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

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

COMMENTS OF AT&T SERVICES, INC.
ON NOTICE OF PROPOSED RULEMAKING,
NOTICE OF INQUIRY, AND REQUEST FOR COMMENT

Terri Hoskins
Keith Krom
Robert Vitanza
Christopher Heimann
Gary Phillips
AT&T SERVICES, INC.
1120 20th Street, N.W., Suite 1000
Washington, D.C. 20036
(202) 457-3046

Aaron M. Panner
Matthew R. Huppert
KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900

June 15, 2017

TABLE OF CONTENTS

INTRODUCTION AND EXECUTIVE SUMMARY 1

DISCUSSION 6

I. The Commission Should Adopt Targeted Pole Attachment Reforms 6

A. The Application Review and Survey Stage Should Remain the Same, but the Commission Should Combine the Estimate Stage with the Review and Survey Stage 6

B. The Commission Should Modify Its Rules To Reflect the Practical Realities of Larger Orders 9

C. The Commission Should Adopt Two Targeted Reforms To Reduce the Make-Ready Timeline 12

D. Any "One-Touch Make-Ready" Approach Must Be Balanced 14

E. Rates for Make-Ready Work and Wireless Pole Attachments 18

F. Other Pole Attachment Issues 23

1. Pole Attachment Rates for ILECs 23

2. The Commission Should Make Pole Attachment Rates, but Not Pole Locations, Publicly Available 24

3. The Commission Should Adopt a 180-Day "Shot Clock" for Resolving All Pole Attachment Complaints 25

4. Section 251 Creates a Reciprocal System of Infrastructure Access 26

5. Rewards and Penalties for Completion or Non-Completion of Make-Ready Work 28

II. The Commission Should Reform Its Copper Retirement and Network Change Notification Rules 29

A. The Commission Should Eliminate 47 C.F.R. § 51.332 in Its Entirety and Return to a Streamlined Version of Its Pre-2015 Rules 31

B. The Commission Should Eliminate 47 C.F.R. § 68.110(b) and the Related CPE Requirement in 47 C.F.R. § 51.325(a)(3) 35

C. The Commission Should Eliminate 47 C.F.R. § 51.325(c) Because It Unnecessarily Restricts the Free Flow of Useful Information 37

D. The Commission Should Provide Flexibility for ILECs Responding to *Force Majeure* Events ... 38

E. The Commission Should Adopt Certain Technical Changes to Its Rules That Are Necessary To Accommodate Reforming the Copper Retirement Process ... 40

III. The Commission Should Streamline Its § 214(a) Procedures and Requirements for the Discontinuance of Services ... 40

A. The Commission Should Adopt Streamlined Automatic-Grant Procedures for Legacy Interstate Voice Services with Existing Customers ... 41

B. The Commission Should Forbear from Requiring Compliance with § 214(a)'s Discontinuance Requirements for Services Without Existing Customers and Interconnected VoIP Services ... 47

1. Services Without Existing Customers ... 48

2. Interconnected VoIP Services ... 49

C. The Commission Should Not Adopt Special § 214(a) Requirements Related to Government Users ... 51

IV. The Commission Should Reverse Its 2015 Determination That Carriers Must Take into Account the End Users of Their Wholesale Customers in Determining Whether They Must Obtain § 214(a) Discontinuance Authority ... 53

A. The Commission's Clarification Is Inconsistent with the Statute ... 53

B. The Commission's Clarification Imposes Undue Burdens on Discontinuing Wholesale Carriers ... 56

C. The Commission's Clarification Misinterpreted Commission Precedent ... 58

V. The Commission Should Eliminate the "Functional Test" for Determining Whether § 214(a) Discontinuance Authority Is Required ... 60

A. The Terms of a Carrier's Tariff or Service Agreement Conclusively Limit the "Service" Provided by the Carrier ... 61

B. The Commission's Justifications for the Functional Test Lack Merit ... 64

C. The Functional Test Is Impermissibly Vague ... 67

VI. The Commission Should Use Its Authority Under § 253 To Preempt State and Local Laws Inhibiting Broadband Deployment ... 69

A. The Commission Has Authority To Prospectively Preempt Enforcement of State and Local Laws That Effectively Prohibit Carriers from Providing Telecommunications Services 69

B. Section 253 Preempts State or Local Laws That Materially Limit the Ability of a Competitor or Potential Competitor To Provide Telecommunications Service 71

C. The Commission Should Preempt State and Local Laws and Other Legal Requirements That Inhibit Broadband Deployment 74

D. The Commission Should Establish a Streamlined § 253 Complaint Procedure To Provide Greater Predictability for Siting Applicants 76

APPENDIX A

INTRODUCTION AND EXECUTIVE SUMMARY

The ongoing transformation of the nation's communications networks from outdated legacy facilities to next-generation technologies is vitally important and is delivering significant benefits to consumers and the American public – and promises to deliver more. As the Notice rightly observes,[1] high-speed broadband is crucial to jobs, health care, information, and economic development. As the Commission has remarked in the past, the transition from a circuit-switched, copper-loop-based PSTN to an IP-based platform over which voice, data, and video services converge, "creates extraordinary opportunities to improve American life and benefit consumers."[2]

Given the stakes, the Commission's commitment to "remove regulatory barriers to infrastructure investment at the federal, state, and local level"; to make "changes to speed the transition from copper networks and legacy services to next-generation networks and services"; and "to reform Commission regulations that increase costs and slow broadband deployment" is urgently needed to ensure that excessive regulation does not hamper innovation. Over the last decade, carriers have invested enormous resources in deploying next-generation facilities, upgrading the quality of their service offerings, and introducing innovative new features and functions to consumers. Retail POTS subscriptions have declined to the point that less than 17% of households purchase switched-access voice service from an ILEC, and these services will only continue to decline. Yet too much of existing regulation is directed to regulatory concerns that

---

[1] Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, 32 FCC Rcd 3266, ¶ 1 (2017) ("Notice").

[2] FCC, *Connecting America: The National Broadband Plan* at 49 (2010) ("*National Broadband Plan*"), https://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf.

may have been meaningful in the late 1990s but that have no relevance to current market conditions.

As initial steps toward needed reforms, the Commission should adopt many of the proposals laid out in the Notice. Those reforms will help to mitigate regulatory barriers to the deployment of next-generation facilities and technologies that will continue to change the telecommunications landscape for the better. Moreover, the Commission should "think big" and continue to explore changes that will bring regulations into line with current conditions, spurring increasing investment and innovation by all competitors.

Pole Attachment Proposals. The Commission should adopt targeted reforms to the pole attachment process that eliminate unnecessary delays while accounting for the legitimate concerns of pole owners and existing attachers. AT&T proposes shortening the pole attachment timeline by eliminating unnecessary stages rather than reducing the time periods during which crucial stages can be performed, as proposed in the Notice. Folding the 14-day estimate stage into the 45-day review and survey stage and eliminating the 15 days when a pole owner can perform make-ready work when an existing attacher fails to do so would save 29 days in the pole attachment timeline. AT&T opposes proposals to reduce the time available for survey and make-ready work for large orders: especially for pole owners with broad geographic footprints, the current rules establish timeframes that can be unreasonable when multiple attachers submit sizable requests. The Commission should therefore resolve this without changing the timelines by defining "large orders" based on the aggregate number of poles that a pole owner is reviewing and surveying when a pole attachment order is received, rather than based on the poles covered by orders received from a single applicant in a 30-day window.

The Commission can also adopt other targeted reforms to reduce the make-ready timeline without undue burden. To the extent the Commission adopts a one-touch-make-ready approach, it should be limited to routine transfers, employ only approved contractors, respect existing collective bargaining arrangements, and include provisions for post-completion inspection and indemnification.

As to make-ready charges, AT&T supports a balanced proposal to codify principles that would avoid the imposition of excessive make-ready costs on new attachers, but would allow pole owners to continue to recover all of their make-ready costs. As to pole attachment rates, the Commission should (1) avoid a separate pole attachment rate for operators offering information services commingled with cable or telecommunications services and instead apply the applicable telecommunications rate and cable rate; (2) provide needed guidance that attachments using more than one foot of space on a pole are subject to a rate equal to the telecommunications rate for one foot of space plus an incremental rate per additional foot of space used; and (3) use the telecommunications rate as presumptively reasonable for ILEC attachments on electric utility poles when the ILEC owns fewer poles than the electric utility.

Network Modification Proposals/Copper Retirement. The transition from legacy to next-generation networks has been underway for years, but there are steps the Commission should take to accelerate and complete that transition. Specifically, the Commission should adopt its proposals to eliminate network disclosure rules that unnecessarily impede the infrastructure modifications needed to usher in new technologies. The Commission should also streamline and enhance the remaining network disclosure rules to provide needed flexibility to carriers, whether they are responding to demands for new technologies or responding to natural disasters. In particular, the Commission should adopt its proposal to eliminate 47 C.F.R.

§ 51.332 and to return to a more streamlined version of its requirements for handling copper retirements; eliminate obligations to give customer notice of changes that may affect use of CPE; eliminate rules that unreasonably restrict information sharing; and adopt a rule giving ILECs greater flexibility in responding to *force majeure* events.

Section 214 Discontinuance Proposals. The discontinuance provision 47 U.S.C. § 214(a) is supposed to protect communities from being cut off from telecommunications service. The Commission should reorient its § 214(a) discontinuance regulations to fit that limited statutory purpose. To that end, the Commission should make it easier for carriers to stop maintaining outdated facilities and services, encourage free entry and exit from competitive service markets, and get out of the business of using § 214(a) as a catch-all to scrutinize the technical details of every transition from legacy to next-generation services. Accordingly, the Commission should adopt streamlined automatic-grant procedures for legacy voice services with existing customers, as well as data services and forbear from requiring compliance with § 214(a)'s requirements for services without existing customers and for interconnected VoIP services.

The Commission should also reverse two recent determinations that perversely increased regulatory burdens for carriers seeking to transition to next-generation networks. First, the Commission should reverse the requirement that carriers take end users of their *wholesale* customers into account in determining whether they are required to comply with § 214: that requirement lacks adequate legal basis and serves no constructive purpose. Second, the Commission should also eliminate its "functional test" for defining a service for purposes of § 214: that definition improperly expands the scope of the Commission's authority and is impermissibly vague.

Preemption Proposals. Acknowledging that barriers to deployment and infrastructure investment do not arise only from federal regulation, the Commission should adopt its proposal to promulgate rules that identify types of state and local requirements that unnecessarily impede deployment of broadband infrastructure and will be preempted under 47 U.S.C. § 253.

DISCUSSION

I. The Commission Should Adopt Targeted Pole Attachment Reforms

As the Commission recognizes, "[p]ole attachments are a key input for many broadband deployment projects,"[3] including for wireline fiber, cable, and wireless providers' equipment. Utility poles will continue for the foreseeable future to serve the key role of providing a practical medium for deployment of these facilities. In particular, wireline carriers will continue to expand their fiber deployments, and wireless carriers will continue to increase the density of their networks. With affiliates operating as incumbent local exchange carriers ("ILECs"), competitive local exchange carriers ("CLECs"), an interexchange carrier, and a wireless carrier, AT&T is simultaneously a pole owner, wireline attacher, and wireless attacher. It thus has a unique and particularly useful perspective on the types of commonsense changes to pole attachment rules that will balance stakeholder interests and accelerate broadband infrastructure deployment without sacrificing service quality or safety.

A. The Application Review and Survey Stage Should Remain the Same, but the Commission Should Combine the Estimate Stage with the Review and Survey Stage

The Commission seeks comment on several specific proposals to shorten the pole attachment application process, including (1) shortening the application review and survey stage; (2) eliminating the survey aspect of the process; (3) combining the estimate and acceptance timeframes; (4) eliminating the estimate and acceptance steps; and (5) folding the estimate and acceptance steps into the make-ready timeframe.[4] AT&T shares the Commission's desire to streamline the pole attachment process. But, based on our experience, alternative measures,

---

[3] Notice ¶ 3.

[4] *See id.* ¶¶ 8-10.

described below, could more optimally achieve this goal than these particular proposals. We discuss below our concerns with the proposals as well as our proposed alternatives.

First, the review period for pole attachment applications should continue to include time for pole owners to survey the pole(s) for which access is requested. The review and survey stage allows the pole owner to evaluate the application and to conduct a physical survey of the pole. The survey allows a pole owner to accurately assess a pole's ownership, capacity for new attachers, safety, and general condition so that the pole owner can appropriately advise new attachers. Some of these pole conditions change over time for reasons both foreseeable (*e.g.*, normal wear and tear) and unforeseeable (*e.g.*, weather events, unauthorized attachers). AT&T has adopted and continues to explore methods to make the survey process more efficient, such as using drones and LIDAR technology (which uses lasers to produce very high-resolution surveys). But, those new methods have thus far achieved only limited success as they are suitable only for some of the necessary functions, such as identifying available pole capacity for new attachers, clearance violations, and obvious safety concerns. A physical inspection of each pole is still needed to verify the pole's ownership and age on the tag and birthmark at the pole's base and to perform sound-and-prod testing to confirm the serviceability of the pole.

Second, it would be impractical to expect pole owners to complete the application review and pole survey stage in less than 45 days, as suggested in the Notice.[5] AT&T owns or controls more than 9 million poles and 535 million feet of conduit across 21 states. In the course of any given 30-day period, AT&T can receive applications to attach to thousands of poles in each of those states. Moreover, the volume of applications, and poles or conduit they implicate, fluctuates significantly over time and by location, creating manpower challenges. While an

[5] *Id.* ¶ 8.

abbreviated application review and pole survey stage might be sufficient for a single application involving a limited number of poles, it is not tenable for the larger volume of applications that AT&T and other pole owners routinely process, which can involve up to 300 poles per attacher within any 30-day period.

Indeed, the existing 45-day timeline for application review and pole survey will only become harder to meet as wireless carriers (including AT&T) continue to densify their 4G networks to improve capacity and throughput and begin deploying 5G systems. Industry-wide 5G network deployment is expected to involve 10 to 100 times more antenna locations than 4G or 3G,[6] and CTIA estimates that about 300,000 small cell facilities will be needed in just the next three to four years to support the evolution to 5G technology.[7] In light of these realities, the Commission should retain the existing 45-day review and survey stage timeline so that the pole attachment process can remain orderly, safe, and predictable for everyone involved.

The Commission also should reject proposals to combine the estimate and acceptance stages, eliminate those two stages altogether, or fold those stages into the make-ready timeframe. These proposals would make the pole attachment application process less flexible and reliable. Both the estimate stage and the acceptance stage facilitate a crucial exchange of information between pole owners and prospective attachers and ensure that the parties reach a clear

---

[6] Accenture Strategy, *Smart Cities: How 5G Can Help Municipalities Become Vibrant Smart Cities* (2017), https://www.ctia.org/docs/default-source/default-document-library/how-5g-can-help-municipalities-become-vibrant-smart-cities-accenture.pdf.

[7] CTIA Ex Parte, WT Docket No. 16-421, Attach. at 4 (filed Apr. 13, 2017). For its part, AT&T intends to begin supplementing its network in 2017 with small cell facilities in more than 20 metropolitan areas, including 1,000 facilities across the Bay Area. *See* Press Release, AT&T, AT&T Plans to Bring 5G Evolution to Over 20 Metros by End of Year (Apr. 25, 2017), http://about.att.com/story/5g_evolution_to_over_20_metros_in_2017.html; Doug Irwin, *AT&T Deploys Network of Small Cells in San Francisco*, Radio Mag. (Feb. 21, 2017), http://www.radiomagonline.com/mobile/0022/att-deploys-network-of-small-cells-in-san-francisco/38638.

understanding of the scope of required work before it begins. That does not mean that stages cannot be combined, but combining stages is only feasible when the obligations of each party in the new commingled stage can be performed in tandem. The estimate and acceptance cannot be performed in tandem because acceptance is dependent on completion of the estimate. A single timeline imposed on multiple parties with dependent obligations is unworkable, potentially reducing accountability and creating uncertainty about when each party should or must act.

There are other, better ways "to streamline and accelerate the Commission-established timeline for processing pole attachment requests."[8] One simple way to shorten the overall pole attachment timeline would be to fold the 14-day estimate stage into the 45-day review and survey stage. This combination makes sense because AT&T believes that it can generate an estimate in less than an additional 14 days and, while the estimate is dependent on completion of the application review and the pole survey, the pole owner or its contractor controls each of these stages and can effectively manage the timelines. This change would benefit pole owners by keeping the existing survey timeline intact while adding flexibility, and it would also benefit pole attachers by cutting 14 days out of the pole attachment application timeline.

B. The Commission Should Modify Its Rules To Reflect the Practical Realities of Larger Orders

The Commission seeks comment on whether to retain extended time periods for large pole attachment orders,[9] defined by rule as those involving more than 300 poles or 0.5% of the owner's poles in a given state.[10] AT&T and most other pole owners strive to complete pole attachment orders as quickly as possible, but concerns about safety and manpower are

[8] Notice ¶ 6.

[9] *See id.* ¶ 12.

[10] 47 C.F.R. § 1.1420(g).

heightened in the context of large pole attachment applications. The application timeframe for these "large orders" must be long enough to minimize those concerns while allowing for reasonably prompt deployments. To accomplish that balance, pole owners need the additional 15 days and 45 days currently provided for survey and make-ready work, respectively, for large orders.[11] The reason is straightforward: more attachments on more poles require more surveys, more coordination with attachers, and more make-ready work. That additional work, much of which involves site visits, requires additional time.

Current rules, however, do not provide enough flexibility for pole owners with respect to large orders because they do not adequately account for the realities that pole owners face when multiple applications add up to large-order status. Currently, the Commission's rules permit a pole owner to use large-order timeframes for an application only if: (1) one or more applications have been filed within a 30-day period, (2) by the same attacher, (3) collectively implicating more than 300 poles or 0.5% of the owners' poles in a given state.[12]

This regime creates two distinct problems for pole owners. *First*, the current rules fail to account for the fact that pole owners, and especially those with larger geographic footprints, regularly receive applications from multiple attachers across individual states. A pole owner's ability to perform timely surveys and make-ready for an order depends on the total number of poles it is surveying, reviewing, or working in the state when the order is received, not just the number of poles it is surveying or working in the state for the potential attacher that submitted the order. To address this problem, the availability of large-order timeframes should be based on

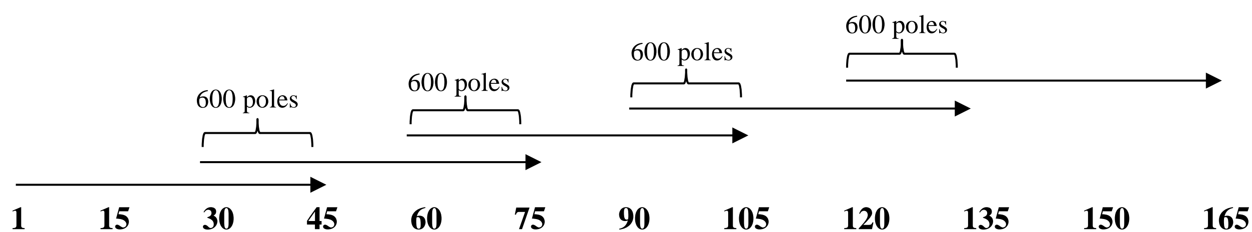
[11] *See id*. § 1.1420(g)(2)-(3).

[12] *See id*. § 1.1420(g).

the total number of poles that must be surveyed, reviewed, or worked across all attachers in a given state, rather than a single attacher in that state.

Second, the 30-day period for calculating large orders does not properly account for a pole owner's workload at any given point in time and is vulnerable to gamesmanship by applicants because it does not align with the 45-day or 60-day review and survey periods. For example, an attacher can submit an application on Day 1 that implicates exactly 300 poles, requiring the pole owner to respond within 45 days, and then submit another application on Day 31 implicating another 300 poles, all without triggering the large-order timeframes. In this situation, as shown in Figure 1 below, the pole owner must still review 600 poles from Day 31 to Day 45, but cannot use the large-order timeframes. And, as the diagram below shows, to the extent this pattern repeats itself, the pole owner could be forced to bear this burden over and over again – to the point that it would spend half the year (180 days) simultaneously surveying as many as 600 poles for that single attacher, without ever being able to rely on the large-order timeframes.

Figure 1



The possibilities are even more striking if an attacher submits an application for exactly 3,000 poles (which carries a 60-day review and survey period) on Day 1 and every 30 days thereafter. If that scenario continued for one year the pole owner would have spent more than 90% of the year (335 days) simultaneously surveying up to 6,000 poles for that single attacher without being able to negotiate a response timeline under 47 C.F.R. § 1.1420(g)(4). These

examples demonstrate how the 30-day window in section 1.1420(g)(5) can quickly lead to an accumulation of work for the pole owner with no corresponding flexibility in the form of extended timeframes. The Commission should therefore eliminate the 30-day window and instead calculate large and larger orders based on the aggregate number of poles a pole owner is reviewing/surveying in a state when an order is received, including the poles that are the subject of the application. For example, if a pole owner is reviewing and surveying 250 poles in a state for multiple attachers when it receives an attachment order from another attacher implicating 100 poles in that same state, the order for the 100 poles will be considered a large order and receive the large order timelines. That categorization would apply to all stages of the pole attachment timeline.

In combination, these two reforms would ensure that a pole owner's deadlines relating to pole attachment applications better reflect the pole owner's actual workload at any given time. That, in turn, will set more realistic expectations for attachers and help to ensure that pole owners have the time to process applications with the care and attention they deserve.

C. The Commission Should Adopt Two Targeted Reforms To Reduce the Make-Ready Timeline

The Commission seeks comment on several proposals to shorten the timeframe for make-ready work, including use of utility-approved contractors or new attachers to perform make-ready work.[13] Similar to the survey and application review discussed above, AT&T endeavors to complete make-ready work as quickly as possible. But the sometimes-complicated nature of make-ready work and the fluctuating demand for such work are challenges to shortening completion timelines. The sudden and finite ebbs and flows in demand for make-ready work do

[13] *See* Notice ¶¶ 11, 14-24.

not justify a permanent increase in resources to complete such work, though temporary expanded coverage is feasible when attachers coordinate with AT&T and provide advanced notice of major deployments. Due to the unpredictable timing and extent of make-ready work, simply reducing timelines for make-ready work will not ensure faster completion times. Even so, the Commission can and should adopt two targeted reforms that would reduce the make-ready timeline without undue burden.

First, the Commission should eliminate the 15 days currently afforded to pole owners to complete make-ready work that existing attachers fail to complete in the required timeframe.[14] In AT&T's experience, that extra time is not needed and adds complexity to the pole attachment process without any corresponding benefit. AT&T generally has not invoked this additional time primarily because of the complexity of planning the work, coordinating payment from the proposed attacher, and performing the work in a compressed, 15-day timeframe. The Commission can thus eliminate this 15-day period in favor of allowing the new attacher to invoke its self-help remedy and perform the make-ready work with a utility-approved contractor as soon as an existing attacher fails to do so in the allotted time.

Second, the Commission's rules currently permit up to 90 days (135 days on larger orders) for make-ready work on wireless attachments above the communications space but permit only up to 60 days (105 days on larger orders) for attachments in the communications space.[15] The Commission created that disparity in its *2011 Pole Attachment Order* based on safety concerns associated with wireless attachments' proximity to the electric space and a

[14] *See* 47 C.F.R. § 1.1420(e).

[15] *Id.*

relative lack of industry experience with attachments at the pole top.[16] Now, more than six years after the Commission made that determination, pole owners have much more experience with pole-top attachments and the measures needed to maximize the safety of deploying such attachments. Make-ready work above the communications space is not sufficiently different, and in many cases is less complex, than make-ready work in the communications space. For example, such work sometimes involves only using prefabricated material to extend the pole's height for clearance above the power facilities. Further, fewer existing attachers are typically present above the communications space, which means make-ready work in that space requires less coordination. Because of these considerations, the additional 30 days for make-ready work on wireless attachments above the communications space are no longer needed, and the Commission should harmonize the make-ready timelines for all pole attachments to 60 days for normal orders and 105 days for larger orders.

D. Any "One-Touch Make-Ready" Approach Must Be Balanced

The Commission seeks comment on the potential benefits and drawbacks of a "one-touch make-ready" ("OTMR") approach, in which a single, agreed-upon contractor or group of contractors conducts all new make-ready work.[17] AT&T currently has an OTMR agreement with one pole owner and many other OTMR-like processes incorporated into transfer agreements with other pole owners across the country. These OTMR processes, which are designed with protections to avoid service outages and to respect AT&T's labor contracts, have worked well in agreed-upon scenarios. Thus, AT&T agrees with Chairman Pai that OTMR has "great potential

---

[16] Report and Order and Order on Reconsideration, *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, 26 FCC Rcd 5240, ¶ 33 (2011) ("*2011 Pole Attachment Order*").

[17] Notice ¶ 21.

to streamline the pole attachment process."[18] Even so, the Nashville and Louisville examples discussed in the Notice are problematic because they are not balanced, allowing prospective attachers to compel OTMR at the expense of existing attachers. In such a scenario, existing attachers are expected to accept the risk of service outages (in the case of complex make-ready work), as well as the impairment of both their joint-use agreements with pole owners and their collective bargaining agreements with their union workers. If the Commission seeks to impose OTMR, it should do so in a balanced manner by easing access to poles while also preserving the safety of the public and workers and advancing the interests of both pole owners and prospective attachers. Such an OTMR approach should incorporate the following principles:

- **Routine transfers only**. "Simple" make-ready work involves moving an attachment due to pole replacement or rearrangement on the same pole, where the associated through-bolt or J-hook can be relocated without impacting the attachment or any equipment associated with it. By contrast, a "complex" make-ready transfer is one that "reasonably would be expected to cause a customer outage,"[19] including where cable splicing is needed.[20] Limiting OTMR to routine make-ready work would avoid potential complications, such as service outages, that could otherwise needlessly result with complex transfers. As AT&T has previously explained, existing attachers are in the best position to determine whether required make-ready

[18] Remarks of Chairman Ajit Pai at the First Meeting of the Federal Communications Commission's Broadband Deployment Advisory Committee, Washington, DC (Apr. 21, 2017), http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0421/DOC-344513A1.pdf .

[19] Notice ¶ 14.

[20] Cable splicing is often needed because a replacement pole is placed far enough from the original hole to impact aerial terminals on the cable span, cable risers transitioning the cable from the underground environment to the aerial, and terminal equipment boxes mounted in the unusable portion of the pole situations. Thoughtful placement of a replacement pole could obviate the need to perform cable splicing.

work could impact their service or threaten the reliability of their networks.[21] Existing attachers should be allowed to make those assessments and agree to OTMR when they determine that minimal or no service disruption would result. Otherwise, existing attachers should be permitted to perform their own make-ready work within reasonable timelines. The public interest is not served by allowing a new attacher to perform "complex" work that risks impacting services provided by an existing attacher and/or important portions of America's communications systems.

- **Contractors approved by pole owner after consultation with existing attachers**. Use of contractors on which everyone agrees is paramount to the success of any OTMR regime. Poor work on a pole or when placing a pole can result in various kinds of avoidable but serious harms, such as catastrophic pole failures in bad weather, premature pole failures due to improper design or construction, and service outages for public safety organizations and 911. AT&T has firsthand experience dealing with the fallout from using unapproved contractors. For example, unapproved contractors have caused outages to AT&T wireline facilities in Tennessee, Kentucky, Florida, Georgia, and North Carolina. In 2016, AT&T suffered four outages in the Nashville area that were caused by an attacher's unapproved contractors' underground boring operations, one of which resulted in a major 911 outage. AT&T is justifiably concerned about the occurrence of similar incidences arising from the use of unapproved contractors to perform make-ready work on aerial facilities. Moreover, wireless antennas are placed with relative precision, and, thus, it is unrealistic to expect them to be consistently and reliably detached and repositioned by someone other than the wireless carrier or

[21] Pls.' Reply in Supp. of Mot. for Summ. J. & Opp'n to Defs.' Cross-Mot. for Summ. J. or for Alternative Relief at 19, *BellSouth Telecomms., LLC v. Louisville/Jefferson Cty. Metro Gov't*, No. 3:16-cv-124 (W.D. Ky. filed Oct. 31, 2016), ECF No. 69.

an approved contractor. Otherwise, wireless licensees' operations could not only experience an outage but also cause interference to systems operating in adjacent spectrum bands, such as public safety receivers.

Even so, electric utilities and their contractors perform simple transfers of AT&T facilities in a handful of locations throughout the country, and in AT&T's experience most pole owners and their approved contractors perform these transfers well. Thus, electric utilities should be able to utilize approved contractors following input from existing attachers, both for initial selection and ongoing eligibility.

- **Allow existing attachers to fulfill their collective bargaining agreements**.

AT&T values its workforce and has negotiated fair collective bargaining agreements allowing its bargained-for employees to perform all work on AT&T's facilities in certain regions of the country. An OTMR regime should not impair the collective bargaining agreements of any existing attacher by mandating that independent contractors perform make-ready work in all situations. The unionized employees of AT&T and other, similar attachers have performed in this manner for decades, and it would be unreasonable for an OTMR rule to upset those settled, negotiated expectations and contractual obligations.

- **Advanced notice of OTMR to existing attachers**. In order to allow existing

attachers to determine whether their facilities require a complex transfer, the new attacher initiating the OTMR should notify all existing attachers at least 30 days prior to the performance of the OTMR. Such advance notification would also provide existing attachers the ability to identify any critical facilities, such as those that provide services to emergency responders, which would subsequently be excluded from the scope of the OTMR.

- **Post-completion inspection and indemnification**. Upon completion of the OTMR and installation of the new attacher's facilities, the new attacher should be required to give notice to all existing attachers and the pole owner. This notice would trigger the right of existing attachers and pole owners to inspect the make-ready work within a reasonable timeframe (*e.g.*, 60 days). Any deficiencies noted during the inspection that were caused by the OTMR process should be corrected, with the cost of the inspection and the correction of any deficiencies borne by the new attacher. Further, the new attacher should be required to agree in advance to indemnify existing attachers and pole owners for damages or outages, including attorneys' fees, that occur as a result of the new attacher's OTMR work.

E. Rates for Make-Ready Work and Wireless Pole Attachments

The Commission seeks comment on a variety of issues related to make-ready rates,[22] and AT&T offers the following comments on those issues.

First, the Commission seeks comment on "whether the make-ready costs being charged today are just and reasonable, and whether such costs represent a barrier to broadband infrastructure deployment."[23] In AT&T's view, make-ready rates are just and reasonable and are not a barrier to broadband deployment. AT&T charges cost-based rates, consistent with the Commission's prior recognition that pole owners "are entitled to recover their costs from attachers for reasonable make-ready work necessitated by requests for attachment."[24] To AT&T's knowledge, other ILECs and investor-owned electric companies have generally not imposed excessive or unreasonable make-ready charges associated with AT&T's wireline

[22] *See* Notice ¶¶ 32-46.

[23] *Id.* ¶ 32.

[24] Memorandum Opinion and Order, *Knology, Inc. v. Georgia Power Co.*, 18 FCC Rcd 24615, ¶ 26 (2003).

attachments and limited wireless attachments on utility poles. If, however, the record reveals that pole owners are not generally charging cost-based rates, AT&T would not oppose a rule codifying that principle with the appropriate level of specificity.

Second, the Commission seeks comment on whether to "require utilities to provide potential new attachers with a schedule of common make-ready charges."[25] In support of this proposal, the Commission cites an ex parte letter from INCOMPAS, which asserted that a schedule of make-ready charges is needed because "make ready charges are not predictable or verifiable in many cases."[26] AT&T agrees that make-ready charges are unpredictable but disagrees that this unpredictability is attributable to pole owners improperly keeping attachers in the dark. Rather, make-ready charges are *inherently* unpredictable because every make-ready job is unique. Poles come in a variety of sizes and conditions, support differing numbers and types of attachments, and are located in a wide range of terrains and environments (from country roads to urban alleyways and everything in between) and in different regions of the country with widely varying costs of doing business (*e.g.*, labor costs). Neither pole owners nor attachers can be insulated from those variations. Because make-ready charges can never be uniform, creating a standard schedule of such charges would be impractical.[27]

---

[25] Notice ¶ 33.

[26] *See id*. (quoting Letter from Chip Pickering, CEO of INCOMPAS, to Ajit Pai, FCC Chairman, WT Docket No. 16-138 *et al.*, at 3 (filed Feb. 3, 2017)).

[27] To be sure, pole owners and attachers can and do enter into agreements to provide for structured make-ready charges. These agreements are between one attacher and one utility in joint use and joint ownership arrangements that fit the needs of their businesses and are regional in nature, reducing the potential variance among many of the factors that cause make-ready charges to be unpredictable. In contrast, a schedule of mandated uniform make-ready fees fails to account for any of these factors, leading to excess make-ready charges in some cases and insufficient make-ready charges in others.

By a similar token, attempts to "limit the make-ready fees charged by utilities to new attachers"[28] by imposing caps or limiting which elements' costs can be recovered would be an unlawful taking from pole owners and would contravene the Commission's acknowledgment that "pole owners are entitled to fair compensation for their property."[29] Indeed, the Commission's proposals for per-pole charges capped at $300, $400, or $500[30] substantially understate make-ready costs when a pole is replaced and, even assuming no complications and minimal manpower requirements, would account for only the most routine make-ready work.

Third, AT&T supports the Commission's proposal "to codify a rule that excludes capital costs that utilities already recover via make-ready fees from pole attachment rates."[31] AT&T does not include recovered make-ready capital costs in calculating pole attachment rates, and all attachers on AT&T poles benefit from lower rates as a result. In contrast, costs for AT&T to replace a pole for reasons other than new-attacher make-ready, including to accommodate its own facilities, constitute normal capital improvements and are included in the pole attachment rate formula. Such costs are appropriately shared through rates because the capital improvements benefit all current and future attachers.[32]

Fourth, the Commission seeks comment on how it should set pole attachment rates for commingled services, *i.e.*, cable and telecommunications service provided over a single attachment.[33] Ideally, all wireline pole attachments that occupy the rebuttably presumed one

---

[28] Notice ¶ 35.

[29] *2011 Pole Attachment Order* ¶ 6.

[30] Notice ¶ 36.

[31] *Id.* ¶ 38.

[32] Costs incurred by AT&T to install and rearrange its own cables on a pole are not included in pole attachment rates.

[33] *See* Notice ¶ 42.

foot of space would be subject to the same rates, regardless of the size or type of attachment or the services offered over the attachment. Outdated distinctions between pole attachment rates for cable and telecommunications services no longer serve any meaningful purpose and have led the Commission to modify the pole attachment rate formulas in an effort to achieve regulatory parity.[34] The Commission should continue to apply the cable rate to cable operators and the modified telecommunications rate to telecommunications operators, even when they also offer information services. Cable operators also offering telecommunications services should also be allowed to opt into the telecommunications rate. This result is consistent with § 224 and reduces the complexity of a ratemaking process that is already extraordinarily complicated. Calculating a separate commingled rate would require pole owners to track which type of services its attachers offer over each attachment, which is a heavy burden that is not justified by any corresponding benefit.

Finally, definitive Commission guidance is required to ensure that wireless attachments are subject to "just and reasonable" rates as required by § 224(b).[35] Wireless attachments are entitled to the modified telecommunications rate, but the rate can be difficult to apply when the "attachment requires more than the presumptive one-foot of usable space on [a] pole,"[36] as many wireless facilities do. Although the Commission has invited wireless companies that are unable to reach a pole attachment agreement with a utility to bring a complaint, regulation through complaints is an inefficient way to manage relationships between attachers and pole owners,

---

[34] Indeed, under default assumptions the cable rate formula and the modified telecommunications rate formula produce comparable rates. *See 2011 Pole Attachment Order* ¶¶ 126-198; Order on Reconsideration, *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, 30 FCC Rcd 13731 (2015).

[35] 47 U.S.C. § 224(b)(1).

[36] *2011 Pole Attachment Order* ¶ 153.

typically involves delays, and has not improved attachers' leverage with investor-owned electric utilities. As a result, many investor-owned electric utilities overcharge wireless carriers for their attachments by applying the telecommunications rate on a per-foot-of-occupancy basis (*i.e.*, telecommunications rate multiplied by number of feet of occupancy), which over-allocates common space to the wireless attacher. For example, when a pole attachment occupies one foot of space on a pole with three telecommunications attachers, each of these attachers is assigned 16.89% of the total pole costs. Simply multiplying the telecommunications rate by five for a wireless attachment occupying five feet of space on the pole assigns 84.45% of the total pole cost to the wireless attacher.

To correct this frequent misapplication of the telecommunications rate formula, the Commission should clarify that attachments that occupy more than one foot of space on a pole are subject to a rate comprised of the sum of two related components: the modified telecommunications rate for the first one foot of space occupied plus an incremental rate for each additional foot of space occupied on the pole. The incremental rate would be calculated as the difference between the modified telecommunications rates for two feet of space on the pole and for one foot of space on a pole. In the example above, application of the calculation that AT&T is proposing to a wireless attachment occupying five feet on the pole would assign the wireless attacher 27.56% of pole cost to the wireless attachment (16.89% for the first one foot plus 2.67% incremental cost[37] for each of the four additional feet occupied). This calculation is straightforward and easy to apply, maintains the existing telecommunications rate structure, and allows for the electric utility to recover, but not over recover, pole costs.

---

[37] The 2.67% incremental cost number represents the value of one additional foot of use of space on the pole (*i.e.*, 1/37.5 = 2.67%).

F. Other Pole Attachment Issues

1. Pole Attachment Rates for ILECs

The Commission seeks comment on its proposal to use the modified telecommunications rate as the presumptively "just and reasonable rate" under § 224(b) for ILEC attachers and the pre-2011 telecommunications rate if the pole owner can overcome the presumption that the modified telecommunications rate is just and reasonable by demonstrating with clear and convincing evidence that the benefits to the ILEC far outstrip the benefits accorded to other pole attachers.[38] AT&T endorses this approach as a reasonable, objective alternative to the current requirement that ILECs demonstrate that they are "comparably situated"[39] to a telecommunications provider to justify the telecommunications rate – a complicated and fact-dependent test that is fraught with uncertainty – and endorses applying this approach for all ILEC agreements with investor-owned electric utilities that own the relative majority of poles (*i.e.*, own more poles than the ILEC).

AT&T's bargaining power with electric utilities has significantly eroded over time, as its percentage of pole ownership relative to electric utility poles has dropped. AT&T owns only 29% of the poles that are in joint use with investor-owned electric companies. That ownership drops to only about 20% when poles owned by electric cooperatives and municipal electric companies are included. This reduced leverage has resulted in higher attachment rates paid by AT&T's ILECs to electric utilities relative to competitors that benefit from the telecommunications rate. Adoption of the Commission's proposal is expected to reduce these AT&T payments by more than half.

---

[38] *See* Notice ¶ 45.

[39] *2011 Pole Attachment Order* ¶ 217.

2. The Commission Should Make Pole Attachment Rates, but Not Pole Locations, Publicly Available

The Commission seeks comment on the extent to which making more information publicly available regarding the rates, location, and availability of poles could lead to faster pole attachment timelines.[40] AT&T supports the public availability of pole attachment rate information because it better permits potential attachers (and regulators) to scrutinize such rates. Indeed, AT&T already makes its pole attachment rates available on an external-facing website dedicated to wholesale customers. Requiring investor-owned electric companies to publish their pole attachment rates in a similar manner would further benefit attachers and regulators and speed access to poles. Although investor-owned electric companies file with the Federal Energy Regulatory Commission ("FERC") the underlying data they use to calculate rates, they do not publish the number of distribution poles to which the data pertain. If the Commission were to bridge that gap, attachers could determine all utilities' pole attachment rates on their own, just as they do now for AT&T's rates.

Information about pole locations, however, should not be made publicly available. Publishing the location of poles, with or without attacher information, in any centralized way would present a significant concern for the security of America's communications and electrical distribution networks because it could be used by hostile parties, or simply one bad actor, to attack those networks, which are part of our nation's critical infrastructure. Thus, public disclosure of this detailed pole information could present an unacceptable risk of more effective terrorist activity, especially in light of the lack of any demonstrable benefit from such publication. AT&T already works with attachers that have a legitimate need to deploy their own

[40] *See* Notice ¶ 27.

facilities to share pole lead and manhole locations along a specific, requested route. In AT&T's experience, that arrangement has worked well, and so any hypothetical benefit from publishing pole location information more widely would not justify the corresponding public safety risks.

3. The Commission Should Adopt a 180-Day "Shot Clock" for Resolving All Pole Attachment Complaints

The Commission seeks comment on its proposal to establish a 180-day "shot clock" for resolution of pole attachment complaints.[41] AT&T supports the adoption of a 180-day "shot clock" for the Commission to resolve all pole attachment complaints, including rate complaints. Such a mechanism would be consistent with § 224, which generally withdraws state authority to adjudicate any complaints regarding "the rates, terms, and conditions for pole attachments," unless the state "takes final action on a complaint . . . within 180 days after the complaint is filed."[42] Although some pole attachment complaints may be capable of resolution in less time, a shorter timeframe would offer less flexibility to pole owners and attachers alike and may be insufficient to resolve a large number of complaints. Setting a 180-day time limit lends predictability to the pole attachment complaint process for the parties, while still affording the Commission sufficient time to adjudicate disputes fairly and thoroughly. Predictability will be key in the near future as wireless carriers accelerate their efforts to add density to their networks with small cell equipment, much of which will be deployed on poles. These carriers cannot wait a year or more to deploy, and when faced with potential delays in resolving pole attachment complaints, most will simply move on to another jurisdiction.

AT&T agrees with the Commission's proposal to begin the shot clock at the time a complaint is filed, which is consistent with § 224 and other mechanisms designed to encourage

---

[41] *See id.* ¶¶ 47-51.

[42] 47 U.S.C. § 224(c)(3).

prompt resolution of disputes.[43] It would also ensure a uniform timeline for all pole attachment complaints. With respect to the Commission's concern that starting the shot clock at the time of filing might "disadvantage the timing of the Enforcement Bureau's review if the pleading cycle or discovery takes longer than expected,"[44] AT&T also supports the Commission's proposal to permit the Enforcement Bureau discretion to "pause" the shot clock if delay by the parties, or other delays beyond the Bureau's control, arise during a complaint proceeding.[45] Should the Bureau determine that such a "pause" is necessary, it should provide the parties with written notice and an opportunity to object to it, and the Bureau should "pause" the shot clock over the objection of the parties only in exceptional circumstances. Further, AT&T supports the Commission's proposal to require the parties to a pole attachment complaint proceeding to meet with the Commission before a complaint is filed in an attempt to resolve threshold issues, such as procedural and evidentiary matters, that could otherwise delay the timely resolution of the dispute.

4. Section 251 Creates a Reciprocal System of Infrastructure Access

Section 251(b)(4) of the Act provides that "[e]ach local exchange carrier" has a "duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224." In 1996, the Commission interpreted this provision to mean that "incumbent LECs cannot use section 251(b)(4) as a means of gaining access to the facilities or property of a

---

[43] *See*, *e.g.*, 28 U.S.C. § 476(a)(1), (3) (requiring federal judges to report on "the number of motions that have been pending for more than six months" and "the number and name of cases that have not been terminated within three years").

[44] Notice ¶ 48.

[45] *See id.* ¶ 49.

[CLEC]" because "section 224 does not provide access rights to incumbent LECs," and the Commission was not willing to "infer that section 251(b)(4) restores to an [ILEC] access rights expressly withheld by section 224."[46] The Commission now seeks comment on revisiting that interpretation to "read[ ] the statutes in harmony to create a reciprocal system of infrastructure access rules in which incumbent LECs . . . could demand access to competitive LEC poles and *vice versa*."[47] AT&T supports that reinterpretation because it is most consistent with the statute and fosters the Commission's goal of promoting broadband infrastructure deployment.

As the Ninth Circuit has observed, §§ 224 and 251(b)(4) "can be read in harmony" because § 224 "deals with all utilities," while § 251 "concerns only telecommunications carriers."[48] Thus, it is perfectly consistent for Congress to have granted only CLECs (that had few or no facilities of their own at the time) access to the facilities of all other utilities in order to foster competition, while also ensuring reciprocal access among telecommunications carriers in order "to maintain a level playing field within the telecommunications industry itself."[49] The Commission's prior interpretation relied heavily on the fact that the access required by § 251(b)(4) must be "on rates, terms, and conditions that are consistent with section 224,"[50] but § 224 expressly distinguishes between "[n]ondiscriminatory access," on the one hand, and the "rates, terms, and conditions" that govern such access on the other hand.[51] The Commission's

---

[46] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶ 1231 (1996) ("*1996 Local Competition First Order*").

[47] Notice ¶ 54.

[48] *US West Communications, Inc. v. Hamilton*, 224 F.3d 1049, 1053 (9th Cir. 2000).

[49] *Id*. at 1053-54.

[50] *1996 Local Competition First Order* ¶ 1231.

[51] 47 U.S.C. § 224(b), (f).

1996 interpretation conflated those two concepts, reasoning that "section 224 does not provide *access rights* to incumbent LECs" because it "does not prescribe *rates, terms, or conditions governing access* by an incumbent LEC."[52] Properly understood, § 251(b)(4) grants reciprocal access among all LECs on rates, terms, and conditions that are consistent with those governing CLEC access under § 224, and the Commission should provide such reciprocal access by reconsidering its contrary prior interpretation.

5. Rewards and Penalties for Completion or Non-Completion of Make-Ready Work

The Commission seeks comment on whether to implement "incentive payments" from new attachers to existing attachers if overall make-ready timelines are met and/or whether to penalize existing attachers for failing to complete make-ready work on time.[53] Adopting a penalties-based approach would only foment conflict, in litigation or otherwise, between new and existing attachers about who is to blame for the make-ready delay. Such conflict would introduce new and unnecessary delay and deadweight loss into the pole attachment process. A reward-based system, however, is more likely to achieve the Commission's goal of speeding access to poles because it would encourage cooperation rather than conflict and could create benefits for all attachers. In particular, new attachers should be willing to pay for faster make-ready work in order to facilitate broader use of their services, and existing attachers should be willing to invest greater resources to complete make-ready work faster if they can use reward payments to offset those additional costs.

[52] *1996 Local Competition First Order* ¶ 1231 (emphasis added); *see also US West*, 224 F.3d at 1054 ("We are not convinced that the definition of the kind of [LEC] entitled to access is similarly a 'rate, term, or condition' within the meaning of § 251(b)(4).").

[53] *See* Notice ¶¶ 25-26.

II. The Commission Should Reform Its Copper Retirement and Network Change Notification Rules

The Commission's network change notification rules, 47 C.F.R. §§ 51.325-.335, implement 47 U.S.C. § 251(c)(5), which imposes on ILECs the "duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that [LEC]'s facilities or networks, as well of as any other changes that would affect the interoperability of those facilities and networks." The Commission promulgated rules implementing § 251(c)(5) in 1996.[54] Those rules specified how an ILEC must provide public notice whenever an upcoming network change "affects a competing service provider's performance or ability to provide either information or telecommunications services";[55] the Commission's goal in promulgating those rules was to balance the need for adequate notice against the risk of excessive or burdensome delays.[56]

In 2003, the Commission modified the network change notification rules to encompass the retirement of certain copper facilities, namely copper loops and subloops that would be replaced by fiber-to-the-home ("FTTH") or fiber-to-the-curb ("FTTC") facilities.[57] Those rules

[54] *See* Second Report and Order and Memorandum Opinion and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 19392, ¶¶ 165-260 (1996) ("*1996 Local Competition Second Order*").

[55] *Id.* ¶ 17.

[56] *See id.* ¶ 227 ("It is our intention in this proceeding, however, to develop disclosure rules that minimize unnecessary delay by providing competing service providers with adequate, but not excessive, time to respond to changes to an incumbent LEC's network that affect interconnection."); *id.* ¶ 233 ("While we intend that competing service providers have adequate notice of planned network changes, we acknowledge the valid concerns of some commenters that overextended advance notification intervals could needlessly delay the introduction of new services, provide the interconnecting carrier with an unfair competitive advantage, or slow the pace of technical innovation.").

[57] *See* Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 19020, ¶¶ 281-284 (2003).

required ILECs to provide notice of copper loop retirement, including "the planned date for retiring a copper loop and a description of the reasonably foreseeable impact of the planned changes."[58] Those copper-specific rules differed from the Commission's other network change notification rules in only two ways. *First*, the 2003 rules established "a right for parties to object to the [ILEC]'s proposed retirement of its copper loops for both short-term and long-term notification," whereas for other network modifications, only objections to short-term notifications are permitted.[59] *Second*, the 2003 rules established a mechanism to deny such objections automatically within 90 days unless the Commission ruled otherwise.[60]

The network change notification rules remained the same until 2015 when the Commission "significantly update[d]" the rules applicable to copper retirement.[61] Among other changes, the Commission adopted a new section 51.332, which "doubled the time period during which an incumbent LEC must wait to implement a planned copper retirement . . . from 90 days to 180 days, required direct notice to retail customers, states, Tribal entities, and the Secretary of Defense, and expanded the types of information that must be disclosed."[62] The *2015 Technology Transitions Order* also (1) clarified that the definition of "copper retirement" includes *all* copper facilities, including the feeder portion of copper loops and subloops, and (2) added a new concept known as "*de facto* retirement," where an ILEC has failed to maintain the facilities.[63]

---

[58] *Id.* ¶ 281.

[59] *Id.* ¶ 283.

[60] *See id.*

[61] Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, *Technology Transitions*, 30 FCC Rcd 9372, ¶ 12 ("*2015 Technology Transitions Order*").

[62] Notice ¶ 57.

[63] *2015 Technology Transitions Order* ¶¶ 79-97; *see also* 47 C.F.R. § 51.332(a).

Given that less than 17% of all households continue to purchase voice service from an ILEC,[64] ILEC-specific network disclosure rules no longer make sense. Rather, they reflect a mindset about the marketplace that is more appropriate to the 1990s than 2017. Nonetheless, if the Commission retains ILEC-centric network disclosure rules, at a minimum it should revise those rules "to allow providers greater flexibility in the copper retirement process and to reduce associated regulatory burdens [and] facilitate more rapid deployment of next-generation networks."[65] Many of the proposals in the Notice do just that and should be adopted, as discussed in further detail below.

A. The Commission Should Eliminate 47 C.F.R. § 51.332 in Its Entirety and Return to a Streamlined Version of Its Pre-2015 Rules

The Commission seeks comment "on eliminating Section 51.332 entirely and returning to a more streamlined version of the pre–*2015 Technology Transitions Order* requirements for handling copper retirements."[66] AT&T supports the proposal to eliminate section 51.332 because that provision imposes unnecessary delays and administrative burdens on the network modification process, which threaten to hinder ILECs' transition to next-generation technologies. Perhaps the most burdensome requirement added in section 51.332 is the requirement that ILECs provide direct notice of planned copper retirements to "all retail customers within the affected service area."[67] These retail notifications are an unnecessary addition to an already cumbersome process. For example, the requirement that ILECs provide non-residential customer notifications

[64] It is projected that at the end of 2016 only 16.3% of U.S. households received switched voice service from the ILECs. *See* USTelecom, *Residential Competition*, http://www.ustelecom.org/broadband-industry/broadband-industry-stats/residential-competition.

[65] Notice ¶ 56.

[66] *Id.* ¶ 58.

[67] 47 C.F.R. § 51.332(b)(3).

on the same day they file notice with the Commission[68] forces ILECs to ascertain well before the date they intend to file with the Commission whether the facilities in question serve non-residential customers and, if so, to identify the types of services being provided. AT&T estimates that this pre-filing inquiry would need to begin approximately 90 days before the date on which it plans to file notice with the Commission because AT&T provides a variety of services to non-residential customers (*e.g.*, business POTS, DSL, ethernet, Business Data Services). Worse yet, because section 51.332 requires each notice to describe "the services available to the retail customers from the [ILEC],"[69] AT&T must then customize each notice to address each type of service (or combination of services) available to each customer, including contact information for the different, discrete business units at AT&T that would provide customer service for each type of service.

This internal 90-day planning period for assembling retail notices adds to the already extended waiting periods for copper retirements set out in the current rules. Under those rules, a notice is "deemed accepted" 180 days after the Commission releases public notice of the filing – 90 days longer than the pre-2015 rule.[70] In AT&T's experience, many weeks can pass – generally at least 45 to 60 days – between the date of filing and the Commission's release of public notice. Thus, the 2015 changes to the copper retirement notification rules increased the timeline for *all* copper retirements impacting non-residential customers from no more than 150 days (including the time for the Commission to release a public notice) – and no more than 240 days if an objection was filed – to nearly a full year.[71]

---

[68] *Id*. § 51.332(e)(3).

[69] *Id*. § 51.332(c)(2)(i)(C).

[70] *Compare id*. § 51.332(f), *with* 47 C.F.R. § 51.333(b)(ii), (f) (2003).

[71] 90 days pre-planning + 60 days to release public notice + 180 days = 330 days.

Moreover, the delay and burden of providing retail notifications is unnecessary. For network changes affecting facilities and/or interoperability, the only arguable stakeholders are the carriers that interconnect directly with the ILEC's network. Retail customers would only have a need to be notified if the proposed copper retirement were going to result in a discontinuance of the ultimate retail service, whether provided by the ILEC or by an interconnecting CLEC. In that circumstance, customers would receive notice under § 214. Further, when copper facilities are replaced by FTTH facilities, the retail customer is not only notified of the upgrade but is directly involved in the installation of the new optical network terminal on the customer's premises.[72] Requiring additional, detailed notice to customers under § 251(c)(5) is redundant and only leads to customer confusion.

In addition to eliminating section 51.332 in its entirety, AT&T also supports the following additional enhancement to the Commissions' copper retirement notification rules:

First, the Commission should eliminate the distinction between copper and non-copper network change notification rules.[73] There is no logical reason to perpetuate that artificial distinction. In 2015, the Commission vaguely cited "the pace and impact of copper retirement" as justification for creating the distinction,[74] but there is no substantial evidence to support that rationale, and as the Commission has acknowledged, "the transition from copper to fiber has been occurring for well more than a decade now."[75] Thus, the Commission is right to expect "that interconnecting carriers are aware that copper retirements are inevitable and that they

---

[72] As part of this installation, the customer would also be provided any separate notice regarding their upgraded facilities, *e.g.*, battery backup disclosures.

[73] *See* Notice ¶ 62.

[74] *2015 Technology Transitions Order* ¶ 13.

[75] Notice ¶ 62.

should be familiar by now with the implications of and processes involved in accommodating such changes."[76] There is nothing special about copper retirement that requires additional burdens and longer waiting periods, and therefore the Commission should harmonize the network change disclosure and copper retirement processes going forward.

Second, the effective date for a short-term notification under 47 C.F.R. § 51.333 should be calculated from the date the ILEC files notice or certification of the change with the Commission. Because the ILEC is required to serve short-term notices on all interconnecting entities, there is no need to wait until the Commission releases its own public notice before starting the clock on the time period for finalizing the effective date of the network changes. Tying the effective date to the date when the ILEC files notice with the Commission would provide a predictable date certain to start the short-term network modification process and allow ILECs to plan their network construction projects faster and more efficiently. Therefore, AT&T proposes that the Commission amend section 51.333 to provide that short-term network changes, including any copper retirements planned within six months, be deemed accepted 60 days after the notice is filed with the Commission.

Third, based on this 60-day planning interval for short-term notifications, the Commission should also eliminate the objection process for short-term notifications.[77] An objection process injects additional and often unnecessary uncertainty into the planning process for upgrading network facilities. If the Commission accepts AT&T's proposal to give interconnecting carriers at least 60 days' notice before finalizing short-term network modifications, those carriers will have ample information and time to accommodate the ILEC's

---

[76] *Id.*

[77] *See id.* ¶ 69.

proposed changes. In AT&T's experience, network modifications, including copper retirement, are uncontroversial. From 2007 to 2016, AT&T filed 666 network change notices – 266 short-term, 12 copper retirement, and 388 long-term. Not one of those 278 short-term or copper retirement notices generated an objection from any party. That large body of evidence supports the conclusion that an objection process is not needed to ensure just and reasonable rates or to protect consumers and the public interest.

Fourth, the Commission should establish an expedited timeframe when the network facilities subject to the change in question, including copper facilities, are no longer being used to provide service.[78] In such a scenario, there are no interconnecting carriers impacted and no service to be transitioned, and therefore notification is unlikely to serve any practical purpose. Therefore, the Commission should deem such notifications effective 15 days after the ILEC files notice with the Commission.

Finally, the Commission should use one certification form for all notifications. The most important part of the network change notification process is the notice provided to affected interconnecting carriers. When filing the required network change notice with the Commission, the ILEC should only have to certify that it provided notice pursuant to the rules.

B. The Commission Should Eliminate 47 C.F.R. § 68.110(b) and the Related CPE Requirement in 47 C.F.R. § 51.325(a)(3)

The Commission seeks comment on eliminating or modifying 47 C.F.R. § 68.110(b),[79] which requires a wireline telecommunications provider to give customers notice of "changes in its communications facilities, equipment, operations or procedures" if that change "can be

[78] *See id.* ¶ 63 (suggesting reduction in waiting period "where the copper facilities being retired are no longer being used to serve any customers in the affected service area").

[79] *See id.* ¶ 70.

reasonably expected to render any customer's terminal equipment incompatible with the communications facilities of the provider . . . or require modification or alteration of such terminal equipment, or otherwise materially affect its use or performance." A similar rule is codified at 47 C.F.R. § 51.325(a)(3), which requires public notice regarding any network change that "[w]ill affect the manner in which customer premises equipment is attached to the interstate network." Neither of these rules is necessary in the 21st century, and ILECs should no longer have to comply with them.

Part 68 is premised on the ability of the consumer to connect equipment of their choosing to the public telephone network, as long as that equipment did not cause harm to the network.[80] The consumer makes that decision independent of the ILEC. The ILEC does not track or inventory that equipment and would not have knowledge of what equipment is being used by the customer to attach to the network and access the service. It is unrealistic to require the ILEC to be able to predict whether a network change could possibly have a material effect on customer equipment that the ILEC is unaware of and is not itself provisioning and maintaining.

That said, the concern in the existing rules about incompatibility is no longer a concern in today's CPE marketplace. That marketplace requires that CPE manufacturers adapt their products to be compatible with new technologies and satisfy their customer's needs in order to stay competitive. Moreover, the rationale that the Commission relied on in originally adopting section 51.325(a)(3) in 1999 – concern that ILECs that also manufactured CPE might leverage their control of facilities to favor their affiliates' CPE[81] – has become a relic of a shifting marketplace. ILECs do not have a significant presence in the market for manufacturing CPE,

[80] *See* 47 C.F.R. § 68.1.

[81] *See* Report and Order, *Computer III Further Remand Proceedings: Bell Operating Co. Provision of Enhanced Services*, 14 FCC Rcd 4289, ¶ 52 (1999).

and CPE manufacturers move at lightning speed to adapt to new technologies. Nor do ILECs continue to possess the market power that would enable them to adversely affect the CPE marketplace even if ILECs continue to possess significant CPE businesses. For the foregoing reasons, the Commission should eliminate 47 C.F.R. §§ 51.325(a)(3) and 68.110(b).

C. The Commission Should Eliminate 47 C.F.R. § 51.325(c) Because It Unnecessarily Restricts the Free Flow of Useful Information

The Commission seeks comment on its proposal to eliminate 47 C.F.R. § 51.325(c), which prohibits ILECs from privately disclosing any information about planned network changes before they give public notice of such changes.[82] Although the possibility of "preferential disclosure to selected entities" is what originally motivated the Commission to adopt this rule,[83] it is unclear exactly what harm the Commission sought to avoid because any disclosure about a potential change before the make/buy point would be before an ILEC has definitively decided to move forward with that change,[84] and thus such a disclosure could not confer any concrete competitive edge to its recipient(s). Rather, such a disclosure would necessarily only be about *possible* or *tentative* changes that have not yet matured into concrete plans. Yet a rule barring disclosure could chill discussions that may improve the planning process. Thus, AT&T agrees with the Commission's tentative finding that section 51.325(c) "unnecessarily constrain[s] the free flow of useful information"[85] and that eliminating this prohibition would provide flexibility

---

[82] *See* Notice ¶ 67.

[83] *1996 Local Competition Second Order* ¶ 224.

[84] *See* 47 C.F.R. § 51.331(a), (b) (public notice required "at the make/buy point," which is when the ILEC "makes a definite decision to implement a network change").

[85] Notice ¶ 67.

to ILECs to "discuss contemplated changes before cementing definitive plans," which will make the network change process more thoughtful and collaborative.[86]

In the alternative, the Commission should revise section 51.325(c) to permit private disclosure of information about contemplated network changes to the extent that the information disclosed is part of the same information the ILEC would be required to include in a public notice filed under section 51.327.[87] Based on the streamlined timeframes for network change notifications that AT&T proposes,[88] all interconnected entities would receive at least 60 days' notice of the same information before the network change could be implemented. That 60-day period would level any playing field that had possibly become uneven as a result of a "preferential disclosure."

D. The Commission Should Provide Flexibility for ILECs Responding to *Force Majeure* Events

The Commission has previously recognized the appropriateness of granting temporary waivers of network disclosure requirements in the event of hurricanes or other natural disasters.[89] In granting that temporary relief, the Commission reasoned that, when disaster strikes, restoring networks as quickly as possible is paramount, and requiring compliance with network disclosure rules in such circumstances "would impede restoration efforts and delay recovery."[90] AT&T

---

[86] *Id.* ¶ 68.

[87] *See id.* ¶ 67.

[88] *See supra* Part II.A.

[89] *See* Order, *Petition of AT&T, Inc. for Special Temporary Authority and Waiver to Support Disaster Planning and Response*, 21 FCC Rcd 4306, ¶ 11 (2006) ("*AT&T Petition Order*"); Order, *Petition of BellSouth Corporation for Special Temporary Authority and Waiver to Support Disaster Planning and Response*, 21 FCC Rcd 6518, ¶ 19 (2006) ("*BellSouth Petition Order*"); Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 20 FCC Rcd 14713, ¶¶ 1, 3 (2005) ("*Katrina Order*").

[90] *AT&T Petition Order* ¶ 11; *see also BellSouth Petition Order* ¶ 19 ("[I]n the event of a disaster, requiring compliance with [network disclosure] rules would impede restoration efforts

proposes that the Commission promulgate a rule that relies on the same rationale and permanently provides the same flexibility for all ILECs responding to *force majeure*, as follows:

- If an ILEC invokes its disaster recovery plan in response to a *force majeure* event,[91] the ILEC is exempted during the period when the plan is invoked (up to 180 days) from all advanced notice and waiting periods requirements associated with network changes that are a direct result of damage to the ILEC's network infrastructure caused by the event.

- During the exemption period, the ILEC must communicate with other carriers and make them aware of any network changes the ILEC is making that are subject to the exemption but that may impact the other carriers' operations.

- Within 10 days of the end of the exemption period, the ILEC must provide public notice in compliance with 47 C.F.R. §§ 51.325-.335 regarding any network changes made subject to the exemption.

- If an ILEC requires relief longer than 180 days after the disaster recovery plan is invoked, the ILEC must request such authority from the Commission. Any such request must be accompanied by a status report describing the ILEC's progress and providing an estimate of when the ILEC expects to be able to resume compliance with network disclosure requirements.

---

and delay recovery and therefore waiver of [those] rules serves the public interest given the unique circumstances of a hurricane or other disaster."); *Katrina Order* ¶ 3 (finding "good cause" to waive network disclosure rules because "[r]estoring full telecommunications service in the areas affected by the hurricane as quickly as possible is a critical component in the overall recovery operation in the Gulf Coast region").

[91] The Commission has previously defined *force majeure* as "an unexpected and disruptive event," such as a natural disaster or a terrorist attack. *See* Order, *Waiver of Digital Testing Pursuant to the Satellite Home Viewer Extension and Reauthorization Act of 2004*, 22 FCC Rcd 8430, ¶¶ 9-11 (2007).

E. The Commission Should Adopt Certain Technical Changes to Its Rules That Are Necessary To Accommodate Reforming the Copper Retirement Process

The Commission seeks comment on whether any technical changes to its rules are necessary to accommodate reforming the copper retirement process. In line with the reform proposals discussed above, AT&T believes that two technical changes to the Commission's rules are needed to ensure consistency. *First*, if the Commission harmonizes its network change disclosure and copper retirement processes, it should eliminate any headings or section titles in its network disclosure rules that refer specifically to copper or copper retirement. *Second*, if the Commission uses a single, standard certification for network changes, it should eliminate the pre-filing certification required by 47 C.F.R. § 51.333(a)(1). For ease of reference, AT&T attaches as Appendix A to its comments a redline that reflects these proposed technical changes, as well as the other changes to the network disclosure rules discussed above.

III. The Commission Should Streamline Its § 214(a) Procedures and Requirements for the Discontinuance of Services

The Commission seeks comment generally on "methods to streamline Section 214(a) applications."[92] AT&T proposes two changes to the Commission's § 214(a) regulations for discontinuances related to technology transitions, which would further the Commission's goal "to shorten timeframes and eliminate unnecessary process encumbrances that force carriers to maintain legacy services they seek to discontinue."[93] *First*, the Commission should streamline the discontinuance procedures for legacy interstate voice and data services with existing

[92] Notice ¶ 95.

[93] *Id.* ¶ 71; *see also* Declaratory Ruling, Second Report and Order, and Order on Reconsideration, *Technology Transitions*, 31 FCC Rcd 8283, ¶ 64 (2016) ("*2016 Technology Transitions Order*") (stating that it "furthers the public interest" to "adopt[ ] clear, streamlined criteria" for technology transition discontinuances in order to "eliminate uncertainty that could potentially impede the industry from a prompt transition to newer technologies").

customers that are discontinued as part of a technology transition. For legacy voice services, the Commission should (a) establish clear timeframes for notifying affected customers and permitting carriers to grandfather and discontinue services; and (b) eliminate the "adequate replacement" test and rely instead on customers to demonstrate whether a proposed substitute service is adequate. The Commission should adopt similar reforms related to the discontinuance of data services. *Second*, the Commission should forbear from requiring compliance with § 214(a) for interconnected VoIP services, and services without existing customers. For interconnected VoIP services, robust competition will protect consumers and ensure that carriers do not exit the market in an unjust or unreasonably discriminatory way. For legacy voice services without customers, requiring compliance with § 214(a) serves no regulatory purpose because there are no impacted members of the public to protect.

A. The Commission Should Adopt Streamlined Automatic-Grant Procedures for Legacy Interstate Voice Services with Existing Customers

As the Commission has recently acknowledged, "[t]here has been an indisputable 'societal and technological shift' away from switched telephone service as a fixture of American life."[94] That shift continues to become more pronounced. Since 2013, the number of retail switched-access line connections has continued to plummet 11% per year as the number of interconnected VoIP and mobile voice subscriptions have continued to climb.[95] The most recent data show that about 65% of American households receive all or almost all telephone calls on

---

[94] *2016 Technology Transitions Order* ¶ 17.

[95] FCC Industry Analysis & Technology Division, *Voice Telephone Services Report*, at 2 (rel. Apr. 2017), https://apps.fcc.gov/edocs_public/attachmatch/DOC-344500A1.pdf.

cell phones,[96] while only about 14% of American households still rely on legacy TDM landlines.[97] Given this radical and ongoing shift toward competitive alternatives, the Commission should make it simpler and easier for carriers to discontinue the ever-shrinking number of legacy interstate voice services that still have customers.

The streamlined discontinuance process AT&T proposes would begin by requiring a discontinuing carrier to send written notice to affected customers, via email or traditional mail, at least 30 days prior to filing an application for discontinuance with the Commission. Such a notice would contain the same information currently required by 47 C.F.R. § 63.71(a)(1)-(5) and thus would alert customers about, *inter alia*, the timing of the planned discontinuance and the customers' right to object to the discontinuance if they believe the discontinuance will leave them with no adequate alternative service. Then, the carrier would submit an application to the Commission containing (a) the information required by 47 C.F.R. § 63.71(a)(1)-(4); (b) the date the carrier sent notice to its affected customers; and (c) a statement explaining why the proposed discontinuance will not adversely affect the present or future public convenience, including whether and to what extent replacement services are available to affected customers.[98] In order to establish the existence of an "adequate replacement," the carrier would no longer be required to satisfy the three criteria in 47 C.F.R. § 63.602(b), but instead could show that at least one of

---

[96] National Center for Health Statistics, *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, July-December 2016*, at 2-4 (rel. May 2017), https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201705.pdf.

[97] USTelecom, *Here Comes the IP Transition – What's In It For You?* at 5 (Feb. 2017), http://pubs.naruc.org/pub/A398A935-0F98-4A44-9223-E16FF28132F8.

[98] Carriers would remain required to notify and submit a copy of its application to the other stakeholders listed in 47 C.F.R. § 63.71(a), including the public utility commission and governor of the state in which the discontinuance would take place.

the following alternative services is available to affected customers: fixed or mobile voice service, including interconnected VoIP services.

The Commission would be required to issue a public notice of the carrier's application no later than five days after it is submitted, and objections or other comments on the application would need to be filed within 10 days of the public notice. If the application remains eligible for streamlined treatment due to the absence of any significant, evidence-based objections, the application would be automatically granted on the 25th day after its filing, regardless of whether the applicant is a dominant or non-dominant carrier. Upon the application being granted, the carrier would immediately be permitted to grandfather the service and would be permitted to discontinue the service entirely 60 days after the application is granted.

This streamlined process has several advantages over the current process. *First*, AT&T's proposal furthers the Commission's goal to "shorten timeframes" for securing § 214(a) approval.[99] In particular, the uniform 10-day comment period and 25-day automatic-grant period are consistent with the Commission's proposal to reduce the comment and automatic-grants periods to a uniform 10 days and 25 days, respectively, for all applications seeking to grandfather low-speed services.[100] We agree with the Commission "that there is no reason to maintain disparate [comment or] auto-grant periods for such applications."[101] The legacy classification of carriers no longer reflects the realities of today's competitive marketplace, and the benefits of streamlining should extend equally to all discontinuing carriers.

[99] Notice ¶ 71.

[100] *See id.* ¶¶ 73, 76.

[101] *Id.* ¶¶ 73, 75-77.

The specific timeframes that AT&T proposes strike a balance between the predictability sought by discontinuing carriers, on the one hand, and the need to ensure adequate public scrutiny on the other hand. For example, under the current rules, a carrier may file its § 214(a) application with the Commission on the same day it provides notice to affected customers.[102] AT&T's proposal, by contrast, requires at least 30 days' notice to affected customers *before* an application can be filed. Requiring this 30-day notice period will allow the comment process to hit the ground running and thereby promote an efficient evaluation of each application, without sacrificing any of the benefits to consumers of advance notice. AT&T's proposal would also guarantee consumers at least 55 days' notice before any service is grandfathered and 115 days' notice before any service is sunset – timeframes that carriers can predictably rely on if they are eligible for an automatic grant but that are also sufficiently lengthy to minimize, if not eliminate, gaps in consumers' service.

Second, AT&T's proposal "eliminate[s] unnecessary process encumbrances"[103] by simplifying the analysis of whether an alternative service is an adequate substitute. The three-part "adequate replacement" test adopted by the Commission in 2016 is a prime example of such an unnecessary encumbrance because it is not necessary to burden carriers with the obligation to show "adequacy" when marketplace realities are the best source of information regarding which services are adequate substitutes. Therefore, a better approach would be to adopt a presumption that certain types of next-generation services are adequate substitutes for

[102] 47 C.F.R. § 63.71(c).

[103] Notice ¶ 71.

legacy voice service,[104] while giving customers the opportunity to rebut that presumption if specific circumstances warrant. Under AT&T's proposal, customers would have 40 days' notice before having to file objections to a proposed discontinuance. Given this amount of time, consumers and consumer advocates can be relied upon to identify any potential inadequacies in the replacement services available, without the need for a complicated affirmative demonstration of adequacy by the carrier. If consumers or advocacy organizations do not raise substantial, evidence-based objections, the Commission can safely conclude that available substitutes are adequate.

The Commission should also eliminate the requirement that technology transition applications demonstrate interoperability of "key" elements to be eligible for automatic-grant treatment.[105] Interoperability is an issue that the market can fully address. Consumers will determine which features and applications are "key," and carriers will have economic incentives to develop next-generation services that incorporate those features and applications, or risk losing customers to the competition. The power of competitive incentives will "protect[ ] consumers' access to applications and functionalities they deem valuable,"[106] and therefore the Commission does not need to attempt to do so by requiring discontinuing carriers to make a burdensome, affirmative showing of adequacy. Rather than attempting to constantly reassess

[104] As discussed above, *see supra* p. 42, presumptively adequate substitutes for legacy voice service would include voice service (fixed or mobile) including interconnected VoIP services.

[105] *See* 47 C.F.R. §§ 63.71(h), 63.602(b)(3).

[106] *2016 Technology Transitions Order* ¶ 167.

which features and applications are "key,"[107] the Commission should allow the market to dictate which aspects of legacy technologies are carried over into next-generation services.

Moreover, AT&T agrees with the Commission that applications seeking authorization to discontinue legacy data services[108] that have been previously grandfathered for 180 days should have a "comment period of 10 days and an auto-grant period of 31 days for both dominant and non-dominant carriers."[109] These periods provide ample time for customers to investigate and transition its legacy services to an alternative service. However, these proposed comment and auto-grant dates should not be limited to legacy data services that were previously grandfathered. Implicit in the Commission's proposal is the recognition that 180 days is sufficient time for customers to assess their service needs and to take any necessary steps to ensure that their services are transitioned to alternative services. In light of that, the Commission should apply the streamlined automatic grant process to the discontinuance of all data services.[110] As with AT&T's proposal for the discontinuance of legacy voice service, AT&T proposes that the Commission adopt a streamlined auto-grant process under which service providers would send customers notice at least 180 days prior to filing an application to discontinue data services.

---

[107] *See id.* ¶ 166 (finding it "important to review regularly the list of key applications to determine whether elements of that list no longer are key," because "interoperability considerations will likely change over time, as new applications and functionalities are developed for new services, and consumers increasingly are no longer relying on applications and functionalities associated with legacy voice services").

[108] Legacy data services include all legacy private line services – that is, making available to a customer on a common-carrier basis a dedicated circuit for a specified period of time for the customer's exclusive use.

[109] Notice ¶ 85.

[110] These services could be grandfathered using the existing § 214 process; however, the streamlined approval should be effective after 31 days for both dominant and non-dominant carriers, as the Commission has recognized that there is no reason to maintain different auto-grant periods. *See* Notice ¶ 76.

Under this proposal, customers would have at least 190 days before comments are due on the § 214 application, and 211 days to transition their services before the service could be discontinued. As contemplated by the Commission's proposal, this provides sufficient time for customers to transition their services. Importantly, the vast majority of legacy data services, regardless of the customer's application, can be replaced by ethernet-based services, which are widely available in the market today. As a result, unless a customer can demonstrate there is no alternative service available, any § 214 application to discontinue data services should be automatically granted.[111]

B. The Commission Should Forbear from Requiring Compliance with § 214(a)'s Discontinuance Requirements for Services Without Existing Customers and Interconnected VoIP Services

Section 10 of the Telecommunications Act requires the Commission to forbear from applying a regulation or statutory provision to a class of telecommunications services if (1) enforcement "is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection, with that . . . service are just and reasonable and not unjustly or unreasonably discriminatory"; (2) enforcement "is not necessary for the protection of consumers"; and (3) forbearance from applying that law "is consistent with the public interest."[112] Under the third criteria, "the Commission shall consider whether forbearance . . . will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services."[113] Under this

[111] To prevent gaming, the Commission should establish guidelines that require any opposition to § 214 discontinuance applications to include specific, evidence-based objections. Bald allegations without support should not suffice.

[112] 47 U.S.C. § 160(a).

[113] *Id*. § 160(b).

framework, the Commission should determine that forbearance from applying § 214(a)'s discontinuance requirements is warranted with respect to services without existing customers and interconnected VoIP services.

1. Services Without Existing Customers

The rationale to forbear from applying § 214(a)'s discontinuance procedures to services without existing customers is straightforward: When a service has no customers, the market has already essentially determined that there is no need for the service, and there is no further role for § 214(a) to play.[114] The purpose of § 214(a)'s discontinuance provision is to prevent particular communities from being deprived of critical links to the larger public communications infrastructure.[115] But no community or part of a community would be cut off from the public communications infrastructure when a service with no existing customer is eliminated. In such a situation, there are no consumers to protect and no prices or practices for which to ensure reasonableness, and therefore no possible impairment of the public interest. Indeed, a key component of the § 214(a) discontinuance process – "notify[ing] all affected customers" – would be futile in the context of services without existing customers.[116] The sooner that carriers can

---

[114] Under AT&T's proposal, a service would be considered to have no existing customers when it "has had no customers or reasonable requests for service during the 180-day period immediately preceding [discontinuance]." 47 C.F.R. § 63.71(g).

[115] *See*, *e.g.*, Memorandum Opinion and Order, *Lincoln Cty. Tel. Sys., Inc.*, 81 F.C.C.2d 328, ¶¶ 11-12 (1980) ("*Lincoln County*") (citing the legislative history and observing that the purpose of § 214(a)'s discontinuance provision was to prevent a loss of telegraph service to critical wartime institutions resulting from, for example, merging telegraph companies closing particular stations); Memorandum Opinion and Order, *Western Union Tel. Co.*, 74 F.C.C.2d 293, ¶¶ 6-7 & n.4 (1979) ("*Western Union*") (same).

[116] 47 C.F.R. § 63.71(a); *see also id.* § 63.71(c) (carrier cannot file discontinuance application until "on or after the date on which notice has been given to all affected customers"); *id.* § 63.71 (technology transition discontinuance application "may be automatically granted only if the applicant provides affected customers with the notice required under paragraphs (a)(6) and (a)(7) of this section").

stop maintaining unused services, the sooner those carriers can increase their investments in next-generation services. Therefore, the Commission should forbear from applying § 214(a)'s discontinuance procedures on services without existing customers.

2. Interconnected VoIP Services

The Commission's precedents make clear that "competition, properly demonstrated, can form the basis for forbearance under section 10."[117] In that regard, the Commission has repeatedly acknowledged the important role that competition plays in ensuring reasonable rates, protecting consumers, and furthering the public interest.[118] Thus, in reaching decisions regarding forbearance, a primary consideration is "the prevailing climate of competition" regarding the class of services for which the regulation(s) would be forborne.[119] The Commission's forbearance analysis, especially its consideration of the public interest, is further informed by section 706's overarching direction to use "regulatory forbearance" to "remove barriers to infrastructure investment" and thereby "encourage the deployment on a reasonable

[117] Memorandum Opinion and Order, *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, 25 FCC Rcd 8622, ¶ 23 (2010).

[118] *See*, *e.g.*, Memorandum Opinion and Order, *Petition of US West Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance*, 14 FCC Rcd 21806, ¶ 31 (1999) ("[C]ompetition is the most effective means of ensuring that [particular] charges, practices, classifications, and regulations . . . are just and reasonable, and not unjustly or unreasonably discriminatory."); Memorandum Opinion and Order, *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, 19 FCC Rcd 21496, ¶ 24 (2004) ("*Verizon Forbearance Order*") (acknowledging "the importance of competition in ensuring just, reasonable, and nondiscriminatory charges and practices"); *see also National Broadband Plan* at 36 ("Competition is crucial for promoting consumer welfare" because it "provides consumers the benefits of choice, better service and lower prices.").

[119] Second Report and Order, *Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411, ¶ 136 (1994) ("*Mobility Second Report and Order*").

and timely basis of advanced telecommunications capability."[120] Robust competition for interconnected VoIP services justifies forbearance from applying § 214(a)'s discontinuance procedures to those services. Indeed, interconnected VoIP subscriptions increased at a compound annual growth rate of 10% over the three-year period ending in 2016.[121] There are multiple providers of business and residential over-the-top VoIP services – including Skype, Vonage, Voipo, Broadvoice, and many others. These services can generally provide service to anyone with a broadband connection. Because customers have ready access to alternative VoIP services, requiring any filing before discontinuance is unnecessary and simply imposes a regulatory burden.

In 2009, the Commission used its ancillary authority to apply the § 214(a) discontinuance requirements to VoIP "to protect customers of interconnected VoIP service from interrupted service and its associated consequences."[122] However, § 214(a) approval is unnecessary to address these concerns. As discussed above, Commission precedent has long supported the principle that "in a competitive market, market forces are generally sufficient to ensure the lawfulness of rate levels, rate structures, and terms and conditions of service set by carriers who lack market power," and that "[r]emoving or reducing regulatory requirements also tends to encourage market entry and lower costs."[123] Therefore, the existence of multiple competitors providing interconnected VoIP services justifies forbearing from § 214(a) discontinuance

---

[120] 47 U.S.C. § 1302(a); *see Verizon Forbearance Order* ¶¶ 20, 34; Report and Order on Remand, Declaratory Ruling, and Order, *Protecting and Promoting the Open Internet*, 30 FCC Rcd 5601, ¶¶ 437, 439 (2015), *aff'd*, *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016) (section 706's direction is "central" to forbearance analysis and can justify forbearance even in the absence of robust competition).

[121] *See* source cited *supra* note 95.

[122] Report and Order, *IP-Enabled Services*, 24 FCC Rcd 6039, ¶ 14 (2009).

[123] *Mobility Second Report and Order* ¶ 173.

requirements. To the extent the Commission remains concerned about customers receiving proper notice, it could adopt a notice requirement similar to the Commission's rule for discontinuing non-dominant international services.[124]

C. The Commission Should Not Adopt Special § 214(a) Requirements Related to Government Users

The Commission seeks comment on how to account for the needs of local, state, federal, and Tribal governments that use legacy services in its effort to streamline its process for reviewing § 214 applications to grandfather low-speed services.[125] AT&T recognizes the budget and procurement challenges that government entities face, as well as the challenges of transitioning strategic government applications that utilize legacy services. However, as discussed below, these challenges are not insurmountable, and certainly do not warrant adoption of unique regulatory requirements.

The IP transition should be old news for government customers, and planning should already be underway. The FCC and the industry have been studying and discussing the IP transition for a number of years. For example, in 2010, the Commission issued its *National Broadband Plan*, which recognized the clear and irreversible trend of consumers abandoning legacy TDM-based services in favor of other IP-based and wireless services.[126] After several months of study, the FCC's Technology Advisory Council recommended that the TDM-based

---

[124] *See* 47 C.F.R. § 63.19(a) (requiring carriers to provide notice to affected customers at least 30 days prior to discontinuance and requiring carriers to file a copy of such notice with the Commission).

[125] Notice ¶¶ 82-84.

[126] *See National Broadband Plan* at 59 (also acknowledging the associated and unsustainable costs borne by carriers to maintain network facilities and infrastructure to sustain declining legacy services).

PSTN be retired by 2018,[127] and the dialogue continues to the present in numerous other proceedings. Thus, government customers have had ample notice and opportunity to plan for the transition of these services for some time, from both budgetary and operational perspectives.

Importantly, the challenges associated with transitioning large volumes of services, including "critical" services, can all be overcome by negotiation and coordination between the carrier and the government customer, which is routine for carrier/customer relationships of this size.[128] Carriers have vast experience working with government customers and the volume of services they utilize, such as by relocating governmental agencies, establishing services for extremely large events, and ensuring redundancy of services in the event of disasters. Thus, carriers are very adept at managing the needs of government customers, and there is no reason to suspect that carriers will not apply their expertise when transitioning government customers off legacy services. Carriers are especially sensitive to these needs where the carrier is supplying mission-critical services that implicate emergency response and national security. To be sure, carriers have incentives to ensure government customers' needs are met, as competition to provide services to any government entity is fierce. Therefore, carriers go to great lengths to ensure that they have successful relationships with these customers, or risk losing future business. Thus, regulatory requirements are unnecessary to ensure the needs of government users are met. The marketplace already sees to it.

---

[127] *See* Technology Advisory Council, *Status of Recommendations* at 11, 16 (June 29, 2011), http://transition.fcc.gov/oet/tac/TACJune2011mtgfullpresentation.pdf; *see also* Report and Order and Further Notice of Proposed Rulemaking, *Connect America Fund*, 26 FCC Rcd 17663, ¶ 783 (2011) (vowing to "facilitate the transition" away from the TDM-based network and toward the all-IP network of the future).

[128] Many government service contracts include minimum notice periods for the withdrawal of services, and customers can renegotiate such terms to the extent they require additional time.

IV. The Commission Should Reverse Its 2015 Determination That Carriers Must Take into Account the End Users of Their Wholesale Customers in Determining Whether They Must Obtain § 214(a) Discontinuance Authority

In its *2015 Technology Transitions Order*, the Commission concluded that "it is not enough for a carrier that intends to discontinue a service to look only at its own end user customers," but rather it must also seek § 214(a) approval "when [its] actions will discontinue, reduce, or impair service to . . . a carrier-customer's retail end users."[129] The Commission seeks comment on reversing that "clarification."[130] The Commission's 2015 guidance should be reversed because it is inconsistent with the statutory and regulatory scheme, places undue burdens on discontinuing carriers, and misinterprets prior Commission precedent.

A. The Commission's Clarification Is Inconsistent with the Statute

Section 214(a) provides, in relevant part, that a carrier must seek approval from the Commission before it "discontinue[s], reduce[s], or impair[s] service *to a community, or part of a community*." (Emphasis added.) By its terms, the statute only requires a carrier to seek approval if the service it is discontinuing is provided directly to a community of end users (or a part thereof). That text accords with the statute's purpose, which was to protect end users from a loss or impairment of critical communications services (at the time, telegraph service was the primary concern) during wartime.[131]

The Commission's 2015 clarification concluded that § 214(a) applies even to the discontinuance of a wholesale input if that discontinuance will result in the wholesale carrier-

[129] *2015 Technology Transitions Order* ¶ 102.

[130] Notice ¶ 90.

[131] *See* sources cited *supra* note 1155.

customer's discontinuance of its own service to its own retail end users.[132] That conclusion was contrary to the statute's text because a service provider's elimination of a wholesale input does not, by itself, "discontinue, reduce, or impair service to a community, or part of a community." Rather, it only discontinues a service to another carrier.[133] If that carrier-customer then elects or is required to discontinue its retail service to end users, it is solely that carrier-customer's obligation to seek approval from the Commission under § 214(a).

Congress's 1996 amendments to the Communications Act confirm § 214(a)'s inapplicability to wholesale discontinuances. One such amendment was the addition of 47 U.S.C. § 251, which governs carriers' responsibilities when providing wholesale inputs to other carriers. In particular, § 251(c)(2) requires ILECs to provide CLECs wholesale interconnection to their networks, and § 251(c)(5) – discussed above, *see supra* Part II – further requires ILECs "to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that [ILEC]'s facilities or networks, as well as any other changes that would affect the interoperability of those facilities and networks." The Commission's implementing regulations require ILECs to give public notice "regarding any network change that . . . [w]ill affect a competing service provider's performance or ability to provide service,"[134] which necessarily includes any change that would result in a discontinuance of service to end users. The notice required by § 251(c)(5) resembles the notice required before seeking approval

[132] *See 2015 Technology Transitions Order* ¶ 113 ("Discontinuance, reduction, or impairment of wholesale service is subject to section 214(a) . . . when the actions will discontinue, reduce, or impair service to retail customers, including carrier-customers' retail end users.").

[133] *See id.* ¶ 130 ("[W]e do not interpret the statutory phrase 'community, or part of a community' to include platform providers and other competitive LECs, in addition to retail customers . . . .").

[134] 47 C.F.R. § 51.325(a)(1).

under § 214(a), except that it is strictly carrier-to-carrier rather than carrier-to-end user.[135] Section 251(c)(5) thus comprehensively addresses a carrier's duties when discontinuing a wholesale input, distinct from a carrier's duties under § 214(a) when it discontinues a service to end users. Section 251(c)(5) would be largely superfluous if, as the Commission concluded, § 214(a) already addressed a carrier's duties when discontinuing a wholesale input.[136]

Sections 214(a) and 251(c)(5) reflect Congress's intent to create mutually exclusive obligations for wholesale and retail discontinuances. When a carrier discontinues a wholesale service, § 251(c)(5) provides that advanced notice to affected carrier-customers is all that is required. When a carrier discontinues a retail service provided directly to a community of end users, § 214(a) requires prior Commission approval. Section 214(a) requires carrier-customers to consider the contents of any § 251(c)(5) notice – just as it would consider any other development affecting its service – to determine whether that network change will require the carrier-customer to discontinue any of its own services to end users. If so, then the *carrier-customer* must file a § 214(a) application. The Commission's 2015 clarification conflates (indeed, disregards) Congress's careful separation of wholesale and retail discontinuance obligations by imposing redundant obligations on discontinuing wholesale carriers and requiring carrier-customers and wholesale carriers both to submit a § 214(a) application for the same discontinuance.[137] That

[135] *Compare id.* § 51.327 (required contents of notice), *and id.* § 51.329 (methods for providing notice), *and id.* § 51.333 (short-term notices), *with id.* § 63.71(a).

[136] In adopting its "clarification" of § 214(a), the Commission nowhere cited § 251(c)(5), even though the Commission discussed that provision at length elsewhere in the same Order. *Compare 2015 Technology Transitions Order* ¶¶ 108-113, *with id.* ¶¶ 18, 24-84.

[137] *See id.* ¶ 120 n.421 (explaining that carrier-customers and wholesale carriers must each submit § 214(a) applications for the same discontinuance).

interpretation is not only contrary to the statutory design but is also unnecessary because end users are already sufficiently protected by carrier-customers' § 214(a) obligations.

B. The Commission's Clarification Imposes Undue Burdens on Discontinuing Wholesale Carriers

One consequence of the Commission's 2015 clarification is that discontinuing wholesale carriers must now "undertake a meaningful evaluation" of whether their actions will impact their carrier-customers' end users.[138] That evaluation "must include consultation directly with affected carrier-customers to evaluate the impact on those carrier-customers' end users."[139] This latter requirement, in turn, recognizes that carrier-customers are in the best position to evaluate the impact on end users of a wholesale discontinuance. Yet, the Commission has insisted on requiring wholesale carriers, rather than carrier-customers alone, to evaluate the impact of a wholesale discontinuance on end users. Requiring this extra layer of evaluation is inefficient, creates bad incentives for carrier-customers, and imposes unnecessary burdens on discontinuing wholesale carriers.

First, requiring a wholesale carrier to evaluate the impact of a wholesale discontinuance on its carrier-customer's business is inefficient because the carrier-customer is naturally in a better position to evaluate such impact. In economics parlance, the carrier-customer is the least-cost avoider, and as a general matter legal duties should rest upon the least-cost avoider because its efforts will "have the greatest marginal effect on preventing the loss."[140] Carrier-customers

---

[138] *Id.* ¶ 114.

[139] *Id.*

[140] *National Union Fire Ins. Co. of Pittsburgh v. Riggs Nat'l Bank of D.C.*, 5 F.3d 554, 557 (D.C. Cir. 1993) (Silberman, J., concurring); *see also*, *e.g.*, *Holtz v. J.J.B. Hilliard W.L. Lyons, Inc.*, 185 F.3d 732, 743 (7th Cir. 1999) (declining to impose duty on broker to confirm an investor's intentions regarding the beneficiaries of his account because the investor "was in the best position to ensure that the application accurately reflected his intentions").

know how their businesses operate and how they use wholesale inputs much better than their wholesale service providers do. Thus, as compared to carrier-customers themselves assessing the potential impact of a wholesale discontinuance, a wholesale carrier must expend much more time and resources to collect and decipher the same information. Intermediating wholesale carriers between carrier-customers and their end users will inevitably lead to wasteful expenditure of wholesale carriers' resources that could otherwise be put toward furthering technology transitions.

Second, the Commission's 2015 clarification creates a perverse incentive for carrier-customers to claim that a wholesale discontinuance will affect its end users in order to force the wholesale carrier to file, thus delaying or even blocking the discontinuance.[141] Carrier-customers especially have this incentive when elimination of a wholesale input would increase their costs of providing a retail service.[142]

Third, requiring a wholesale carrier and its carrier-customers to file sequential § 214(a) applications for the same discontinuance imposes unnecessary burdens on wholesale carriers. In addition to the burden of regularly filing § 214(a) applications of dubious necessity, as discussed above, the Commission's 2015 clarification also imposes on wholesale carriers the burden of gathering and interpreting information about how carrier-customers use wholesale inputs and whether and to what extent carrier-customers could use alternative inputs to provide the same

[141] Although not clear from the *2015 Technology Transitions Order*, the Commission's clarification appears to require a sequential, rather than concurrent, application process, whereby a wholesale carrier first seeks discontinuance of the wholesale input, and only if that application is granted must the carrier-customer seek discontinuance of the retail service. *See* 47 C.F.R. § 63.71 (notice and application only required from carrier "that *seeks to* discontinue, reduce or impair service") (emphasis added).

[142] *See 2015 Technology Transitions Order* ¶ 117 (finding that "financial and technical factors affecting the carrier-customer may be relevant to determining the impact of a planned discontinuance on the retail end-user").

retail service. There is no justification for requiring wholesale carriers to learn these details about the interworking of its carrier-customers' business operations because the carrier-customers already know that information and must consider it in determining whether a wholesale discontinuance will impact their end users. Imposing these additional burdens on wholesale carriers provides no corresponding additional protection to end users.

Finally, it is inappropriate to put wholesale carriers in the position of gauging the impact of a discontinuance on its *competitor's* retail customers. The Commission made clear that wholesale carriers are "required [to] us[e] all information available, including information obtained from carrier-customers,"[143] and that carrier-customers must provide their wholesale carriers with any "information relevant to making the determination of a discontinuance's impact on end-user customers."[144] This framework will inevitably require carrier-customers to turn over commercially sensitive information about how they use wholesale inputs. That intrusive and potentially anticompetitive result further highlights why the Commission's 2015 interpretation is unworkable.

C. The Commission's Clarification Misinterpreted Commission Precedent

The Commission asserted in 2015 that its clarification was "consistent with and builds on [Commission] precedent,"[145] and the Commission now seeks comment on "whether [it] correctly interpreted the precedent upon which it relied to support its expansive 2015 clarification."[146]

---

[143] *Id.* ¶ 119.

[144] *Id.* ¶ 121.

[145] *Id.* ¶ 108; *see also id.* ¶¶ 109-113 (interpreting prior Commission precedents).

[146] Notice ¶ 94.

The Commission should now conclude that it misinterpreted its own precedents in arriving at its 2015 clarification of § 214(a).[147]

None of the decisions cited by the Commission required a wholesale provider to file a § 214 application simply because its carrier-customers might lose the ability to serve their retail customers. Indeed, in all but one of the decisions, the Commission *rejected* claims by carrier-customers that their wholesale suppliers could not withdraw service without filing a § 214 application, reasoning that there was not sufficient evidence that the wholesale change would discontinue, impair, or reduce service to "the using public."[148] The one decision that did find that a § 214 application was required, *BellSouth Telephone*, involved a situation in which the carrier-customer's end-users "would have lost their ability to obtain" a particular service entirely.[149] That decision thus does not support the radically more expansive 2015 rule, which

---

[147] *See 2015 Technology Transitions Order* at 9544-47 & n.203 (Pai, Comm'r, dissenting) (contending "[t]he *Order* shreds pages of precedent" to support its clarification of § 214(a), and stating that "[s]uch disregard for our past decisions suggests that future Commissions may not respect the radical departures blessed today").

[148] *See Western Union* ¶ 9 (holding that carrier-customer's allegations "d[id] not present a Section 214 question" and did "not show[ ] how [wholesale carrier's action] results in any loss or impairment of service to the customers [the carrier-customer] serves"); *Lincoln County* ¶¶ 14, 23 (holding that "Section 214(a) does not govern this situation" because "[t]he community of Pioche will be able to make the same amount or more telephone calls at the same quality of transmission after" the wholesale carrier makes the complained-of network change); Memorandum Opinion and Order, *Graphnet, Inc. v. AT&T Corp.*, 17 FCC Rcd 1131, ¶ 29 (2002) (rejecting "reduce or impair" claim under § 214(a) where carrier-customer "failed to produce any persuasive evidence of service disruptions resulting from" wholesale carrier's actions).

[149] Memorandum Opinion and Order, *BellSouth Telephone Companies Revisions to Tariff F.C.C. No. 4*, 7 FCC Rcd 6322, ¶ 5 (1992) ("*BellSouth Telephone*"). Further, the Commission indicated in its *BellSouth Telephone* decision that availability of the particular wholesale input at issue – Calling Party Number ("CPN"), which enables a carrier to provide "caller ID" service to end users – was especially important to the public interest, and that § 214(a) approval "may or may not be required" for "other types of [wholesale] tariffed service options." *Id.* ¶ 6 n.9.

requires § 214(a) applications even where other providers will continue offering the same service to the using public (or an "adequate" replacement).[150]

In all events, *BellSouth Telephone* was decided years before Congress enacted § 251(c)(5), significantly limiting its continuing precedential force. As discussed above in Part IV.A, § 251(c)(5) reflects Congress's intent to create mutually exclusive wholesale and retail discontinuance obligations. To the extent that pre-1996 Commission precedents could otherwise be read to interpret § 214(a) to apply to wholesale discontinuances, those precedents must now be read in conjunction with § 251(c)(5)'s notice-based process for changes to wholesale inputs.

V. The Commission Should Eliminate the "Functional Test" for Determining Whether § 214(a) Discontinuance Authority Is Required

In 2014, the Commission issued a declaratory ruling that it "looks beyond the terms of a carrier's tariff, and instead it applies a functional test that takes into account the totality of the circumstances from the perspective of the relevant community or part of a community, when analyzing whether a service is discontinued, reduced, or impaired under section 214."[151] The Commission now seeks comment on whether it should "revisit" that ruling, including its "functional test."[152] It also seeks comment on its proposal that "a carrier's description in its tariff – or customer service agreement in the absence of a tariff – should be dispositive as to what comprises the 'service' within the meaning of the Section 214(a) discontinuance requirement."[153] The Commission should issue a new declaratory ruling that abrogates the "functional test" and

[150] *See 2015 Technology Transitions Order* ¶ 116.

[151] Notice of Proposed Rulemaking and Declaratory Ruling, *Ensuring Customer Premises Equipment Backup Power for Continuity of Communications*, 29 FCC Rcd 14968, ¶ 117 (2014) ("*2014 Declaratory Ruling*").

[152] Notice ¶ 115.

[153] *Id.* ¶ 116.

instead clarifies that only features described in a carrier's tariff or service agreement can be considered part of that carrier's "service" for purposes of § 214(a).

A. The Terms of a Carrier's Tariff or Service Agreement Conclusively Limit the "Service" Provided by the Carrier

Section 214(a) strikes a balance between service continuity and technological innovation that differentiates between the service a carrier offers (which the carrier may not discontinue, reduce, or impair without approval) and the equipment over which the carrier provides it (which the carrier may otherwise freely change).[154] The text of the statute makes clear that the relevant "service" that cannot be discontinued, reduced, or impaired without Commission approval is the "service *provided*," not the third-party functionality that customers use the provided service to achieve.[155]

The Commission's historical implementation of § 214(a) underscores the principle that a carrier's tariff or service agreement, not customer use, defines the scope of the "service provided." For example, when the Commission ruled in *Carterfone* that customers could attach third-party devices to the telephone service they purchased, it noted that carriers would not be "hindered in improving telephone service by any tendency of the manufacturers and users of interconnection devices to resist change."[156] Thus, carriers "remain free to make improvements

---

[154] *See* 47 U.S.C. § 214(a) ("[N]othing in this section shall be construed to require a certificate or other authorization from the Commission for any installation, replacement, or other changes in plant, operation, or equipment, other than new construction, which will not impair the adequacy or quality of service provided."); *see also id*. § 153(53) ("The term 'telecommunications service' means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, *regardless of the facilities used*.") (emphasis added).

[155] *Id*. § 214(a) (emphasis added).

[156] Decision, *Use of the Carterfone Device in Message Toll Telephone Service*, 13 F.C.C.2d 420, 424 (1968) ("*Carterfone*").

to the telephone system" that can be reflected in "reasonable revised standards for nontelephone company provided devices used in connection with the system."[157] If the underlying telephone network technology and standards change, then "[a]n owner or user of a device . . . would either have to have the device rebuilt to comply with the revised standards or discontinue its use" because device obsolescence due to changing technology "is the risk inherent in the private ownership of any equipment to be used in connection with the telephone system."[158] The principle of *Carterfone* means that, though "[t]he value of communications networks derives in significant part from the ability of customers to use these networks as inputs for a wide range of productive activities,"[159] the "input[ ]" is necessarily distinct from the ability to conduct the activity. *Carterfone* thus makes clear that when third-party companies offer equipment or services meant to use a carrier's service as an input, it is those third parties, not the carrier, that are ultimately providing the ability to conduct a particular activity using the carrier's service.

Similarly, the Commission has long recognized that inconvenience to customers, standing alone, does not trigger § 214(a). For example, during times when telephone exchanges might operate for only limited hours during the day, the Commission specifically permitted carriers to "shift" their particular hours of operation without triggering § 214(a), so long as the total number of "hours of service" remained the same.[160] A carrier "shift[ing]" its hours of operation would undoubtedly inconvenience customers who relied on being able to use the service at particular times of day if the carrier subsequently curtails or eliminates service during those times.

---

[157] *Id.*

[158] *Id.*

[159] *2014 Declaratory Ruling* ¶ 116.

[160] *Extension of Lines and Discontinuance of Service by Carriers*, 28 Fed. Reg. 13,229, 13,232 (Dec. 5, 1963) (codified at 47 C.F.R. § 63.60).

Nevertheless, the Commission concluded that such a disruption of customer expectations did not qualify as a discontinuance, reduction, or impairment of service under § 214(a).

As the Commission has explained, "the 'filed tariff doctrine,' which is also called the 'filed rate doctrine,' requires carriers, as well as their customers, to abide by the terms of the tariff and precludes them from acting outside it."[161] As a result, "each carrier's tariff alone defines the terms and conditions under which it offer[s] and provide[s]" telecommunications services.[162] In determining whether something constitutes a "service" subject to § 214(a), prior to 2014, the Commission traditionally looked only to the four corners of a carrier's tariff, not the uses to which the public has put the services, which are not laid out in the tariff.[163]

The same principles apply to services that have been de-tariffed and are offered instead through a service agreement. The terms of a carrier's contractual offer conclusively define the scope and nature of the service it is offering to provide.[164] Thus, if a carrier does not offer a particular functionality with its service, then a customer cannot rewrite the offer to compel the carrier to provide that functionality. Rather, a customer's "silent acceptance of the services when it had a reasonable opportunity to decline them operates to bind the [customer] to a contract on the terms proposed by the [carrier]."[165] In this regard, a customer's subjective intent to use a

---

[161] Memorandum Opinion and Order, *Petition for Declaratory Ruling on Issues Contained in Thorpe v. GTE*, 23 FCC Rcd 6371, ¶ 31 (2008).

[162] *Id*. The filed tariff doctrine is codified at 47 U.S.C. § 203(c), which provides that "no carrier shall . . . extend to any person any privileges or facilities in [interstate and foreign wire, or radio] communication . . . except as specified in" its tariff.

[163] *See*, *e.g.*, *BellSouth Telephone* ¶ 6 (concluding CPN was "a service within the meaning of [§ 214(a)] . . . because BellSouth's tariff permits customers to order switched access with or without CPN").

[164] *See* Restatement (Second) of Contracts § 29(a)(1) cmt. (1981) ("The offeror is the master of his offer.").

[165] 2 Williston on Contracts § 6:51 (4th ed. 1999).

carrier's service in a particular way does not create an obligation on the carrier to ensure that its service supports that use.[166]

B. The Commission's Justifications for the Functional Test Lack Merit

In support of its *Declaratory Ruling*, the Commission presented several purported justifications, and the Commission now seeks comment on the validity of many of them.[167] All of the Commission's stated justifications for the functional test lack merit.

First, the Commission reasoned that "tariffs cannot define the reach of section 214, because the Commission has forborne from the tariffing requirement in certain instances, but the services at issue remain subject to the requirements of section 214."[168] That observation, however, does not support the Commission's functional test because the terms that a carrier offers control, no matter whether they appear in a tariff (for tariffed services) or in a contract (for de-tariffed services).

Second, the Commission contended that "tether[ing] our section 214 analysis to tariff language would yield potentially absurd results" because, for example, "any rate increase could be construed as a discontinuance."[169] Although that result would be both absurd and contrary to

---

[166] *See*, *e.g.*, *Tanadgusix Corp. v. Huber*, 404 F.3d 1201, 1205 (9th Cir. 2005) ("The terms of the contract control, regardless of the parties' subjective intentions shown by extrinsic evidence."); *see also Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 150-51 (2009) (recognizing that "it is black-letter law that the terms of an unambiguous private contract must be enforced irrespective of the parties' subjective intent") (citing 11 Williston on Contracts § 30:4 (4th ed. 1999)).

[167] *See* Notice ¶ 120.

[168] *2014 Declaratory Ruling* ¶ 115; *see also 2015 Technology Transitions Order* ¶ 189 (citing same in support of denying reconsideration).

[169] *2015 Technology Transitions Order* ¶ 189.

binding judicial precedent,[170] it is not a result that follows from concluding that tariffs or service agreements conclusively limit the nature of the service provided. *Only* features described in the tariff or contract *can be* part of a carrier's service, but that does not mean that *everything* in the tariff or contract *is* a part of that service for purposes of § 214(a).

Third, the Commission cited the fact that the Supreme Court in its *Brand X* decision "explicitly relied on the consumer's point of view when determining how to classify the types of services customers receive from Internet service providers and whether consumers truly had been 'offered' certain services at all."[171] But the *Brand X* decision does not require looking beyond a tariff or service agreement to define the scope of a carrier's service for purposes of § 214(a). *Brand X* did not involve defining the *scope* of a carrier's service, but instead involved defining "the proper regulatory classification . . . of broadband cable Internet service."[172] Whatever value "the consumer's point of view" has in determining the proper regulatory classification of a service, neither the *Brand X* decision nor the Commission's declaratory ruling reviewed in that decision endorsed using consumers' point of view to define the scope of a service for purposes of § 214(a). If anything, *Brand X* supports the Commission's proposal to eliminate its functional test because the Supreme Court's decision (and the ruling it reviewed) emphasized that a service is defined by what is offered to the consumer by the carrier, not by the facilities a provider uses or the other uses to which the consumer may put the service.[173]

---

[170] *See Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221, 1232-33 (D.C. Cir. 1980) (rate increases alone do not trigger § 214(a)).

[171] *2015 Technology Transitions Order* ¶ 190 & n.620 (citing *National Cable Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 988-89 (2005)).

[172] *Brand X*, 545 U.S. at 975.

[173] *See id.* at 990-91 ("What . . . telephone companies providing telephone service 'offer' is . . . telephone service . . . , though they do so using (or 'via') the discrete components composing the end product, including data transmission."); *see also*, *e.g.*, Declaratory Ruling and

Fourth, the Commission asserted that it is reasonable to define "service" differently in the context of § 214 than in the context of the filed tariff doctrine because "they serve different purposes."[174] In particular, the Commission asserted that "section 214 broadly directs [it] to ensure that 'neither the present nor future public convenience and necessity will be adversely affected' by discontinuation of service," such that "limiting the meaning of the term 'service' under section 214(a) to only what is contained in a provider's tariff could cause the public to lose services upon which it has come to rely, directly affecting the public convenience and necessity."[175] But the Commission cannot enlarge its § 214(a) authority through circular reasoning, contending that if the loss of any functionality might affect public convenience and necessity, then that functionality must be part of a carrier's "service." As discussed above, a carrier's obligation is not to insure its customers against the potential obsolescence of third-party equipment. Indeed, as discussed further below, such a test would unreasonably require carriers to guess about the impact of changes in the manner in which they provide services: such a test introduces an unacceptable level of ambiguity and open-endedness into the Commission's regulations.

Finally, the Commission also cited in support of the functional test the obligations of wireline carriers under 47 C.F.R. § 68.110(b) to notify customers if the carrier makes any "change in its communications facilities, equipment, operations or procedures" if that change "can be reasonably expected to render any customer's terminal equipment incompatible with the

---

Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798, ¶ 35 (2002) ("None of the foregoing statutory definitions rests on the particular types of facilities used.").

[174] *2015 Technology Transitions Order* ¶ 191.

[175] *Id.*

communications facilities of the provider . . . or require modification or alteration of such terminal equipment."[176] That provision, however, highlights – in line with *Carterfone* – that network changes impacting the way customers use a service (but not the service itself) only require (at most) *notice* to the customer, not *approval* from the Commission. Such notice – although unnecessary in its own right[177] – affords the customer an opportunity either to get different service that will allow it to keep using the same equipment or to get different equipment that will allow it keep using the same service. Either way, the carrier's offered service remains the same, and § 214(a) approval is not required.

C. The Functional Test Is Impermissibly Vague

The Commission also seeks comment on "whether the 'functional test' is too vague and prohibitively broad for carriers and consumers trying to determine what services do and do not trigger the requirement to obtain Section 214(a) discontinuance authority."[178] The short answer is "yes." Aside from the carrier's definition of a service in its tariff or agreement, the Commission identified a single factor that guides the functional test: "what the 'community or part of a community' reasonably would view as the service provided by the carrier," as informed by "the extent to which the function traditionally has been relied upon by the community."[179] As the Commission now acknowledges, this one-part "test" is bereft of "objective criteria by which a carrier may determine whether an application is necessary."[180] Instead, the Commission's *Declaratory Ruling* raises only questions that go to the heart of its test, such as how to measure

[176] *See 2014 Declaratory Ruling* ¶ 117.

[177] *See supra* Part II.B.

[178] Notice ¶ 119.

[179] *2014 Declaratory Ruling* ¶¶ 115, 119.

[180] Notice ¶ 119.

the extent of community reliance, what degree of reliance triggers § 214(a), and whether community reliance on a feature necessarily means the community views that feature as a "service provided *by the carrier*" rather than a third party. Without answers to these and many other questions, carriers are "hard pressed to know when [they are] in danger of triggering an adverse reaction,"[181] and therefore the functional test is impermissibly vague.

In this regard, it matters little that carriers might be "well aware of many of the forms of terminal equipment in use by their customers on TDM networks."[182] "Many" is not all, and carriers cannot be expected to anticipate every way that customers could use their phone service as an input to other services or devices. Further, even if a carrier had perfect information about the possible uses of its service, it would have no way of knowing whether and to what extent customers actually rely on the service as an input to other services or devices. Further still, even if a carrier knew exactly how each of its customers used each feature of its service as an input to other activities, the carrier still would not know which of those features the Commission would consider sufficiently "little-used" or "old-fashioned" to avoid § 214(a) scrutiny.[183] As Commissioner O'Rielly put it, the functional test is "unbounded" and "provides no guidance whatsoever" to carriers, who must "guess how the service is being used, what the community thinks about such uses, and whether the FCC would require a filing in such instances."[184]

With no answers to crucial questions about the metes and bounds of the functional test, carriers will face a dilemma similar to that caused by the Commission's "clarification" discussed

---

[181] *Timpinaro v. SEC*, 2 F.3d 453, 460 (D.C. Cir. 1993).

[182] *2015 Technology Transitions Order* ¶ 200.

[183] *See 2014 Declaratory Ruling* ¶ 118.

[184] *2014 Declaratory Ruling*, 29 FCC Rcd at 15041 (O'Rielly, Comm'r, concurring in part and dissenting in part).

above in Part IV: accept the possibly unnecessary cost and delay of a § 214(a) application or risk monetary sanctions or other punishment for what ultimately turns out to be an unauthorized discontinuance. Either option would impose real costs and delays on carriers and thereby slow the deployment of new and next-generation services.

VI. The Commission Should Use Its Authority Under § 253 To Preempt State and Local Laws Inhibiting Broadband Deployment

Section 253 "authorizes preemption of state and local laws and regulations expressly or effectively 'prohibiting the ability of any entity' to provide telecommunications services."[185] The Commission seeks comment on whether it should promulgate rules pursuant to § 253 that prospectively prohibit the enforcement of state and local laws that would otherwise effectively prohibit the provision of telecommunications service by inhibiting the deployment of broadband infrastructure.[186] The Commission can and should promulgate such rules.

A. The Commission Has Authority To Prospectively Preempt Enforcement of State and Local Laws That Effectively Prohibit Carriers from Providing Telecommunications Services

The Commission seeks comment on its authority to engage in rulemaking to interpret § 253(a)'s proscription against any "State or local legal requirement" that has a prohibitive effect on the ability to provide telecommunications service. The Commission clearly has such authority. Section 201(b) confers plenary rulemaking authority on the Commission to "carry out the provisions of" the Communications Act, including the provisions added by the Telecommunications Act of 1996.[187] "The Commission has broad discretion in making policy

[185] *Nixon v. Missouri Municipal League*, 541 U.S. 125, 128 (2004).

[186] *See* Notice ¶¶ 100, 109.

[187] *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 (1999).

determinations through the enactment of rules,"[188] including the discretion "to codify by regulation its view of the public interest."[189] Importantly, "the Commission has very broad discretion to decide whether to proceed by adjudication or rulemaking,"[190] and may act to prevent potential violations before they occur.[191]

Section 253(d) does not limit the Commission's power to promulgate rules implementing § 253(a). That subsection provides that "the Commission shall preempt" any state or local legal requirement that it "determines" "after notice and an opportunity for public comment" "violates subsection (a) or (b) of this section," to the extent such preemption is "necessary to correct such violation or inconsistency."[192] This provision provides the Commission an affirmative grant of authority to rule on the validity of particular state requirements in an adjudicatory proceeding. But it does not expressly or by implication suggest any limitation on the Commission's authority to adopt, pursuant to §§ 201(b) and 253(a), rules of general applicability to implement the statute. Therefore, the Commission has discretion to construe § 253(d) to permit rulemaking,[193] which "is an essential component of the administrative process and indeed is often the preferred procedure for the evolution of agency policies."[194] Rulemaking to implement § 253(a) would

---

[188] *American Radio Relay League, Inc. v. FCC*, 617 F.2d 875, 881 (D.C. Cir. 1980).

[189] *Office of Communication of United Church of Christ v. FCC*, 707 F.2d 1413, 1424 (D.C. Cir. 1983).

[190] *Conference Grp., LLC v. FCC*, 720 F.3d 957, 965 (D.C. Cir. 2013).

[191] *Stilwell v. Office of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009) ("An agency need not suffer the flood before building the levee.").

[192] 47 U.S.C. § 253(d).

[193] *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013).

[194] *Trans-Pacific Freight Conference of Japan/Korea v. Federal Maritime Comm'n*, 650 F.3d 1235, 1244-45 (D.C. Cir. 1980) (discussing relative advantages of rulemaking, including that it "permits more precise definition of statutory standards," "allows all those who may be

also be consistent with Congress's intent in enacting § 253, which was that "there should be a central agency in Washington, D.C., which determines whether or not [state or local action] inhibits the competition and the very goals of" the Telecommunications Act.[195]

B. Section 253 Preempts State or Local Laws That Materially Limit the Ability of a Competitor or Potential Competitor To Provide Telecommunications Service

1. General Standard. In implementing § 253(a), the Commission should adopt a general standard similar to the one it has previously applied in adjudicatory proceedings. Under that standard, a state or local statute, regulation, or legal requirement runs afoul of § 253(a) if it materially inhibits or limits the ability of any competitor or potential competitor to provide telecommunications service.[196] That standard acknowledges that a state or local legal requirement need not erect "insurmountable" or "absolute" barriers to violate § 253(a).[197]

---

affected by a rule an opportunity to participate in the deliberative process," and "give[s] advance notice of the standards to which [parties] will be expected to conform in the future").

[195] 141 Cong. Rec. S8305, S8306 (daily ed. June 14, 1995) (statement of Sen. Gorton).

[196] *See* Memorandum Opinion and Order, *California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California Pursuant to Section 253(d) of the Communications Act of 1934*, 12 FCC Rcd 14191, ¶ 31 (1997); *see also*, *e.g.*, Order on Reconsideration, *TCI Cablevision of Oakland County, Inc.*, 13 FCC Rcd 16400, ¶ 8 (1998) ("Section 253 ensures that no new entrant is inhibited from entering a telecommunications market because of any state law, regulation or legal requirement unless such measure is necessary to advance the public interest objectives enumerated in section 253(b) and is competitively neutral."); Memorandum Opinion and Order, *Public Utility Commission of Texas*, 13 FCC Rcd 3460, ¶ 22 (1997) (§ 253 "commands us to sweep away not only those state or local requirements that explicitly and directly bar an entity from providing any telecommunications service, but also those state or local requirements that have the practical effect of prohibiting an entity from providing service").

[197] *See*, *e.g.*, *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1269 (10th Cir. 2004) ("A regulation need not erect an absolute barrier to entry in order to be found prohibitive."); *TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002) ("[A] prohibition does not need to be complete or 'insurmountable' to run afoul of § 253(a).").

Rather, any state or local legal requirement that "place[s] a significant burden on" providers or potential providers of telecommunications service violates § 253(a).[198]

2. Rights-of-Way. Section 253(c) creates a safe harbor that protects from preemption "the authority of a State or local government to manage the public rights-of-way."[199] However, that safe harbor does not insulate from preemption all state and local restrictions on rights-of-way, which still run afoul of § 253 if they are prohibitive and are not "competitively neutral and nondiscriminatory."[200] Also, § 253(a) applies regardless of whether a municipality purports to manage public rights-of-way in its "proprietary" rather than "regulatory" capacity,[201] because § 253(a) broadly applies to all types of "legal requirement[s]," including contractual obligations arising out of negotiated agreements between a municipality and a carrier.[202] Moreover, this argument, which finds no support in the text of § 253, ignores the distinction between ROWs, which are held in trust for the public use,[203] and other government owned property, which,

---

[198] *Puerto Rico Tel. Co. v. Municipality of Guayanila*, 450 F.3d 9, 19 (1st Cir. 2006) (preempting municipal ordinance where it "impact . . . on [carrier]'s overall profitability would be significant"); *accord City of Santa Fe*, 380 F.3d at 1271 ("It is sufficient to show that the rental provisions are prohibitive because they create a massive increase in cost.").

[199] 47 U.S.C. § 253(c). It also protects state and local authority to "to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis." *Id.*

[200] *See, e.g.*, *TCG N.Y.*, 305 F.3d at 79-80 (invalidating municipal right-of-way regulation that was "not 'competitively neutral and nondiscriminatory' "); *see also Cablevision of Boston, Inc. v. Public Improvement Comm'n of Boston*, 184 F.3d 88, 105 (1st Cir. 1999) (§ 253(c) imposes "a negative restriction on local authorities' choices regarding the management of their rights of way").

[201] *See Omnipoint Communications, Inc. v. City of Huntington Beach*, 738 F.3d 192, 200 (9th Cir. 2013); *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 417-21 (2d Cir. 2002).

[202] *See* Memorandum Opinion and Order, *Petition of the State of Minnesota for a Declaratory Ruling Regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way*, 14 FCC Rcd 21697, ¶ 17 (1999).

[203] *Meriwether v. Garrett*, 102 U.S. 472, 513 (1880) ("In its streets, wharves, cemeteries, hospitals, court-houses, and other public buildings, the corporation has no proprietary rights

subject to state law, the municipality can manage and use as it deems appropriate. Likewise, § 224 does not insulate municipal right-of-way management from preemption under § 253. As discussed above, § 224 authorizes the Commission to "regulate the rates, terms, and conditions" for attachments to "a pole, duct, conduit, or right-of-way owned or controlled by a utility," but not rights-of-way owned by a local government. That separate authority, however, is a complement to, rather than a limitation on the Commission's § 253 authority. Otherwise, municipal right-of-way regulations could discriminate with impunity.

3. Mixed-Use Facilities. Although § 253 applies specifically to prohibitions on providing "telecommunications service," the Commission's standard should make clear that § 253 applies to all restrictions that affect facilities used to provide telecommunications service, regardless of whether those facilities are also used to provide other types of service. Wireline broadband facilities are used to provide both information services and telecommunications services, and the Commission has authority to regulate such mixed-use facilities under its authority to regulate telecommunications service.[204] Limiting § 253 to regulations that affect telecommunications services exclusively would lead to the anomalous conclusion that the Commission's jurisdiction over state and local regulation of broadband facilities would ebb and flow depending on which mix of services is offered over those facilities at any given time. Such

---

distinct from the trust for the public. It holds them for public use, and to no other use can they be appropriated without special legislative sanction. It would be a perversion of that trust to apply them to other uses.").

[204] *See National Cable & Telcomms. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 339 (2002); *see also* Order, *Request for Review by InterCall, Inc. of Decision of Universal Service Administrator*, 23 FCC Rcd 10731, ¶ 12 (2008) (product's provision of information service features "do[es] not change a service from telecommunications to an information service"); Memorandum Opinion and Order, *GTE Telephone Operating Cos.; GTOC Tariff No. 1; GTOC Transmittal No. 1148*, 13 FCC Rcd 22466, ¶¶ 23-26 (1998) ("mixed-use facilities" fall within Commission jurisdiction when more than 10% of traffic over facilities is interstate).

a result would also require local governments to evaluate the mix of services before regulating, which are determinations they do not have the expertise or authority to make.

C. The Commission Should Preempt State and Local Laws and Other Legal Requirements That Inhibit Broadband Deployment

The Commission seeks comment on which specific categories of state and local restrictions are inhibiting the provision of telecommunications service.[205] Despite the Commission's work to date on streamlining federal, state, and local siting practices, state and local governments continue to impede broadband infrastructure deployments in a variety of ways. These barriers to broadband deployment violate § 253(a) and should be preempted.

1. Moratoria. The Commission should adopt rules that preempt blanket moratoria on the ability to deploy broadband infrastructure in rights-of-way. For example, an Ohio municipality enacted a 145-day moratorium on permits for construction in rights-of-way, and an Illinois city imposed a five-year moratorium on pavement cuts to roadways that have been resurfaced or reconstructed. These kinds of moratoria do not merely place reasonable limits on the time, place, and manner of access to rights-of-way. Rather, they are blunt instruments that force providers either to delay or cancel their planned deployments, which inhibits their ability to compete on a level playing field and artificially limits the choices of consumers. They therefore fall outside the § 253(c) savings clause that allows local governments "to manage the public rights of way": that authority must be limited to *reasonable* regulations to avoid permitting evasion of the basic purpose of the provision.

2. Above-Ground Facility Prohibitions. Some municipalities prohibit or restrict the deployment of above-ground facilities, usually to shield residents from having to look at electric,

---

[205] *See* Notice ¶¶ 101-108.

telephone, and cable lines. These regulations are not part of the traditional management when, for purely aesthetic reasons, they require providers to fund the removal of long standing poles and aerial facilities that were lawfully placed and replace them with alternative underground facilities. For example, a municipality in Alabama recently passed an ordinance prohibiting above-ground facilities in certain downtown areas and requiring entities with existing above-ground facilities to relocate them underground, which would likely cost AT&T hundreds of thousands of dollars. Such regulations inhibit broadband deployment, both by requiring providers to spend significant resources to scrap and rebuild facilities that still have years of remaining productive use, and by diverting funds that otherwise could be used to deploy broadband.

3. Regulations Requiring the Continued Provision of Legacy Services. The Commission should preempt state service obligations that require, or have the effect of requiring, the continued provision of legacy services by ILEC, CLEC, and IXC entities. These state service obligations come in many forms. For example, state public utility commissions ("PUCs") have traditionally imposed "carrier-of-last-resort," or "COLR," obligations on ILECs. These obligations generally require carriers to provide telecommunications services to all customers in a given geographic area, often at regulated rates. In addition, many states require overly burdensome approval processes for the withdrawal of ILEC, CLEC or IXC intrastate services. These obligations made sense in a time when regulators granted ILECs an exclusive franchise and guaranteed them a reasonable rate of return in exchange for a commitment by the carriers to offer basic telecommunications services at affordable rates to all consumers in their service territories. But, that business model is extinct, and customers have more choices than ever.

While many states have repealed these requirements in recognition that their time has come and gone,[206] these obligations remain in many other states.[207] The Commission should preempt these state regulations under § 253 because every dollar spent on legacy TDM networks and services is another dollar stranded in obsolete facilities and services that cannot be invested in deploying next-generation broadband networks.[208] In addition, many of these requirements impose asymmetric costs on ILECs alone, thereby putting ILECs at a competitive disadvantage relative to other telecommunications providers. ILECs should no longer be subject to these monopoly-era obligations, which hinder their ability to retire their legacy TDM networks.

D. The Commission Should Establish a Streamlined § 253 Complaint Procedure To Provide Greater Predictability for Siting Applicants

In addition to promulgating rules that clarify the types of state and local legal requirements that violate § 253, the Commission should also take steps to ensure that carriers faced with unlawful barriers to deployment can use those new rules to obtain relief as quickly as practicable. In particular, the Commission should create a streamlined administrative review process to review and act upon complaints regarding state or local legal requirements that violate § 253. Such a process would be similar to the process the Commission currently uses for pole attachment complaints, whereby an aggrieved party can file a complaint with the Commission,

---

[206] *See* Fla. Admin. Code § 25-4.084; Mo. Rev. Stat. § 392.611; N.C. Gen. Stat. § 62-110; Wis. Stat. § 196.503.

[207] *See* Opinion, *Universal Service and Compliance with the Mandates of Assembly Bill 3643*, Decision No. 96-10-066, 68 Cal. P.U.C.2d 524 (1996); *see also* National Regulatory Research Institute, "*Telecommunications Carrier of Last Resort: Necessity or Anachronism?*" (July 22, 2016), http://nrri.org/download/nrri-16-06-carrier-of-last-resort-pdf/.

[208] *See National Broadband Plan* at 59 ("Regulations require certain carriers to maintain POTS – a requirement that is not sustainable – and lead to investments in assets that could be stranded. These regulations can have a number of unintended consequences, including siphoning investments away from new networks and services.").

and the Commission then hears and decides the complaint.[209] To ensure prompt resolution of § 253 complaints, the Commission's process should incorporate a shot clock, similar to the shot clock proposed for pole attachment complaints.[210] Providing a clear, predictable procedure for resolution of § 253 violations will mitigate the prohibitive impacts of state or local legal requirements that run afoul of the statute.

---

[209] *See* 47 C.F.R. §§ 1.1404-.1424.

[210] *See supra* Part I.F.3.

Respectfully submitted,

/s/ Aaron M. Panner

Aaron M. Panner
Matthew R. Huppert
KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900

Terri Hoskins
Keith Krom
Robert Vitanza
Christopher Heimann
Gary Phillips
AT&T SERVICES, INC.
1120 20th Street, N.W., Suite 1000
Washington, D.C. 20036
(202) 457-3046

June 15, 2017