Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Accelerating Wireline Broadband	)	
Deployment by Removing Barriers to	)	
Infrastructure Investment	)	WC Docket No. 17-84
	)	
Technology Transitions	)	GN Docket No. 13-5
	)	
AT&T Petition to Launch a Proceeding	)	
Concerning the TDM-to-IP Transition	)	GN Docket No. 12-353

COMMENTS OF PUBLIC KNOWLEDGE

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I. INTRODUCTION

Public Knowledge submits these comments in response to the Commission's combined Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, collectively entitled *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*.[1] The Commission's proposals regarding copper retirement rules, the technology transitions process, preemption of state and local laws, and statutory interpretation of Sections 214 and 253 of the Communications Act are deeply concerning, representing a stark departure from long-established Commission practice and precedent. The Commission's proposal lacks a solid legal foundation, is devoid of substantive justifications for its policy objectives, and clearly disregards the Commission's duty to protect consumers, competitors, and the public interest. We strenuously object to the Commission's efforts to revisit and abandon critical consumer protections, threaten the stability and reliability of the nation's communications networks, and railroad state and local governments, all for the apparent convenience of incumbent telecommunications providers upon whose products and services, tens of millions of Americans rely. The technology transition process is of critical importance to closing the digital divide, and after almost five years of proceedings, the FCC arrived at common-sense, balanced rules which advanced this critical process. The Commission now seeks to relitigate these settled issues, introducing substantial new regulatory uncertainty into the marketplace and further delaying the broadband deployment the Commission claims here to promote.

[1] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, WC Docket No. 17-84 (rel. Apr. 21, 2017) ("Proposal" or "2017 Proposal").

II. THE COMMISSION FAILS TO ARTICULATE A SUBSTANTIVE POLICY BASIS FOR ABANDONING CRITICAL TECH TRANSITIONS CONSUMER PROTECTIONS.

A. The Commission Must Consider the Substantial Record Presented in Previous Proceedings As It Considers Abandoning the Substance of the 105 Tech Transitions Order.

The Commission may not disregard the substantial records developed in the proceedings which led to the rules whose abandonment is proposed here.[2] As discussed at length in those proceedings, copper retirement and the tech transitions process present a variety of complex issues which implicate a broad array of stakeholders and interests, including consumers, businesses, and other organizations which rely on the copper PSTN but are not ordinarily participants in FCC proceedings. The complex technical issues at play have been examined in a deliberative and thorough manner by the Commission in previous proceedings. The contents of those records, which supported the rules adopted by the agency, must be considered as the Commission attempts to change course. The mere opening of a new docket does not relieve the Commission of its obligation to consider the full scope of evidence presented to it on these issues, including years of comments,[3] technical studies,[4] reports from field trials,[5] and feedback solicited under a bipartisan framework supported by the Commission's current leadership.

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[2] *See generally, e.g.*, Technology Transitions, GN Docket No. 13-5; Policies and Procedures Governing Retirement of Copper Loops by Incumbent Local Exchange Carriers, RM-11358.
[3] *See, e.g.* Comments of Public Knowledge, *In the Matter of Technology Transitions Policy Task Force Public Notice Regarding Potential Trials*, GN Docket No. 13-5 (July 8, 2013).
[4] *See* Response to AT&T's Proposal for Wire Center Trials in the IP Transition Proceeding prepared by CTC Technology & Energy, GN Docket No. 13-5 (Mar. 24, 2017).
[5] *See, e.g.* Ex Parte Letter & Attachments from AT&T Services Inc. Regarding Status of Trials, GN Docket No. 13-5 (rec. May 27, 2014).

The 2015 Tech Transitions Order,[6] whose copper retirement rules' elimination is proposed by the Commission,[7] represented the culmination of efforts beginning in 2012 with the establishment of the Technology Transitions Policy Task Force.[8] That Task Force's work led to public workshops,[9] field trials,[10] multiple rounds of comment and feedback from stakeholders, and clear Commission actions including the 2014 Declaratory Ruling.[11]

Though the Commission attempts to reopen these issues through a new proceeding, it cannot sustain new action while ignoring the factual records or Commission findings made subsequent to those records. To suggest or even act as though the multi-year proceedings leading to the rules targeted for elimination are utterly unrelated to the matter at hand is the very

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[6] *In the Matter of Technology Transitions, et al*, Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, GN Docket No. 13-5 (rel. Aug. 7, 2015) ("2015 Order").

[7] 2017 Proposal at ¶ 57 ("First, we seek comment on eliminating some or all of the changes to the copper retirement process adopted by the Commission in the *2015 Technology Transitions Order*.")

[8] *See Ex Parte Meetings with the Technology Transitions Policy Task Force*, Public Notice, GN Docket No. 13-5 (rel. Jan 10, 2013) ("On December 12, 2012, Chairman Julius Genachowski announced the formation of an agency-wide Technology Transitions Policy Task Force to provide recommendations on how to modernize the Commission's policies in a manner that encourages the technology transition, empowers and protects consumers, promotes competition, and ensures network resiliency and reliability.")

[9] *See, e.g. FCC Announces First Technology Transitions Policy Task Force Workshop*, Public Notice, GN Docket No. 13-5 (rel. Feb. 12, 2013); *FCC Announces Second Technology Transitions Policy Task Force Workshop*, Public Notice, GN Docket No. 13-5 (rel. Sep. 12, 2013).

[10] *See, e.g. Commission Seeks Comment on AT&T Proposal for Service-Based Technology Transitions Experiments*, Public Notice, GN Docket Nos. 12-353, 13-5 (rel. Feb. 28, 2014); *Commission Seeks Comment on Proposal of Iowa Network Services, Inc. for Service-Based Technology Transitions Experiment*, Public Notice, GN Docket Nos. 12-353, 13-5 (rel. Feb. 21, 2014).

[11] See *Technology Transitions et. al.*, Notice of Proposed Rulemaking and Declaratory Ruling, GN Docket No. 13-5 (rel. Nov. 25, 2014) ("2014 NPRM").

definition of capricious.[12] Where the Commission proposes to set aside findings of previous proceedings, it has an obligation to consider the evidentiary record that was established in those proceedings, and articulate its rationale in choosing a different path.[13]

B. Despite the Commission's Assertion, Retirement of Copper Loops Represents a Unique Transition and Should Be Governed Separately from Other Section 214 Procedures.

The Commission should not harmonize copper retirement procedures with other network change rules.[14] Despite Commission efforts to suggest otherwise in this item, copper connections remain unique.[15] Copper networks exhibit unique performance characteristics as compared to fiber-based networks, including but not limited to functionality during power outages. Furthermore, the Commission has long maintained as part of its practice and precedent, distinct and separate treatment of copper plant from other types of services. The Commission here offers no rationale to justify its deliberated departure from past practice or precedent, nor any indication of why copper should suddenly be stripped of its separate process and protections.[16]

If copper were not uniquely positioned in the marketplace and in Americans' understanding of telecommunications services, the entire tech transitions process would be unnecessary, including this proceeding. The mere fact that these unique issues are before the Commission today stands as proof positive that copper retirement poses unique challenges and policy considerations and must be treated differently. Furthermore, if copper were not unique,

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[12] Dictionary.com, *Capricious* (last viewed Jun. 15, 2017) ("adjective 1. subject to, led by, or indicative of a sudden, odd notion or unpredictable change; erratic") http://www.dictionary.com/browse/capricious.
[13] *See Fox TV Stations, Inc. v. FCC,* 280 F.3d 1027, 1044-45 (D.C. Cir. 2002) (modified on rehearing, 293 F.3d 537 (D.C. Cir. 2002).
[14] 2017 Proposal at ¶ 62.
[15] *Id.*
[16] *Id*.

the process of its retirement would not be so burdensome on competitors and consumers, nor so desirable for incumbent providers. The entire tech transitions process would not be hailed as a tremendous step forward, were copper no different than any other technology. It is laudable that the Commission strives for technology-neutral policymaking, but it should not place that important goal above the reality of the telecommunications network we have today. Copper is unique, and must continue to be treated accordingly.

C. The Commission Fails to Offer any Independent Cost-Benefit Analysis or Other Substantive Evidence to Support Its Presumption that the Copper Retirement Rules are Unduly Burdensome.

Despite asserting that elimination of Section 51.332 of the Commission's rules is necessary "to prevent unnecessary delay and capital expenditures on this legacy technology," the Commission offers no substantive analysis to justify its belief that simply eliminating consumer protection rules will accomplish this goal.[17] The Commission asserts that "delays and increased burdens"[18] resulted from the rules, citing as its only source a complaint from Frontier Communications in the 2016 Biennial Review process.[19] The Commission argues elsewhere that this is necessary to "reduce associated regulatory burdens" but offers no substantive support for

[17] 2017 Proposal at ¶ 58.
[18] *Id.*
[19] As we noted in our reply comments in that proceeding, the Biennial Review is meant to examine Commission rules which have become outdated or no longer serve their purpose. The Commission seeks to use that proceeding here to justify reversal of rules in effect for less than two years – hardly the outdated regulations contemplated for targeting by Congress in enacting the biennial review statute. As we noted in that proceeding, Frontier offered no substantive basis for its plea for relief, simply insisting that the rules must be eliminated. The Commission can point to no economic or other substantive analysis to justify its position on this issue. *See* 2017 Proposal at ¶ 58, FN 84; *See generally* Reply Comments of Public Knowledge, *2016 Biennial Review of Telecommunications Regulations*, WC Docket No. 16-132, WT Docket No. 16-138, PS Docket No 16-128, ET Docket No. 16-127 (Jan 3. 2017).

that argument.[20] The Commission asserts that burdens exist, and are great enough to justify sweeping changes to existing rules, but offers no substantive analysis to justify this position, instead beseeching commenters to explain the costs and benefits.[21] This approach represents little more than an invitation for incumbents to provide support the Commission lacks, in order to justify a conclusion at which it has already arrived.

Even in the absence of substantive analysis, the Commission fails to even attempt to offer a policy justification for its steadfast belief that these rules are too burdensome. The Commission adopted the 2015 Tech Transitions rules to ensure the stability of the phone network, protect consumers and small businesses, and limit harm to persons with disabilities, all in furtherance of its core statutory duty to ensure all Americans have access to reliable, fast, and efficient communications systems, at reasonable rates.[22] The Commission's writing here suggests little interest in the impact of its actions in light of this mandate, however, focusing instead on whether and to what extent incumbent carriers are inconvenienced by rules promoting the public interest.

The copper retirement rules serve critical public purposes pursuant to the Commission's Congressional directives.[23] All public interest actions have costs. 911 compliance, interconnection, numbering plan compliance, and emergency alerts all have associated costs. Congress has directed the Commission to pursue these public interest goals in spite of the costs, however, and given it other directives to address issues which market forces will not solve. The Commission may consider a variety of factors, such as deployment speed, preservation of public

[20] 2017 Proposal at ¶ 56.
[21] 2017 Proposal at ¶ 58.
[22] 2015 Order at ¶ 1 ("Today, we take the next step in advancing longstanding competition and consumer protection policies on a technologically-neutral basis in order to ensure that the deployment of innovative and improved communications services can continue without delay.")
[23] *See* 2015 Order at ¶ 1; 2014 NPRM at ¶ 1.

safety, consumer protection, or the furtherance of the Commission's directives in 47 U.S.C. § 151. The Commission may not, however, speak only of costs. If the Commission wishes to make its case on the basis of costs and benefits, then it must first prove that costs exist associated with particular directives, and furthermore that those costs rise to such a level as to be harmful to deployment, even after accounting for the cost savings associated with the technology transitions process. An often-cited justification for copper retirement is the increasing costs of maintaining copper lines. Any cost-benefit analysis on these issues must, at a bare minimum, take into account the cost savings associated with deployment as an offset for consumer protection rules. The Commission seeks to focus solely on costs to providers, making no effort to demonstrate a causal relationship between those costs and allegedly slow deployment. It furthermore fails to adequately consider the benefits realized by the transition. The Commission's purpose is to further the public interest – while the interests of business play a role, they are neither exclusive nor solely determinative. The Commission must conduct, and seek comment on, a far more thorough analysis and proposal before any effort to move forward in this area might rest on solid legal footing or have hope of surviving judicial review.

D. The Commission's 'Grandfathering' Proposal Goes Against the Foundational Principles of Common Carriage, and Lacks Any Support in Past Commission Practice or Procedure.

The Commission must abandon its 'grandfathering' proposal.[24] The Commission fails to offer any citation to past practice or precedent which would justify such a scheme. The only authority on this point that the Commission is able to offer comes by citing *applications* made by AT&T – not any Commission document.[25] This represents a complete departure *sub rosa* from

[24] *See* 2017 Proposal at ¶¶ 73-89.
[25] *See* 2017 Proposal at ¶ 73 FN 103.

all previous practice regarding the definition of common carriers. Common carriage requires a provider to offer service to all comers on equal terms.[26] The Commission's grandfathering proposal is fundamentally inconsistent with not only the Commission's body of law, but with the fundamental principles of common carriage, and must be abandoned as baseless and unsupportable.

III. THE COMMISSION FAILS TO ARTICULATE A SOUND LEGAL BASIS TO SUPPORT ITS PROPOSED INTERPRETATION OF SECTION 214.

A. The Fundamental Scope Of Title II, And Section 214, Is Broad, Not Narrow As The Commission Now Suggests.

The Commission's proposal to narrow the definition of "service" and accordingly severely curtail the Commission's authority over tech transitions and copper retirement rests on a fundamental misunderstanding of the nature of the Communications Act. A narrow reading of the statutory language – in this case, to narrow the meaning of "service" to purely what is contained within a tariff or customer service agreement[27] – leads to illogical results and contradicts the plain structure of Section 214 of the Communications Act, in addition to representing a significant departure from past Commission practice and precedent.

As the DC Circuit noted, "evaluation of the Commission's interpretation of the scope of its jurisdiction must take into account the Act's broad purpose and objectives."[28] Congress intended that the scope of the act would be expansive, and contoured by the courts, to ensure that the Commission would be adequately able to address new technologies and developments in a

[26] *See Cellco Partnership v. Federal Communications Commission,* 700 F.3d 534 (D.C. Cir. 2012).
[27] *See* 2017 Proposal at ¶ 115
[28] *General Telephone Company of California v. Federal Communications Commission,* 413 F.2d 390, ¶ 35 (D.C. Cir. 1969)

highly complex field.[29] "The Act must be construed in light of the needs for comprehensive regulation and the practical difficulties inhering in state by state regulation of parts of an organic whole."[30] In particular, when examining Section 214, the court cautioned against "overly restrictive interpretation" of the Act, as such an approach would "prevent the Commission from employing the regulatory devices which have been established for effective common carrier control."[31] This Commission must recognize that "the Commission's regulatory and enforcement powers should not be artificially fragmented or compartmentalized when the result would be to frustrate a comprehensive, pervasive regulatory scheme."[32] The Commission here proposes just such a fragmentation, however, as it seeks to set aside its Section 214 responsibilities in one narrow area, without regard for past, present, or future practice and precedent.

B. The Commission's Proposal Defines "service" Too Narrowly, in Contradiction to Legal Practice and Commission Precedent.

a. Section 214 Must Be Examined In Its Entirety, Not Piecemeal.

Statutory interpretation principles require that a statute be read in its entirety. This means that the Commission cannot consider Section 214(a) in a vacuum, but must look at the whole statute, including Section 214(c) and the entirety of Title II, as context as it exercises its authority under these sections. Section 214(c) discusses in further detail the Commission's authority, including language regarding terms and conditions bound up in the *certificate*, not in any tariff.[33] There is no reason articulated by the Commission as to why the term "service" should have a different and distinct meaning in Section 214(a) without regard for its usage in Section 214(c).

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[29] *Id.* at ¶ 34.
[30] *Id.* at ¶ 35.
[31] *Id.* at ¶ 61.
[32] *Id.*
[33] 47 U.S.C. § 214(c).

Section 214 serves, among other functions, as the licensing statute for Title II.[34] It expands beyond mere tariffing, and the Commission's arguments to the contrary are baseless.

b. The Commission's Use Of The Term 'Service' In Section 214 Has Long Been Understood To Extend Beyond The Four Corners Of The Tariff.

Section 214 endows the Commission with broad authority governing the construction, operation, and transfer of lines, and the discontinuance, reduction, or impairment of service.[35] The Commission exercises this authority in a variety of contexts ranging from technology transitions to new deployment and competitive entry to review of mergers and acquisitions.[36] When interpreting Section 214(a), including in previous discontinuance proceedings, the Commission has consistently interpreted the term "service" to mean the subject of the certificate of public convenience and necessity, not merely those services defined by the tariff. The Commission's past practice and precedent extends the scope of the term "service" in Section 214 beyond the four corners of the tariff, as the agency continues to maintain and exercise authority over mergers and acquisitions which implicate detariffed services.[37] Merely exempting a service from a tariff should not, and does not, relieve its provider of obligations under Section 214.

The Commission's present proposal would depart from this practice, narrowing the scope of Section 214 without regard for the consequences. The Commission has never distinguished 'line' from 'service' as either term is used in Section 214(a). For example, the Commission

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[34] 47 U.S.C. § 214.
[35] 47 U.S.C. § 214(a).
[36] *See, e.g., Applications Filed by Frontier Communications Corporation and Verizon Communications Inc. for Assignment or Transfer of Control*, Memorandum Opinion and Order, WC Docket No. 09-95 (rel. May 21, 2010).
[37] *See id.*

continues to exercise authority over wireless sector mergers.[38] The Commission continues to exercise Section 214 authority over transfers of services that have either never been tariffed, or have been detariffed. The Commission's new interpretation threatens to narrow or eliminate Commission authority in these areas, which while perhaps desirable from a philosophical standpoint, is not in keeping with the Commission's practice, precedent, or statutory obligations.

c. Equating "Service" With "Tariff" Contradicts The Structure, Language, And Purpose Of Section 214.

Where Congress intended the Commission's authority to focus on tariffs, it spoke to that point in its legislative language. Section 214 is distinctly broad, and does not contain any use of the word tariff. Had Congress intended "service" to be so narrowly defined as the Commission currently proposes, it would have written the statute accordingly. There is no ambiguity here. In a statutory chapter which contains numerous references to tariffing, Congress conspicuously chose not to include that term in Section 214, opting instead for broader terms like "like" and "service." The Commission's proposed interpretation, which seeks equivalence to supplant distinct terminology, is patently unsupportable in the context of the statute as a whole.

d. The Commission's Reliance on the 1938 Amendment is Misplaced.

It is clear that the 1938 amendment which added language regarding discontinuance expressed no intent to limit the Commission's authority to the four corners of the tariff. Had

[38] *See, e.g., Applications for the Transfer of Control of Licenses and Authorizations from AT&T Wireless Services, Inc. and Its Subsidiaries to Cingular Wireless Corporation*, Order Adopting Protective Order, WT Docket No. 04-70 (rel. Mar. 17, 2004) ("The Applicants' Agreement and Plan of Merger provides that they will use their best efforts to file, by March 18, 2004, their applications (pursuant to sections 214 and 310 of the Communications Act, as amended, 47 U.S.C. §§ 214 and 310) requesting that the Federal Communications Commission ("Commission") approve the transfer of control of licenses and authorizations currently held or controlled, directly or indirectly, by AT&T Wireless in connection with the proposed acquisition by Cingular of AT&T Wireless.")

Congress meant to confine the Commission's actions to the tariff, the term would have been added with the amendment. Furthermore, the plain language of the statute suggests that "service" and "tariff" are not meant to be interchangeable. For example, the language of the statute does not support direct substitution without leading to illogical results. "Impairment of tariff" makes no sense, as tariffs concern rates, not functions provided by a network.[39] It is implausible to suggest that "service" means "tariff." The statute simply does not admit to the Commission's proposed interpretation, when context is considered. Finally, Section 214(c) specifically says "as described in the application", not "as described in the tariff."[40] Congress had ample opportunity in Section 214's text to insert the term "tariff" if they wanted it there – its absence speaks volumes and is, in sum, determinative.

C. The Commission Proposal Departs from Past Practice and Precedent in Violation of the Administrative Procedures Act.

Before abandoning decades of precedent regarding the scope of Section 214 and the meaning of 'service' in that context, the Commission must discuss that precedent and articulate its reasons for departure. The Commission here proposes widespread departure from past practice, but offers no proposed justification, instead inviting those who would benefit from its proposals to provide the Commission with a justification it fails to itself articulate or substantiate. The Commission must consider and articulate its reasons for departing from past practice if it intends to narrow its definition of "service" and must consider the implications of this abrupt change in direction on its merger review process and other transfers of non-tariffed services subject to Sections 214(a) and (c). The Commission's actions furthermore represent a deviation from the bipartisan framework adopted for the Tech Transitions process in 2014 – the

[39] *See* 47 U.S.C. § 214(c).

Commission must acknowledge this and articulate its justification for abandoning this bipartisan policy framework.[41]

IV. THE COMMISSION MUST TREAD CAREFULLY AS IT PURSUES PREEMPTION OF STATE AND LOCAL LAWS PERTAINING TO TELECOMMUNICATIONS SERVICE.

A. Any Application Of Section 201(B) Or 253 To Facilitate Broadband Deployment Necessarily Relies Upon The Continued Classification Of Internet Access As A Telecommunications Service.

As a preliminary matter, the Commission must recognize that this proceeding relies on legal authority only available to the extent that broadband internet access remains classified as a Title II telecommunications service. This proceeding, recognizing that "high-speed broadband is an important gateway to jobs, health care, education, information, and economic development," seeks "to accelerate the deployment of next-generation networks and services by removing barriers" to the deployment of broadband. Commission action in furtherance of this goal must, as always, rest on sound legal authority. We remind the Commission that the exercises of authority it proposes in this item, including but not limited to the discussed preemption of state and local laws, depend entirely on the continued classification of broadband internet access as a Title II telecommunications service. The Commission cannot, for example, exercise its Sections 201(b) and 253 authority to preempt state and local laws, citing as its justification the need to eliminate barriers to broadband deployment and investment, if the services whose deployment it seeks to

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[40] *Id.*

[41] *See In the Matter of Technology Transitions, AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition et al,* Order, Report And Order And Further Notice Of Proposed Rulemaking, Report And Order, Order And Further Notice Of Proposed Rulemaking, Proposal For Ongoing Data Initiative, GN Docket Nos. 13-5, 12-353, *et al.* (rel. Jan. 31, 2014) ("By the Commission: Chairman Wheeler and Commissioners Clyburn, Rosenworcel and Pai issuing separate statements; Commissioner O'Rielly approving in part, concurring in part and issuing a statement.")

promote are not Title II telecommunications services. Section 253 is clear: the Commission may only act to preempt a state or local law that "prohibit[s] or [has] the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[42] The Commission cannot declare broadband to no longer be a telecommunications service and yet continue to exercise Title II authority to promote broadband deployment.

B. Section 253 Is Not A General Grant Of Authority To Promote Or Streamline Broadband Deployment.

A plain reading of the statutory language of Sections 201(b) and 253 makes it clear that, while Section 201(b) grants the Commission broad authority to act in the public interest to ensure that the provision of communications services happens in a just and reasonable manner,[43] Section 253 is far more narrowly focused. Section 253 exists separately and distinctly, and its language reflects clear purpose, intent, and scope. Section 253 is meant to address a particular problem – laws which "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[44] Section 253 narrowly defines the problem, constrains the Commission's power by broadly preserving state and local authority, and directs the Commission to follow a particular process before exercise of Section 253 authority is permissible. It is, in other words, a specialized tool to address a particular problem in a narrowly tailored manner. It is not the broad grant of authority to prospectively preempt which the Commission here suggests it is.

Furthermore, Section 253 is not a statute which directs the Commission to actively promote or advance the deployment of services. Indeed, it is unreasonable to look to Section 253

[42] 47 U.S.C. § 253(a).
[43] 47 U.S.C. § 201(b).
[44] 47 U.S.C. § 253(a).

when policy objectives include the advancement of broadband deployment, as Congress saw fit to craft a wholly separate statutory provision directing the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."[45] Congress went further, in fact, and noted that the Commission should use methods that "remove barriers to infrastructure investment" in furtherance of this Congressional directive.[46] The very purpose expressed by the title of this proceeding is expressly contained in the language of Section 706. Section 253 speaks narrowly of outright prohibitions on service offerings, not of laws which might discourage investment or inconvenience telecommunications providers. To work more broadly on "barriers" which may inconvenience or discourage, but not prohibit, broadband deployment, the Commission must look elsewhere in its governing statutes for Congressional direction.

C. Section 253 Must Be Narrowly Construed And Applied, In Accordance With Its Statutory Language.

a. An Exercise Of Section 253 Authority Must Be Targeted At An Outright Prohibition, Or A Policy Which Has The Effect Of An Outright Prohibition – Not At A Policy That Simply Inconveniences A Provider Or Delays Deployment.

The language of Section 253 must be narrowly construed, and does not grant the expansive and prospective preemption authority the Commission suggests. Section 253(a) notes that the authority only allows the Commission to act to preempt laws which "prohibit or have the effect of prohibiting" the deployment of telecommunications service.[47] This is clear language, permitting the Commission to target policies which serve as a complete barrier to the provision of service. Policies which merely inconvenience a provider, or which impose conditions or

[45] 47 U.S.C. § 1302.
[46] *Id.*

requirements which change the business case for deployment, do not necessarily rise to this level. The Commission asks, for example, for comment on state or local moratoria, which may result in "delays," or "affect the cost of deployment and providing service."[48] The Commission seeks further comment on policies which create "excessive delays in negotiations and approvals for rights-of-way agreements and permitting" for deployment.[49] The Commission seeks "examples of delays that jeopardized investors or deployment" but cites no specifics.[50] While perhaps not perfect circumstances for deployment which the Commission desires, these sorts of local policies do not rise to the level required to exercise Section 253 authority. The Commission cites no example of a state or local law or policy which "prohibits or has the effect of prohibiting" deployment of telecommunications services, as the statute requires. The Commission seems to be seeking to eliminate inconveniences under the guise of eliminating prohibitions. While promoting deployment is a laudable goal, Section 253 does not give the Commission authority to act in that manner – it must look elsewhere, such as to Section 706 – for broader authority to increase efficiency.

b. Section 253 Preserves Broad Authority For States And Local Governments.

The Commission must respect the broad authority preserved for state and local governments by Sections 253(b) and (c). Both sections preserve clear authority for states and localities to act on a competitively neutral basis to implement policies governing telecommunications service. Section 253(c) is particularly clear with regard to one area of inquiry the Commission pursues. Section 253(c)'s language clearly protects the authority of

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[47] 47 USC 253(a).
[48] 2017 Proposal at ¶ 102.
[49] 2017 Proposal at ¶ 103.

states and localities to implement policies regarding the use of rights-of-way. The Commission asks questions about preempting "excessive fees and other costs" associated with use of rights-of-way. If the Commission wishes to preempt a particular state or local policy regarding fees under Section 253, it may, but only if the particular processes of the section are followed and the narrow requirement so Section 253(a) are satisfied. Broad, categorical preemption of fees as "excessive" would necessarily require a determination that fees above a particular level are presumptively unreasonable, regardless of the unique circumstances of a particular market. Such a presumption and according prospective preemption would contradict the requirements of Section 253(d).

c. The Commission Must Target Specific Prohibitions Under Section 253 – It Cannot Broadly And Prospectively Preempt Categories Of Law.

The text of Section 253(d) is clear – the Commission must seek notice and comment on a particular provision of state or local law prior to exercising its authority to preempt under Section 253. A plain reading of the language of this section establishes that the Commission may not act to prospectively preempt categories of barriers, as it contemplates in the Notice of Inquiry. The Commission may only act *after* it has identified, and sought comment on, a particular law or policy it wishes to preempt.

[50] *Id.*

Joint application of Sections 201(b) and 253 does not resolve this issue. Had Congress meant the Commission to have broad prospective preemption authority in this area, the language of Section 253 would more resemble the language of Sections 201b or 706, which grant the Commission broad authority to act to promote deployment and preempt counterproductive policies. Section 253 exists separately, however, and distinctly constrains the Commission's authority, ensuring that it only acts to preempt state and local laws after a particular problem has been identified and a distinct deliberative process has been followed. An effort by the Commission to use Section 253 to prospectively preempt a category of policies, even if supported by an application of Section 201b, must necessarily fail by virtue of the existence of Section 253(d) as a limit on the Commission's authority.

V. CONCLUSION

In sum, the Commission with this proposal seems set on advancing an exceptionally deregulatory agenda, with or without a sound substantive or legal basis to support its well-settled conclusions. The Commission expresses a troubling willingness to cast aside consumer protection and bipartisan processes, threatening the security and stability of our nation's communications networks and particularly threatening the vulnerable communities who continue to this day to rely upon copper networks. The digital divide is real, and while streamlined broadband deployment may help in some ways to close that gap, the communities most in need will only be hurt, not helped, by the proposals offered here.

Public Knowledge has always supported the transition to next-generation network technologies, and our belief remains strong that the transition can bring a variety of benefits to Americans, in furtherance of the Commission's core statutory objective. We do not, however, support efforts to streamline broadband deployment which come at the expense of consumer

education, protection, local choice, or competitive forces. For these, and all the forgoing reasons, we strongly urge the Commission to take a more thoughtful, reasoned, and deliberate approach as it seeks to further its laudable goal of closing the digital divide.

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