The legislative and regulatory purpose of Section 1501 is to require carriers to ensure that their current networks are maintained while they are in use, and not to allow impairment or degradation of the existing network facilities that would result in a *de facto* retirement, and to

ensure that carriers provide reasonably continuous, etc. service over those networks, regardless of the network technology used. To that end, the Code does not inhibit or prohibit an ILEC from transitioning its current legacy facilities to an all-fiber network providing a mix of services including broadband access. Rather the Utility Code only requires the adequate maintenance of the existing network until such time as the carrier makes the business decision to transition to another technology and the provision of services through that technology is reasonably continuous in the affected service area.

Second, there is no evidence from any Pennsylvania carrier demonstrating that ILECs or other carriers have been less likely to deploy fiber in Pennsylvania because of the existence of Section 1501. In fact, the opposite has occurred. Pennsylvania's promotion of universal broadband including fiber deployment permits carriers to retire copper and transition consumers to fiber-based functionally equivalent services. Moreover, the number of recent copper retirement notice filings submitted to it by ILECs indicate that the service quality and facilities maintenance requirements of Section 1501 have had negligible to no impact on an ILEC's business decision to retire legacy copper facilities in the state.²¹ The decision to retire copper truly depends entirely on the schedule and scope of the ILEC's respective business plan to deploy next-generation technologies to their customers, not on any service quality and facilities maintenance laws or regulations subject to Section 1501.

Concomitantly, Section 3011 of the Utility Code, 66 Pa. C.S. § 3011, declares that it is the public policy of Pennsylvania to ensure the efficient delivery of technological advances and

²¹ Verizon Public Notice of Network Change(s), CFR 47 Sections 51.325- 51.335 Copper Retirement ID No. 2016-03-A-PA; Frontier Notice of Network Changes pursuant to 47 C.F.R. §§ 51.325-51.331, 51.332 (Copper Retirements); CenturyLink Short Term Notice of Network Change(s), CC Docket No. 96-47 C.F.R. Sections 51.325-51.331, 51.332 (Copper Retirements), 51.333-51 Disclosure No. 16-004, Docket No. M-2016-2522716 and Verizon Public Notice of Network Change(s), 47 C.F.R §§51.325-51.335 Copper Retirement ID No. 2017-01-A-PA; Verizon Public Notice of Network Change(s), 47 C.F.R §§51.325-51.335 Copper Retirement ID No. 2017-01-B-PA, Docket No. M-2017-2582568.

new advanced services throughout the Commonwealth and to promote the delivery and provision of competitive services without jeopardizing universal service. Sections 1501 and 3011 work in tandem in that the Pa. PUC seeks to maintain the current network and services, while, at the same time, promoting the technology transitions that are underway that will bring broadband and advanced services to Pennsylvania customers.

Pennsylvania's goal is to encourage technology transitions to help unleash the benefits of network innovation for businesses and consumers, but, at the same time, preserving the adequacy, reliability and safety of operational networks and services in order to mitigate any disruptions to existing customers until such time that the carrier decides to deploy next-generation technologies to its customers. Thus, it would be contrary to the intent behind the Pennsylvania Utility to utilize Section 1501 in any manner that would prohibit the deployment of broadband networks and services.

As one example where the Pa. PUC has adhered to the intent of the Code, in a formal complaint adjudicated by the Pa. PUC involving quality of service issues and specific network architecture, relief was provided to the extent available for inadequate customer service. However, the Pa. PUC explicitly denied the complainants' request to have their residential basic local exchange service restored to copper-based network facilities that had been replaced by fiber optic facilities.²² Of note, the Commission found that nothing under Pennsylvania law entitled the customers to receive copper-based local exchange service.

Consequently, the Pa. PUC disagrees that Section 253 of the Act, 47 U.S.C. § 253, provides the Commission with authority to preempt state laws and regulations governing service quality, reliability, adequacy, safety, and corresponding network facilities operation and

²² *Altman v. Verizon Pennsylvania LLC*, Docket No. C-2015-2515583 (Pa. PUC Order adopted October 27, 2016; Initial Decision issued July 25, 2016).

maintenance requirements. Section 253(a) of the Act generally provides that no state and local legal requirements “may prohibit or have the effect of prohibiting” the provisioning of interstate or intrastate telecommunications services, and also provides the Commission with “a rule of preemption” that “articulates a reasonably broad limitation on state and local governments’ authority to regulate telecommunications providers.”²³ Section 253(b), provides exceptions for state and local legal requirements that are competitively neutral, consistent with Section 254 of the Act, and necessary to preserve and advance universal service.²⁴ Section 253(c) provides another exception described by the Eighth Circuit as a “safe harbor functioning as an affirmative defense” which “limits the ability of state and local governments to regulate their rights-of-way or charge ‘fair and reasonable compensation.’”²⁵ Under Section 253(d), Congress directed the Commission to preempt the enforcement of any legal requirement which violates Section 253(a) or 253(b) “after notice and an opportunity for public comment.”²⁶

To the extent that an improperly implemented copper retirement may or will compromise the provision of service under these Section 1501 parameters, the Pa. PUC is not barred by Section 253 from appropriately enforcing its Section 1501 statutory authority over the carrier in question. For example, the Pa. PUC can exercise its lawful Section 1501 authority and appropriately address why a copper replacement may have deprived end-user consumers from 911/E911 calling capabilities.

In any event, as stated above, Section 1501 does not “have the effect of prohibiting the ability of [those incumbent LECs] to provide any interstate or intrastate telecommunications

²³ 47 U.S.C. § 253(a); *see also Level 3 Commc’ns L.L.C. v. City of St. Louis, Mo.*, 477 F.3d 528, 531-32 (8th Cir 2007) (*Level 3*).

²⁴ 47 U.S.C. § 253(b); *see also Western Wireless Corp. Petition for Preemption of Statutes and Rules Regarding the Kansas State Universal Service Fund Pursuant to Section 253 of the Communications Act of 1934*, File No. CWD 98-90, Memorandum Opinion and Order, 15 FCC Rcd 16227, 16231-32, para. 9 (2000).

²⁵ 47 U.S.C. § 253(c); *Level 3*, 477 F.3d at 532.

²⁶ 47 U.S.C. § 253(d).

service.” Section 1501 is “competitively neutral” in that it applies to the underlying facilities and service of all certificated telephone utilities in Pennsylvania and applies regardless of the technology used to provide service. Moreover, Section 1501 is “necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.” Section 1501 of the Code does not pose a barrier to broadband development. It does not hinder a company’s business to speed the retirement of legacy copper networks and does not impact the transition to fiber-based networks and services.

Since Section 1501 of the Code does not prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service, the preemption authority of Section 253(a) does not apply to it. Likewise, if any other state’s service quality and facilities maintenance requirements law or regulations are similar to Section 1501, the Commission should not seek to preempt it either. The Pa. PUC asserts that concerns about accelerating broadband deployment and promoting ongoing technological changes should be addressed within the principle of cooperative federalism to the extent specific issues arise but not through outright preemption of a state’s valid exercise of its police powers.

D. Section 214(a) of the Act Is Triggered When a Carrier Seeks to Discontinue Service That Another Carrier Uses to Provide Service to the Community or Part of the Community and Not Just Services Described in a Carrier’s Tariffs.

In November 2014, the Commission *sua sponte* adopted the *2014 Declaratory Ruling* determining that when analyzing whether network changes contemplated by a carrier constitute a discontinuance, reduction, or impairment of service for purposes of determining whether Section

214(a) discontinuance authority is required, the Commission applies a “functional test.”²⁷ Under “the functional test,” of the Commission is obligated under Section 214(a) to look beyond the terms of a carrier’s tariff and instead consider the *totality of the circumstances* from the perspective of the relevant community when analyzing whether a service is discontinued, reduced, or impaired under Section 214.²⁸ The basis for the application of this test appears to be that the term “service” in Section 214(a) of the Act is defined “functionally and not solely with reference to a carrier’s tariffs.”²⁹

Specifically, the Commission seeks comment on the “functional test” and whether it should revise the Commission’s *2014 Declaratory Ruling* and subsequent *2015 Order on Reconsideration*³⁰ expanding what constitutes a “service” for purposes of Section 214(a) discontinuance review. The Pa. PUC submits that the “functionality test” remains relevant during the copper-to-fiber transition, and therefore, the Commission should continue to apply the test for Section 214(a) purposes.

Replacing copper with fiber or wireless potentially alters the capabilities of circuits. For instance, copper lines—unlike fiber—can deliver power, so voice service works during power outages as long as the customer has a telephone that will work without commercial power and the link with the central office is maintained and can supply direct current. Home-security alarms, fax machines, credit-card readers, medical-alert monitors, and similar devices that may depend on the TDM communications protocol may not optimally function with IP-only networks

²⁷ See *Technology Transitions et al.*, GN Docket No. 13-5 et al., Notice of Proposed Rulemaking and Declaratory Ruling, 29 FCC Rcd 14968, 15015-16, para. 115 (2014) (*2014 Declaratory Ruling*).

²⁸ *Id.*

²⁹ *Declaratory Ruling*, 29 FCC Rcd at 15017-18, para. 117.

³⁰ In response to a petition for reconsideration filed by USTelecom, the Commission reaffirmed this Declaratory Ruling in the *2015 Technology Transitions Order*. See *2015 Technology Transitions Order*, 30 FCC Rcd at 9471-78, paras. 181-201. USTelecom appealed to the U.S. Court of Appeals for the D.C. Circuit, and the case remains pending. See generally Brief for Petitioner USTelecom, *United States Telecom Ass’n v. FCC*, No. 15-1414 (D.C. Cir. June 14, 2016) (USTelecom Brief).

in the absence of appropriate network control software. Thus, TDM-to-IP transitions can impact functionality.

Additionally, ILEC changes to facilities that alter their functionality and capability, and other service changes, can impact CLEC services on which customers rely. Discontinuing traditional network facilities and/or services before a similarly functional and priced alternative wholesale product is readily available imposes a real impediment to viable competition. To preserve meaningful competition and consumer protections, which are goals of federal law as well as Pennsylvania law, stakeholders must not be precluded from providing their respective wholesale and/or retail services or obtaining such services. Thus, the FCC has appropriately concluded that it should require ILECs, which are seeking to discontinue, reduce, or impair a legacy service used as a wholesale input by competitive providers, to provide equivalent wholesale access on equivalent rates, terms, and conditions.

The Commission has taken reasonable steps to protect consumers, competition, and the public safety by requiring applicants seeking Section 214 relief to affirm that if a retail service or a service used as a wholesale input by one or more other carriers is being discontinued, reduced, or impaired it will be replaced by an adequate functionally equivalent substitute service.³¹ The “functional” test using a totality of the circumstances does not prohibit network changes; rather, it allows wireline ILECs to migrate or transition to all-fiber networks and facilities, while, at the same time, maintaining universal access to competitive retail services and wholesale access services.

Section 214 of the Act is a licensing provision requiring a certificate of public convenience and necessity for *any* change that reduces or impairs the *adequacy* or *quality* of *service*, not just changes that create inconsistency with a tariff. The structure, history, and

³¹ Order, 30 FCC Rcd 9372, 9428, para. 102.

purpose of Section 214 confirm that construction. Section 214(a) is not triggered *only* by changes that would render a service inconsistent with a tariff, rendering the change a violation. Had Congress intended to limit the impair standard set forth in Section 214 to tariff specifications, it would have used the term “schedule of charges” as set forth in Section 203(a) of the Act, 47 U.S.C. § 203(a), which creates the tariff-filing requirement. However, Section 214 does not use that term. Rather, it uses the term “service.”

Section 214 has nothing to do with tariffs or “schedules of charges.” Section 214 declares that “[n]o carrier shall discontinue, reduce, or impair service to a community, or part of a community” unless “neither the present nor future public convenience and necessity will be adversely affected thereby.” 47 U.S.C. § 214(a). It addresses “discontin[uing], reduc[ing], or impair[ing] service”—a phrase encompassing actions that decrease availability, quality, or capabilities of services on which customers rely.

The Pa. PUC agrees with the Commission’s conclusion that Section 214 of the Act should apply when an ILEC seeks to decrease the availability, quality, or capabilities of services on which customers rely. Moreover, this requirement is neither vague or onerous as the applicant can rebut the presumption and show that the discontinuance, reduction, or impairment of the service would not: (1) discontinue, reduce, or impair service to a community or part of a community; or (2) impair the adequacy or quality of service provided to end users by either the incumbent LEC or competitive LECs in the market. The Commission has adopted rules that provide clear and articulate technologically neutral principles that define what constitutes an adequate and functionally equivalent substitute for a discontinued retail service or a wholesale access service provided to end users by either the incumbent LEC or competitive LECs in the market.

The Pa. PUC appreciates the opportunity provided by the Commission for the submission of these Comments.

Respectfully Submitted On Behalf Of
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