

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

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

**COMMENTS OF THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER
ADVOCATES, MAINE OFFICE OF THE PUBLIC ADVOCATE, MARYLAND OFFICE
OF PEOPLE’S COUNSEL, NEW JERSEY DIVISION OF RATE COUNSEL, OFFICE
OF THE OHIO CONSUMERS’ COUNSEL, PENNSYLVANIA OFFICE OF CONSUMER
ADVOCATE AND THE UTILITY REFORM NETWORK ON NOTICE OF PROPOSED
RULEMAKING, NOTICE OF INQUIRY, AND REQUEST FOR COMMENT**

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EXECUTIVE SUMMARY

The National Association of State Utility Consumer Advocates (“NASUCA”), Maine Office of the Public Advocate, Maryland Office of People’s Counsel, New Jersey Division of Rate Counsel, Office of the Ohio Consumers’ Counsel, Pennsylvania Office of the Consumer Advocate, and The Utility Reform Network (collectively, “Consumer Advocates”) file these initial comments on the multiple questions presented by the Commission’s combined Notice of Proposed Rulemaking (“NPRM”), Notice of Inquiry (“NOI”), and Request for Comment (“RFC”).¹

To begin, Consumer Advocates submit that it has not been shown that there is a need to revise the rules adopted in 2015 governing copper retirement and service discontinuance, which have scarcely been given a chance to operate. Certainly, it has not been shown that those rules have had any negative impact on the IP transition or the deployment of broadband facilities.

With regard to Part II.B. of the NPRM “Expediting the Copper Retirement and Network Change Notification Process” (¶¶ 56-70) and Part II.C. “Streamlining the Section 214(A) Discontinuance Process” (¶¶ 71-99), Consumer Advocates submit that the NPRM proposals will harm consumers and benefit industry (especially the largest, most dominant firms), to the overall detriment of the public interest. Consumer Advocates provide information from a number of individual states to support these views, including with the attached declaration of Susan Baldwin.

With regard to the NOI (Part II, ¶¶ 100-114), Consumer Advocates strongly oppose preemption of state and local laws that the FCC views as “inhibiting” broadband deployment or governing copper retirement. These are matters that states should be able to determine, as, in Justice Brandeis’ words, the “laboratories of democracy.”

In response to the RFC (¶¶ 115-123), Consumer Advocates support the use of a functional test to determine whether a service proposed to be discontinued has an adequate replacement. Especially in these times of limited tariff review, a carrier’s self-serving descriptions should not govern the public interest.

¹ Consumer Advocates submit no initial comments on Part II.A. (¶¶ 3-55) regarding pole attachments, but reserve the right to reply.

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I. INTRODUCTION

On April 21, 2017, the Federal Communications Commission (“FCC”) released a Notice of Proposed Rulemaking (“NPRM”), Notice of Inquiry (“NOI”), and Request for Comment (“RFC”) addressing ways in which current regulations supposedly inhibit infrastructure investment and broadband deployment.² The National Association of State Utility Consumer Advocates (“NASUCA”)³, Maine Office of the Public Advocate, Maryland Office of People’s Counsel, New Jersey Division of Rate Counsel, Office of the Ohio Consumers’ Counsel, Pennsylvania Office of the Consumer Advocate and The Utility Reform Network (collectively, “Consumer Advocates”) file these comments on the multiple questions posed by the FCC.⁴

The FCC states that it “seeks to better enable broadband providers to build, maintain, and upgrade their networks, which will lead to more affordable and available Internet access and other broadband services for consumers and businesses alike.” The FCC asserts that its “actions propose to remove regulatory barriers to infrastructure investment at the federal, state, and local level; suggest changes to speed the transition from copper networks and legacy services to next-generation networks and services; and propose to reform Commission regulations that increase

² *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, (rel. Apr. 21, 2017) (“NPRM,” “NOI,” and “RFC” as applicable). On the same day, the FCC issued a separate NPRM/NOI regarding the acceleration of wireless broadband deployment. *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-79, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, rel. Apr. 21, 2017) (“Wireless NPRM/NOI”). Consumer Advocates may respond to comments filed in response to the Wireless NPRM/NOI on reply.

³ NASUCA is a voluntary association of 56 consumer advocate offices. NASUCA members represent the interests of utility consumers in 42 states, the District of Columbia, Puerto Rico, Barbados and Jamaica. NASUCA is incorporated in Florida as a non-profit corporation. NASUCA’s full members are designated by the laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. Members operate independently from state utility commissions. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (e.g., the state Attorney General’s office). NASUCA’s associate and affiliate members also represent the interests of utility consumers but are not created by state law or do not have statewide authority. Some NASUCA member offices advocate in states whose respective state commissions do not have jurisdiction over certain telecommunications issues.

⁴ Helen E. Golding assisted with the drafting of these comments. Consumer Advocates submit no initial comments on Part II.A. (¶¶ 3-5) regarding pole attachments, but reserve the right to reply.

costs and slow broadband deployment.”⁵ Consumer Advocates wholeheartedly support the ubiquitous deployment of affordable broadband Internet access at reasonable speeds by incumbent local exchange carriers (“ILECs”), cable companies, municipalities, cooperatives, and other broadband Internet providers. However, as Consumer Advocates discuss in these comments and the accompanying Declaration of Susan M. Baldwin (“Baldwin Declaration”), the FCC does not explain how existing consumer protection safeguards provided under existing rules impede such deployment.

Forty-eight million Americans continue to rely on ILEC copper-based voice service.⁶ Importantly, Ms. Baldwin's declaration relies upon evidence developed in state proceedings pertaining to de facto copper retirement, the adverse impacts of ILEC failure to adequately maintain copper plant and the fact that millions of customers across the country continue to rely on copper service which, in many rural areas, is the *only* form of ubiquitous and (when properly maintained) reliable telephone service.⁷ Further, in many areas, copper-based service is essential for monitoring facilities such as power plants, dams and levee systems, another important aspect of public safety. The FCC's *2015 Tech Transitions Order* was based, in part, on review and analysis of similar evidence and information regarding de facto copper retirement from multiple state proceedings.⁸ The Notice preceding the *2015 Tech Transitions Order*

⁵ NPRM, at ¶ 2.

⁶ Baldwin Declaration, ¶64, citing FCC Voice Report, Figure 2.

⁷ See, for example, Baldwin Declaration at ¶¶ 7, 8, 31-33, 34-37, 40-46, 48-51, 52-57 and 59-61.

⁸ NPRM, *In the Matter of Technology Transitions; Policies and Rules Governing Retirement Of Copper Loops by Incumbent Local Exchange Carriers; Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25. RM-10593, Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking (“*2015 Tech Transitions Order*”), 30 FCC Rcd 9372, ¶ 89. See also, *In the Matter of Ensuring Customer Premises Equipment for Backup Power for Continuity of Communications, et al.*, PS Docket No. 14-174, Notice of Proposed Rulemaking and Declaratory Order, (*2014 Tech Transitions NPRM/DO*), 29 FCC Rcd 19468, 14979, 14994, ¶ 19, 53 .

recognized the continued value of copper-based services.⁹ The attached Baldwin Declaration demonstrate that those facts have not changed.

As set forth in these Comments, the Consumer Advocates contend that many of the NPRM's proposals would deprive wholesale and retail customers of adequate notice and opportunity for meaningful participation in the highly consequential process of copper retirement and discontinuance of service. If adopted, the proposed changes in the Commission's rules, along with the even more drastic measures under consideration in the NOI (including broad preemption of state laws and rules pertaining to service quality and maintenance of copper networks prior to an authorized retirement or service discontinuance) would jeopardize consumers' access to reliable, adequate, and safe telephone service. In doing so, the FCC's proposals would harm customers and have a detrimental effect on public safety. As Consumer Advocates discuss further, below, with respect to preemption, if proposed copper retirement could cause customers to lose service, be transferred to a service that was inadequate, or be transferred to a service that was inadequate for public safety purposes, many states retain the authority and obligation to ensure adequate service.

While Consumer Advocates appreciate the Commission's concern to facilitate the Internet Protocol ("IP") transition and eliminate unnecessary regulatory hurdles, Consumer Advocates caution that this effort must not be accomplished by sacrificing due process, the interests of consumers, the continued provision of reliable service at just and reasonable rates, and pro-competitive conditions. In Consumer Advocates' experience, states are actively encouraging wireline broadband deployment and the array of IP-based services that this deployment makes available.¹⁰ States are also generally supportive of the IP transition, and at

⁹ *2014 Tech Transitions NPRM/DO*, ¶ 22.

¹⁰ See, for example, Baldwin Declaration at ¶ 18.

the same time continue to comply with statutory obligations to ensure that service continues to be reliable, universally available, affordable and sufficient to ensure the public health and safety. When ILECS propose to discontinue legacy service, Consumer Advocates consider it of utmost importance that there be timely and full disclosure of service changes, so that every customer can fully evaluate the options available and make arrangements to replace affected service(s) with alternatives that meet all the customer's functional requirements.

Moreover, in Consumer Advocates' experience, there are many communities, particularly in rural areas, where ILECs have not installed fiber (or any functionally comparable IP platform that supports both voice and broadband services) and also where they have not committed to deploy such services. Further, in many rural areas wireless service is neither ubiquitous nor reliable due to challenging topography and vegetation. The potential loss of the ILEC as a wireline provider, especially in those rural areas, raises significant issues about competitive conditions. States' ability to fulfill their statutory obligations to preserve universal service and the reliability and stability of services that are critical to the public safety and welfare may also be threatened.

States, primarily through their public utility commissions ("PUCs"), have a long-standing and critical role in protecting consumers' interests with regard to matters pertaining to intrastate telecommunications services. In fact, they are better suited than the FCC to evaluate local impacts with respect to service quality and market conditions, especially during a time when network changes are occurring in all 50 states.

II. THE 2015 TECH TRANSITIONS ORDER IS CONSISTENT WITH THE EXPRESS LANGUAGE OF SECTION 214(a).

Underlying the NPRM is the proposition that the obligations imposed by Section 214(a) on providers of telecommunications services may be a barrier or obstacle to investment in broadband networks and services.¹¹ The Consumer Advocates urge the Commission to adhere to the express language of Section 214(a) as clarified by the *2015 Tech Transitions Order*. That Order and the consumer notice regulations adopted¹² provide both consumers and providers with important guidance as to how to implement a network change while preventing discontinuance, reduction, or impairment of service. The *2015 Tech Transitions Order* struck an appropriate balance between the needs of those consumers who still rely on legacy wireline services for their communications needs and the providers upgrading their networks.

As the Commission explained in the *2015 Tech Transitions Order*, Section 214(a) requires prior Commission approval and issuance of a certificate of public convenience before a provider may take action which will discontinue, reduce or impair service to a community or part of a community.¹³ Otherwise, Section 214(a) provides that nothing in Section 214 “shall be construed to require a certificate or other authorization from the Commission for any installation, replacement, or other change in plant, operation, or equipment, other than new construction, which will not impair the adequacy or quality of service provided.”¹⁴ In adopting the consumer notice requirements for copper retirement, the Commission clearly stated that “the revisions we

¹¹ See, NPRM, ¶¶ 1-2, 57-99. The Commission requests comment on various proposals to streamline the Section 214(a) requirement that the carrier apply for and obtain from the Commission before discontinuance, reduction or impairment of a service. The Commission requests comment on the merits of a more narrow scope of the public and community impact in such review, so as to limit focus to the direct customer, even if the carrier’s customer in turn provides telecommunications services to end users.

¹² See 47 C.F.R. §§ 63-71.

¹³ See, e.g., *2015 Tech Transitions Order*, ¶¶ 4-7, 14-18, 66, 92, 101-124, 128. The Commission discussed the concept and scope of “community” throughout the *Order*. See, e.g. ¶¶ 102-104.

¹⁴ 47 U.S.C. § 214(a).

adopt today to the network change disclosure rules are not intended to change the nature of the process from one based on notice to one based on approval.”¹⁵ The Commission provided guidance that some changes in network facilities may trigger, because of the resulting discontinuance, reduction or impairment of service, the necessity to first obtain Commission approval and certificate.¹⁶

The *2015 Tech Transitions Order* is consistent with the clear language of Section 214(a). While providers of telecommunications service subject to the Commission’s jurisdiction should maintain, upgrade and expand their networks, Section 214(a) makes clear that these actions should be for the benefit of the communities or parts of communities served. The Consumer Advocates oppose any revised interpretation of Section 214(a) which would allow telecommunications service providers to make network changes without notice and without regard to whether the impacted consumers are able to continue to receive the services which they have relied upon and need.

Nor should the Commission grant forbearance from the explicit Section 214(a) requirement that a provider “shall first have obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected” by the proposed discontinuance, reduction, or impairment “of service to a community, or part of a community....”¹⁷ Section 214(a) allows a limited exception to the certificate requirement in the

¹⁵ *2015 Tech Transitions Order*, ¶ 14 (footnote omitted); see also ¶ 18.

¹⁶ *Id.*, ¶ 14. “However, some changes in network facilities can result in a discontinuance, reduction, or impairment of service for which Commission authorization is needed. For instance, in one prominent example, Verizon filed an application under [section 214\(a\)](#) when it sought to replace the copper network serving Fire Island that was damaged by Superstorm Sandy with a wireless network over which it would provide its VoiceLink wireless service. We expect all carriers to consider carefully whether a proposed copper retirement will be accompanied by or be the cause of a discontinuance, reduction, or impairment of service provided over that copper such that they must file a discontinuance application pursuant to *section 63.71* of our rules. If the answer to that question is no, then the carrier need only comply with the Commission’s network change disclosure process as revised herein.”

¹⁷ 47 U.S.C. § 214(a).

event of emergencies.¹⁸ Otherwise, by its express language, Section 214(a) envisions that the Commission will decide whether to issue such a certificate based on the particular facts presented, with specific consideration of the impact of the proposed change in service on the affected community and public convenience and necessity, both present and future. The Commission should not read out of Section 214(a) the express requirement to consider the needs of the community and public served when discontinuance, reduction or some impairment of service is part of the network transition process. The Commission does possess the authority to forbear from applying these provisions of Section 214(a) to a telecommunications carrier or service.¹⁹ However, the Consumer Advocates note that the Commission must first determine whether each of the three criteria for forbearance has been satisfied, including consideration of the need for protection of consumers and whether forbearance is in the public interest. The Commission should not engage in a forbearance analysis where the protection of consumers and public interest impact is examined in the abstract and divorced from consideration of the specific facts and circumstances which might relate to a specific Section 214(a) notice of network change or request for a certificate to discontinue services.²⁰

Section 214(a) has continued without amendment since 1943.²¹ The addition of the universal service provisions of Section 214(e) as part of the 1996 Telecommunications Act strengthens the argument that the Commission and states play an important role in assuring that communities and consumers have continued access to services from at least one common carrier

¹⁸ Id.

¹⁹ 47 U.S.C. § 160(b)(1), (2), (3). In the NPRM, the Commission suggests that some exercise of its forbearance authority may be brought to bear to promote investment in broadband infrastructure and services. NPRM, ¶¶ 80, 96.

²⁰ Id., § 160(b)(2), (3).

²¹ In the RFC, the Commission points to the legislative history of Section 214(a) as a possible source of support for a determination that no certificate is required if the “service” which the provider seeks to discontinue, reduce or impair is “a service offering of a similar type and quality is available in the affected area.” RFC, ¶ 123. Yet, this same legislative history was available to the Commission and all parties in advance of the *2015 Tech Transitions Order*. The Consumer Advocates position on the concept of “services” is addressed below.

charged with providing those services defined as eligible for universal service support.²² No carrier designated as an eligible telecommunications carrier (“ETC”) may relinquish that designation without express permission from the commission, the state regulator or the FCC, which granted the original designation.²³ The Commission has defined those universal service supported services in functional terms.²⁴ The Commission should not revise its interpretation and enforcement of Section 214(a) in a way which conflicts with the dual roles of states and the Commission to assure all consumers and communities have access to such essential services eligible for universal service support.

III. THE COMMISSION SHOULD RETAIN THE DEFINITION OF COPPER RETIREMENT ADOPTED IN THE *2015 TECH TRANSITIONS ORDER*.

In seeking comment on proposed revisions to its notice requirements, the Commission asks, if it returns to its prior notice requirements, whether it should retain the 2015 definition of copper retirement rules to include the feeder portion of copper loops and subloops and "de facto retirement," i.e., "the failure to maintain copper loops, subloops, or the feeder portion of such loops or subloops that is the functional equivalent or removal or disabling."²⁵ Consumer Advocates support preservation of the regulatory definition of copper retirement as adopted in the *2015 Tech Transitions Order*. The expansion of the copper retirement definition was based on an extensive record and well-reasoned analysis. With respect to feeder, the Commission correctly observed that if a CLEC cannot access the feeder portion of a loop, "the practical difficulty of accessing the remaining portion of the loop for retail purposes is insurmountable."²⁶

²² 47 U.S.C. § 214(e).

²³ *Id.*

²⁴ See, 47 C.F.R. §§ 54.101 (Supported Services for Rural, Insular, and High Cost Areas), 54.400 (Definitions of “broadband internet access service,” “voice telephony service,” and “supported services” for Lifeline).

²⁵ *2015 Tech Transitions Order*, ¶60.

²⁶ *Id.*, ¶83.

One generally agreed upon policy goal is to promote competition. The *2015 Tech Transitions Order* correctly found that ILECs "should not be permitted to avoid the network change notification requirements simply because they are replacing one portion of the loop instead of another equally critical portion."²⁷

With respect to de facto retirement, the Commission correctly found that "the practice of deliberately allowing networks to deteriorate" is harmful to competition and negatively impacts wholesale and retail customers. Consequently, the Commission added to the definition of copper retirement "any failure to maintain copper loops, subloops or the feeder portion of such loops and subloops that is the functional equivalent of removal or disabling."²⁸ As noted earlier the decision to include de facto copper retirement was based in part upon submission of multiple state filings by consumer advocates (including NASUCA) and competitors alleging that "in some cases incumbent LECs are failing to maintain their copper networks in an effort to push customers off of copper and onto fiber or other technologies" even when the other technologies do not meet customer needs or are more expensive.²⁹ The Commission included de facto retirement in the definition of copper retirement to ensure that ILECs "are aware that intentional neglect of copper facilities triggers their notification responsibilities."³⁰ As discussed elsewhere in these comments, tens of millions of Americans rely on copper-based services and have a vested interest in knowing when copper retirement - including de facto retirement - is occurring and the ability to evaluate and comment on proposed substitute services. The Commission should continue to include de facto retirement in the definition of copper retirement.

²⁷ Id.

²⁸ Id., ¶¶89-90.

²⁹ Notice, 29 FCC Rcd at 14979, 14994, ¶¶ 19, 53.

³⁰ *2015 Tech Transitions Order*, ¶90.

IV. ADEQUATE NOTICE OF NETWORK CHANGES IS NECESSARY FOR A HEALTHY COMPETITIVE ENVIRONMENT AND TO PERMIT CONSUMERS TO MAKE INFORMED CHANGES TO THEIR SERVICES.

A. Consumers, including public safety officials, cannot reasonably respond or adapt to proposed plant retirement or discontinuance of service within the newly proposed minimal timeframes for public notice suggested by the Commission.

Section 251(c)(5) imposes on ILECs the duty to provide “reasonable public notice” of changes in networks.³¹ Clearly, the retirements of copper networks – whether or not they are replaced by fiber or other facilities – are such changes.³² Section 251(c)(5) was the basis for the changes adopted by the Commission in the *2015 Technology Transitions Order*,³³ the first revisions to the copper retirement rules since 2003. As the Commission stated,

Today, we significantly update our copper retirement rules for the first time in over a decade to address the increasing pace of copper retirement and its implications for consumers and competition. We do so to facilitate the smoothest possible transition of the Nation’s legacy communications networks to newer technologies while ensuring this transition happens free from the obstacles that might arise were this transition not handled responsibly. We believe the updated rules that we adopt today will benefit the entire ecosystem of industry and consumers by ensuring that everyone has the information they need to adapt to an evolving communications environment.³⁴

In the current NPRM, in a new docket, the Commission proposes to relax the 2015 copper retirement rules, principally by eviscerating the notice requirements. Specifically, the Commission asks whether it should repeal the requirement that the ILEC must provide direct notice to retail customers, the governor of the affected state, tribal authorities and the Secretary

³¹ 47 U.S.C. §251(c)(5).

³² This creates a distinction between copper retirement –controlled by § 251(c)(5) – and withdrawal of services provided over the network, controlled by § 214(a). Service withdrawal is addressed in Part E., below.

³³ *2015 Tech Transitions Order*, ¶¶ 20, 24, 37. The Commission modified its network change disclosure rules “to require direct notice to retail customers of planned copper retirements” as warranted and “consistent with the public interest, including our core value of consumer protection, and with Section 251(c)(5)’s requirement of reasonable public notice network changes...” The Commission emphasized that “this notice is required only where the retail customer is within the service area of the retired copper and only where the retirement will result in the involuntary retirement of copper loops to the customer’s premises ...” *Id.* at ¶ 37.

³⁴ *Id.*, ¶ 12.

of Defense, as well as "each entity that directly interconnects with the incumbent LEC's network."³⁵

In part, the Commission's proposal is based on questioning "the Commission's authority to impose the copper retirement notice requirements adopted in the *2015 Tech Transitions Order*."³⁶ As discussed above, the Consumer Advocates support the *2015 Tech Transitions Order's* discussion of the Section 214(a) discontinuance process which requires a certificate and the network change notice requirements. The Commission modified its network change disclosure rules "to require direct notice to retail customers of planned copper retirements" as warranted and "consistent with the public interest, including our core value of consumer protection, and with Section 251(c)(5)'s requirement of reasonable public notice network changes...."³⁷ The Commission emphasized that "this notice is required only where the retail customer is within the service area of the retired copper and only where the retirement will result in the involuntary retirement of copper loops to the customer's premises"³⁸ The Consumer Advocates believe the Commission's reasonable and targeted added customer notice provisions are consistent with Section 214(a), Section 251(c)(5), and the core value of consumer protection.

Adequate notice is a foundation principle of due process, and the Commission's attempt to whittle away at the existing notice provisions creates unacceptable risks for consumers. Here, it is important that the notice period provide the opportunity for affected consumers to learn of and evaluate the impact of the proposed changes and then communicate their concerns to the Commission. An unreasonably abbreviated notice period fails to protect consumers, by impeding their ability to participate in Section 214 process.

³⁵ NPRM, ¶ 61.

³⁶ NPRM, ¶ 17.

³⁷ *2015 Tech Transitions Order*, ¶ 37.

³⁸ *Id.*

Adequate notice is the one due process protection that ordinary consumers can rely on in what is otherwise, from their perspective, an inaccessible and arcane process. As a practical matter, receiving a piece of paper in the mail may not be enough for the information about a discontinuance of service and its consequences to sink in for the consumer. In many cases, the consumer may rely on subsequent coverage of the discontinuance in a local newspaper or on local television news to become more fully acquainted with the impact of the proposed change. If the notice period is only fleeting, the change will have occurred before the consumer has an adequate opportunity to react.

Abbreviating the already streamlined processes for copper retirement and discontinuances related to the IP transition is neither necessary nor prudent. Not two years ago, the Commission found that “[i]n light of the accelerated pace of copper retirements and the allegations in the record of this and other proceedings, ... the states should be fully informed of copper retirements occurring within their respective borders so that they can plan for necessary consumer outreach and education.”³⁹ Providing states with less time for consumer outreach and education (to say nothing of the other inroads in state authority under consideration by the Commission) will be counterproductive to a smooth transition process.

As Public Knowledge et al. set forth, in their petition to expand the comment periods in this proceeding, the process that led to the current rules evolved over a several year period.⁴⁰ Now, based on sweeping and so far unsubstantiated concerns, the Commission proposes to dramatically abbreviate the processes only recently put in place. There is not enough experience

³⁹ *2015 Tech Transitions Order*, ¶ 70.

⁴⁰ Public Knowledge, The Greenlining Institute, the National Association of the Deaf, the Center for Rural Strategies, the Kentucky Resources Council, the National Consumer Law Center on behalf of its low-income clients, Telecommunications for the Deaf and Hard of Hearing, Inc., Rehabilitation Engineering Research Center on Technology for the Deaf and Hard of Hearing (DHH-RERC), and the United Church of Christ, Motion for Extension of Time, filed May 26, 2017, at 2-3.

with the current rules to conclude that they are burdensome, and although the Commission repeatedly implies that the transition might have proceeded more expeditiously with shorter notice intervals, it cites no evidence to that effect. The Commission's rules for copper retirement have been in effect for a year and a half; the ink on the rules for IP transition under Section 214 is barely dry.⁴¹ Given the short time that the rules have been in effect and the minimal activity that has occurred pursuant to these rules, there is insufficient experience to support a finding that they are onerous.

Consumer Advocates recommend that the Commission pay special attention to the needs of individuals and entities that may need additional time to respond to service changes. Section 68.110(b) of the Commission's rules (from 2001) acknowledges that changes to a wireline telecommunications provider's facilities, etc. may make a customer's terminal equipment incompatible, or require modification of that customer premises equipment, or "otherwise materially affect its use or performance."⁴² Thus, the rule requires that "the customer shall be given adequate notice in writing, to allow the customer an opportunity to maintain uninterrupted service."

The Commission now asks about the importance of this provision to individuals with disabilities, such as those that rely on TTYs or other specialized devices or services.⁴³ Consumer Advocates support tailoring notice to ensure that vulnerable populations are not at risk for having their communications disrupted by a change in technology for which they had insufficient time to prepare. If proposed network changes can potentially render end user equipment or essential services inoperable, the Commission needs to ensure that affected parties - including retail

⁴¹ These rules were published in the Federal Register on September 12, 2016 (81 FR 62632). Some rules were effective October 12, 2016, while others became effective only after review by the Office of Management and Budget.

⁴² 47 CFR § 68.110(b)

⁴³ NPRM, ¶ 70.

customers, wholesale customers, agencies at all levels of government, public safety officials, municipalities, tribes and states - have adequate time to become aware of the proposed changes, evaluate their impacts and search for reasonable substitute services that fully meet their needs and are affordable. Consequently, it is important to maintain ample notice, as under the existing rules,⁴⁴ for state governments, national security agencies, and Tribal entities, as well as consumers.

B. The Commission’s intent with respect to changing its rules about copper retirement and Section 214 discontinuance is obscured by a vast number of diverse options it discusses in the NPRM

Within the 35-paragraph segment of the NPRM that deals with copper retirement and Section 214,⁴⁵ the Commission poses roughly 150 questions (not counting more general “requests for comment”), many of which suggest approaches that go well beyond the specific changes incorporated into the proposed rule changes shown in Appendix A to the NPRM.

Consumer Advocates here comment specifically on the changes captured in the rule revisions in Appendix A and then more broadly on the potential additional changes that the Commission is considering.

The proposed rule changes described in Appendix A to the NPRM pertain primarily to Section 63.71, Procedures for discontinuance, reduction or impairment of service by domestic carriers.⁴⁶ They include: “deleting paragraph (d), redesignating paragraphs (e) through (f) as (d) through (e), adding new paragraph (f), and revising paragraphs (a), (c), and (g).”

The revision to paragraph (a) proposed by the NPRM Appendix A consists of the addition of a new subsection (iii) under which any carrier (dominant or nondominant) can avail

⁴⁴ 47 C.F.R. § 63.71(a).

⁴⁵ NPRM, ¶¶ 56-99.

⁴⁶ 47 C.F.R. § 63.71.

itself of expedited procedures to: (1) grandfather a legacy service that operates at a speed below 1.544 Mbps (including voice service, DSL, and more), and (2) discontinue any legacy data service that has previously been grandfathered for 180 days or more. Consumer Advocates contend that it would be unreasonable to require consumers of the service to file objections within ten days of the Commission's public notice. When notice is merely a formality, as it would be under the abbreviated timeframes proposed by the Commission, consumers are also more vulnerable to being "upsold" to the ILEC's more expensive services, including service packages. At the same time, they have less time to evaluate their service options, if any, from providers not affiliated with the ILEC. Failing to ensure that customers have sufficient notice is inconsistent with a competitive marketplace. Customers must have sufficient notice and information to make informed choices about potential replacement services. Consumer Advocates strongly urge the Commission to avoid these negative outcomes by retaining the current rules.

As to the procedure proposed by NPRM Appendix A to be modified in Section 63.71(a)(iii)(2), knowing that a service is grandfathered does not prepare retail or wholesale customers for the subsequent precipitous end to that service (i.e., having the service discontinued a month after they receive notice, unless they are able to object within 10 days of receiving notice). This would effectively require every customer of a grandfathered service to be prepared to migrate away from that service at a moment's notice – and any customers who needed any real planning time would be forced to begin migration plans more or less as soon as they knew the service was grandfathered. This proposal is disruptive and potentially anticompetitive, since the ILEC alone knows when these precipitous changes might occur and can insulate its own retail customers from the impending disruption.

The proposed deletion of paragraph (d) of Section 63.71, as set forth in the NPRM Appendix A, would also remove important language that protects wholesale customers of ILECs' special access services from precipitous rate increases when they are migrated to a comparable IP-based service in the same geographic market. Coming on the heels of the Commission's recent decision to end its decade-old investigation of supra-competitive pricing of special access (business data services),⁴⁷ this is yet another blow to wholesale providers, including ILECs' CMRS competitors.

Paragraph 57 of the NPRM invites comment regarding the authority of the Commission in the *2015 Tech Transitions Order* to adopt the particular copper retirement notice requirements. The logic behind this question seems somewhat circular, as the Commission is now proposing to implement its own, different notice requirements. As discussed above, the Consumer Advocates support the Commission's 2015 action as consistent with the clear, express language of Section 214(a) and other statutory provisions to advance the public interest and adopt specific, targeted consumer notice requirements to better protect consumers. The real question is what requirements are necessary due to the acceleration of copper retirements that is expected to occur during the course of the IP transition. The *2015 Tech Transitions Order* explained in detail why the Commission was extending the notice period, citing to the record which "reflects numerous instances in which competitors and customers have suffered significantly due to the short notice period."⁴⁸ The NPRM doesn't explain why a shorter period is now deemed preferable again, except to return to the unsubstantiated concern about burdens on the ILECs. The Commission cannot simply ignore the prior record as irrelevant.

⁴⁷ *Business Data Services in an Internet Protocol Environment, Technology Transitions, Special Access for Price Cap Local Exchange Carriers, and AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket Nos. 16-143 and 05-25, GN Docket No. 13-5, RM-10593, FCC 17-43 (rel. Apr. 28, 2017).

⁴⁸ *2015 Tech Transitions Order*, ¶¶ 28-33.

C. Complying with existing notice requirements does not significantly burden ILEC planning and deployment efforts, but the abbreviated procedures proposed by the Commission will unfairly disadvantage the ILECs' wholesale customers and impede competition and competitor investments.

One recurring theme in the NPRM is the suggestion that the current notice requirements (only recently implemented) for copper retirements and Section 214 discontinuance requests are causing “delays and increased burdens” that have “hindered next generation investment.”⁴⁹ But the NPRM does not reference any specific evidence that this has occurred, or even point to any convincing rationale for why this should be the case. It is important that the Commission not presume delays or increased burdens or credit empty assertions that investment has or will suffer because the ILEC is required to publicly announce its plans for copper retirement an “extra” 90 days earlier than for short-term network changes. ILEC capital budgets are not spur-of-the-moment creations, and decisions about next-generation investment are likely reflected in comprehensive, relatively long-range plans.

The Commission promotes its proposed revised procedures as consistent with the pro-competitive objectives of Section 251.⁵⁰ Abbreviated notice and comment periods may serve the interests of the petitioning ILEC, but the impact on wholesale and retail consumers is far less benign. ILECs have invested heavily in the IP network transition, and there is no reasonable ground for concern that they will abandon this course – or even delay it significantly – as a result of being required to give reasonable notice. As to the alleged burden of longer notice, as facilities planning is not accomplished in days or even a few months, carriers should not be hampered by sharing their plans with customers under the notice intervals currently in effect.

⁴⁹ See, e.g., NPRM at ¶¶ 56, 58, 61, 97.

⁵⁰ See generally, NPRM at ¶ 56.

Virtually all of the Commission’s policy decisions since 1996 (and even before) have been predicated on the benefit to consumers and the economy of advancing competition. Yet the greatest burden of shortening the notice period for copper retirement will fall on competitors and consumers. This was recognized by the Commission when it adopted rules tailored to balance the interests of competitors, consumers, and ILECs with regard to copper retirements. As the Commission noted when it adopted these rules, less than two years ago:

Specifically, we implement revisions to our copper retirement rules and our service discontinuance rules to ensure that: (i) competitive carriers are adequately informed about technology changes that impact them; (ii) the interests of end users impacted by upstream changes in service by providers of wholesale inputs are adequately recognized as important to our service discontinuance process; and (iii) competitive carriers do not lose the access that they need to continue to provide the benefits of competition.⁵¹

A copper retirement decision is not something that the ILEC can arrive at on the spur of the moment. To meet the definition of copper retirement (with the exception of “de facto” retirement), the ILEC must already have facilities in place that support a seamless provisioning of the services previously offered over copper. (Otherwise, the ILEC would be required to proceed under Section 214 and the Commission’s rules governing discontinuance.) This is information that uniquely rests with the ILEC, and it possesses the information long before the actual retirement occurs. For the ILEC, the “burden” of sharing this information with wholesale and retail customers well ahead of the copper retirement event is minor. However, failing to receive adequate notice has major consequences for providers who rely on interconnection and/or wholesale facilities to provide their services, and on these providers’ customers.

On a related note, Consumer Advocates are concerned that anticompetitive or discriminatory practices could result from proposal (at para. 67) to eliminate Section 51.325(c) of the Commission’s rules, which prohibits an ILEC from disclosing information about planned

⁵¹ 2015 Tech Transitions Order, ¶ 6.

network changes to affiliates or nonaffiliated entities before it has provided public notice.

Consumer Advocates view more positively the alternative approaches that require any early disclosure to be equal in scope to what would be contained in a public notice and be provided (concurrently) to every entity that would be entitled to receive notice. However, it is hard to understand why, if both of these conditions were met, the ILEC could not simply accelerate the timing of its official notice.

D. The NPRM presents such a wide range of options that it provides little guidance about what the Commission intends for notice and comment intervals regarding copper retirement and Section 214 procedures.

As explained above, the specific changes to the Commission’s rules regarding discontinuance of service (Section 63.71), as delineated in Appendix A to the NPRM, concern Consumer Advocates. But the NPRM suggests many additional cut-backs in notice and review procedures that are even more extreme. It is difficult to respond to each proposed change, and Consumer Advocates respectfully suggest that the large number of alternatives might better have been included in the NOI so that the comments could inform the proposed rules, rather than the NPRM.

Substantively, because the Commission proposes to curtail notice at multiple stages, the overall impact would be a cumulative diminution of time and opportunity to comment. Moreover, the Commission, further expands the scope of what it might possibly adopt to include “Other Part 63 proposals.”⁵² Among these, the Commission considers adopting a blanket policy that “Section 214(a) discontinuances will not adversely affect the present or future public convenience and necessity, provided that fiber, IP-based, or wireless services are available to the affected community,” possibly with only a notice and attestation from the discontinuing carrier.

⁵² NPRM, ¶ 95.

This extreme approach is one that the Commission previously rejected⁵³ and could reduce Section 214 review to a mere formality. While these “other” proposals are not captured in Appendix A, if adopted, they would weaken consumer protections even more precipitously than any of the draft proposed rules would suggest.

Among the many other potential courses of action the Commission discusses is the possibility of reverting to the earlier version of its copper retirement rules, replacing the rules that were adopted in 2015. The Commission’s 2015 revisions to its copper retirement rules were adopted in anticipation of a much higher level of activity than was occurring under the pre-2015 rules.⁵⁴ The new wave of copper retirements are typically not “short-term” changes in a carrier’s network facilities but rather part of a comprehensive migration of technology.⁵⁵

E. The Commission’s attempt to overwrite years of exit regulation under Section 214 is unwise and unsupported by the legal framework.

In its NPRM and NOI, the Commission contemplates sweeping changes to the way it applies the requirements of Section 214(a), one of the pillars of common carrier obligations under Title II of the Act. The portrayal of Section 214(a) as an anachronistic mechanism for maintaining industry stability during the Second World War⁵⁶ disregards the core place that entry and exit regulation (along with approval of changes in control and ownership), particularly of

⁵³ *2015 Technology Transitions Order*, 30 FCC Rcd at 9452, ¶ 145 (“We also decline to adopt a presumption in favor of approving discontinuance of a retail service if at least one competitive alternative is available. Under our precedent, the Commission evaluates a range of factors to determine whether to grant a discontinuance application.”); See also, *2016 Technology Transitions Order*, 31 FCC Rcd at 8308, ¶ 74 (“We reject calls from incumbent LECs to presume that particular technologies, by their nature, represent an adequate replacement for legacy voice services in all instances.”)

⁵⁴ *2015 Tech Transitions Order*, ¶ 13 (“This rapid pace of formal copper retirements, along with the deterioration of copper networks that have not been formally retired, has led to requests from both competitive LECs and public advocates for changes to the Commission’s copper retirement rules to protect competition and consumers. We reaffirm that “the increasing frequency and scope of copper retirements call into question key assumptions that underpinned our existing copper retirement rules.” Footnotes omitted).

⁵⁵ *Id.*, ¶ 13.

⁵⁶ NPRM, ¶ 93.

dominant providers, has in common carrier regulation across various industries, both at the federal level and in virtually every state. The network evolution designated as the IP transition is not so novel as to justify upending the processes necessary to evaluate whether a particular instance of service discontinuance is in the public interest. As noted above, Section 214(a) and the Section 214(e) relinquishment of ETC designations provisions are intended to assure that consumers and communities have access to the services that they need and to preserve universal service.

Accordingly, Consumer Advocates strongly object to the Commission's proposal to create a presumption that "Section 214(a) discontinuances will not adversely affect the present or future public convenience and necessity, provided that fiber, IP-based, or wireless services are available to the affected community"⁵⁷ (and possibly regardless of whether the requesting carrier plans to continue to provide one of these alternative services to the community). Such a broad presumption would largely negate the Section 214(a) consumer safeguards of requiring pre-authorization for the discontinuance of a service on a community-by-community basis to ensure that consumers have multiple alternatives for service. A community that ends up with a single wireless provider, when it previously had wireline service from the ILEC, has by far a less adequate level of service than one where the ILEC transitions its wireline service to fiber, there is a second provider of wireline IP-based services, and multiple mobile wireless carriers offer reliable coverage throughout the area.

For some rural areas, the proposed substitution of wireless service will be inadequate or even unavailable to some customers within an ILEC exchange. The upshot would be a shift from a service that was ubiquitous to a service that was unavailable to some customers, who

⁵⁷ NPRM, ¶ 95.

would lose access to essential communications service and the concomitant ability to contact first responders.

Consumer Advocates particularly urge the Commission to proceed cautiously with regard to any proposal⁵⁸ that would deem wireless service, at present, to be an adequate replacement for wireline service (TDM- or IP-based). There continue to be tangible differences between the reliability,⁵⁹ functionality, and pricing (both level and structure) of wireline services and fixed or mobile wireless services. Moreover, an expedited review that fails to examine the impact on the market of losing a major competitor would fall short of ensuring that the discontinuance is in the public interest.

V. SECTION 253(a) DOES NOT PROVIDE THE COMMISSION WITH UNFETTERED AUTHORITY TO PREEMPT STATE AND LOCAL REGULATION.

A. The Commission should not rely on Section 253 to preempt state and local laws and regulations.

Consumer Advocates strongly urge the Commission to back away from the proposal in the NOI to rely on Section 253's restrictions on state and local authority to prohibit telecommunications services as a vehicle for preempting a wide variety of state and local laws and regulations.⁶⁰ Such an interpretation exceeds the appropriate scope of that provision and would unravel over a century of balance between state and federal oversight of telecommunications. The importance of retaining this balance is evident in the recent *Order Approving Stipulation* adopted by the New Jersey Public Utilities Board regarding Verizon

⁵⁸ See, NPRM at ¶¶ 95-96.

⁵⁹ Nearly all wireless carriers' coverage maps continue to include a disclaimer that service might not be available due to terrain or other impediments. . See, e.g., <https://www.att.com/maps/wireless-coverage.html>

⁶⁰ NOI, ¶¶ 100-101. See 47 U.S.C. § 253.

service quality.⁶¹ The proceeding was triggered by a petition from the County of Cumberland and 17 towns seeking an order from the board to investigate Verizon New Jersey's alleged discontinuance of maintenance of copper landline facilities for customers who do not have fiber optic service, necessary for the provision of adequate service.⁶² Under a stipulation agreed to by Verizon New Jersey, the Division of Rate Counsel, Cumberland County and the seventeen towns, Verizon New Jersey has committed to copper maintenance measures, service quality standards and reporting. Absent state regulatory oversight, it is highly unlikely that Verizon would have undertaken those steps.⁶³

During the two decades that Section 253 has been law, neither the Commission nor the courts have previously suggested that its purpose was to insulate carriers from any and all delays caused by the legitimate exercise of state regulatory oversight.⁶⁴ Taking the time to assess a carrier's proposed action prior to authorizing it is not an effective prohibition on the provision of telecommunications service. In particular, there is no basis to conclude that competitively neutral and nondiscriminatory state laws administered by public utility commissions for the purpose of ensuring adequate facilities, service quality on existing services, or entry and exit regulation, including changes necessary to accommodate evolving technology "prohibit or have the effect of prohibiting" telecommunications service. The interpretation in the NOI seems to suggest that virtually any oversight function pursuant to state or local laws or regulation could inhibit the operations of telecommunications providers (whether they are looking to expand service, through new offerings, or cut costs, by abandoning existing service).

⁶¹ New Jersey, In the Matter of Verizon New Jersey Inc.'s Discontinuance of Land Line Telecommunications Maintenance, Facilities and Infrastructure (BPU Docket no. TO15121325), Order Approving Stipulation, May 31, 2017, Effective June 10, 2017. Baldwin Declaration, ¶¶ 49-52.

⁶² Id.

⁶³ Baldwin Declaration, ¶51.

⁶⁴ See, e.g., *WWC v. Sopkin*, 488 F.3d 1262, 1271 (10th Cir., 2007).

The weakening of state authority proposed in the NOI is an unjustified about-face from the FCC's *2015 Tech Transitions Order*, in which the Commission stated: "We recognized in the Notice that States, localities, and Tribal Nations play a vital role in overseeing carriers' service quality and network maintenance."⁶⁵ In fact, far from portraying state oversight as potentially excessive, the FCC in the *2015 Technology Transitions Order* expressed concern that "the trend in which states' legislatures have elected to limit the scope of their PUCs' traditional authority over telecommunications services" might have hampered local institutions ability "to perform key oversight functions."⁶⁶ As far back as its 2003 *Triennial Review Order*, the Commission disclaimed that it was "preempting the ability of any state commission to evaluate an incumbent LEC's retirement of its copper loops to ensure such retirement complies with any applicable state legal or regulatory requirements,"⁶⁷ and it has reaffirmed this position by repeatedly referring to it in several orders in this Technology Transition proceeding.⁶⁸

With respect to local authorizations for rights-of-way,⁶⁹ the Commission may have legitimate concerns to ensure that unreasonable conditions are not imposed on carrier access, but a blanket approach to addressing these exceptions is not warranted. Although a case-by-case approach may be resource-intensive, there is no simple formulation that will weed out overreaching licensing requirements from those that accomplish legitimate objectives.

⁶⁵ *2015 Tech Transitions Order*, 30 FCC Rcd 9425, ¶ 96.

⁶⁶ *Id.* ¶ 96.

⁶⁷ See *2015 Tech Transitions Order*, ¶ 96 and fn. 347, citing *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers et al.*, CC Docket No. 01-338 et al., Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) (Triennial Review Order), , aff'd in part, remanded in part, vacated in part, *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 564-93 (D.C. Cir. 2004) (*USTA II*), cert. denied, 543 U.S. 925 (2004), on remand, *Unbundled Access to Network Elements et al.*, WC Docket No. 04-313 et al., Order on Remand, 20 FCC Rcd 2533, 2541, ¶ 12 (2004), aff'd, *Covad Commc'ns Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

⁶⁸ In the NOI's discussion of the newly formed Broadband Deployment Advisory Committee (BDAC) is a passing statement that "We recognize that states and localities play a vital role in deployment and addressing the needs of their residents." NOI at ¶¶ 111-112. This does not validate the preemption the Commission proposes.

⁶⁹ See generally, NOI, Section III.A.

B. State laws and regulations, including those that preserve quality of service and those related to market exit, fall squarely within the objectives of Section 253(b)

The Commission's interpretation of Section 253 also gives far too little weight to the scope of state and local government authority expressly protected under Section 253(b). These include "competitively neutral... requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." Thus, while Section 253 supports the pro-competitive objectives of the 1996 Act, it certainly does not support interference with most traditional state regulatory functions with respect to telecommunications carriers and their services.

Clearly, oversight to ensure the proper maintenance of facilities used to provide service to current customers and various approaches to service quality regulation fall squarely within the scope of Section 253(b). Universal service, public safety, and the rights of consumers are all legitimate objectives served by PUC oversight with respect to the withdrawal of intrastate service(s) to a community. States have legitimate interests that are not subsidiary to the FCC's discontinuance review, and these interests take on even greater importance as the Commission is considering eliminating much of the scrutiny previously deemed necessary to protect the public interest.

The experience in Ohio is a case in point. In the summer of 2015 – when the *2015 Transitions Order* was adopted by the FCC – some states were also acting on similar issues to protect consumers from a sudden loss of basic telephone service. In Ohio, for example, a statute was adopted providing for an expedited process for ILECs to withdraw basic telephone service *where the FCC had approved the ILEC's withdrawal of the interstate access component of the*

service.⁷⁰ The statute provides that, upon FCC approval, the ILEC must give its customers and the Public Utilities Commission of Ohio (PUCO) 120 days' notice that basic service is being withdrawn. If a "reasonable and comparatively priced service" is available at a customer's residence, the customer's basic service can be withdrawn.⁷¹ But if there is no "reasonable and comparatively priced service" available at the customer's residence, the PUCO can order the ILEC to continue providing basic service to the customer.⁷² The Ohio law provides some consumer protections by placing pricing restrictions on the substitute service⁷³ and by ensuring that affected customers actually have service (either substitute service or the ILEC's basic service) available *at their homes*, not just somewhere within their exchange.

As shown by the Ohio process – and by the descriptions of other state activities set forth in the comments (and the attached affidavit of Susan Baldwin) – consumers are vitally interested in a fair and thorough FCC process regarding the withdrawal of basic telephone service. The *2015 Tech Transitions Order* provided such a process. The 2017 NOI, in an attempt to "streamline" the process to the benefit of the providers of basic telephone service will harm consumers.

⁷⁰ Ohio Rev. Code § 4927.10. Under Ohio law, "basic local exchange service" allows customers to originate or receive voice communications within a local service area at a flat monthly rate, and includes touch tone dialing, access to and usage of 9-1-1 services where such services are available, access to operator services and directory assistance, a telephone directory, Caller ID blocking services, access to telecommunications relay service, and Access to long distance providers and networks of other telephone companies. See Ohio Rev. Code § 4927.01(A)(1). It does not include telephone service bundled with other features.

⁷¹ See Ohio Rev. Code § 4927.10(B).

⁷² Ohio Rev. Code § 4927.10(B)(1)(b).

⁷³ To be "reasonable and comparatively priced," under Ohio law, a service must be "competitively priced, when considering all the alternatives in the marketplace and their functionalities." Ohio Rev. Code § 4927.10(B)(3). The PUCO determined that a service is presumed to be "competitively priced," subject to rebuttal, if its price is no more than 20 percent higher than the ILEC's basic service rate or the FCC's local urban floor as defined in 47 C.F.R. § 54.318(a). See PUCO Case No. 14-1554-TP-ORD, Finding and Order (Nov. 30, 2016) at 13 (available at <http://dis.puc.state.oh.us/DocumentRecord.aspx?DocID=f2f2138d-67cf-4d1d-a998-ec2970967c0a>).

Further, as discussed in Consumer Advocates’ comments in support of “functional test,”⁷⁴ whether an adequate replacement for the service sought to be withdrawn is available is also crucial for consumers, especially residential and small business consumers. Technological transitions should not put consumers at risk of having to accept inferior or higher-priced service in place of the robust, ubiquitous service they have relied on for decades.

The NOI’s discussion of Section 253 addresses “preempting state laws governing copper retirement.”⁷⁵ The types of state laws the Commission references are: 1) laws that “require utilities or specific carriers to maintain adequate equipment and facilities”; 2) laws that “empower utilities commissions, either acting on their own authority or in response to a complaint, to require utilities or specific carriers to maintain, repair, or improve facilities or equipment or to have in place a written preventative maintenance program;” and 3) an amorphous category consisting of “state laws restricting the retirement of copper facilities.” The laws requiring carriers to maintain adequate equipment and facilities and authorizing state commissions to require utilities to maintain, repair or improve facilities have existed for many years and serve a number of key consumer and public safety interests. However in situations where proposed copper retirement would create a situation where customers would lose service or a replacement service would not be adequate for public safety purposes, a state commission retains the authority and obligation to ensure adequate service.

In some states, industry’s arguments that IP-based services – in particular, VoIP – should not be subject to state PUC jurisdiction have prevailed. In some states, a transition that eliminates TDM-based voice service may also remove regulatory protections with respect to rates, service quality, and a PUC-administered complaint process that consumers have come to

⁷⁴ See NPRM ¶¶ 115-123; see Consumer Advocate comments, infra, and Baldwin Declaration, attached.

⁷⁵ NOI, ¶ 94.

rely on. These circumstances are relevant to a PUC's assessment of the consumer impact of copper retirement, and should not be preempted.

C. State and local laws and regulations that focus on preserving quality of service provide important safeguards for consumers

State PUCs protect vital consumer interests when they require ILECs to maintain the integrity of their copper networks and the services provided over such facilities prior to copper retirement or the explicit authorization for a discontinuance of service. As set forth in detail in the Declaration of Susan M. Baldwin, spurred by consumer complaints about troubles with service quality on their copper lines (reflecting inadequate maintenance) and difficulties obtaining timely repairs, state consumer advocates have pressed for PUCs in those states to require remedial action by the ILEC. Further, elsewhere, the Communications Workers of America, representing many ILEC employees, has also raised concerns that retail service quality is suffering from the neglect of facilities necessary to support an adequate level of service to existing wireline customers, particularly in locations where the ILEC has not deployed fiber upgrades. From these investigations and other recent proceedings where service quality data is available, it is clear that consumers' safety and welfare is put in jeopardy without PUC oversight that ensures against widespread de facto retirement of copper and the unauthorized discontinuance, reduction, or impairment of service.

The Baldwin Declaration notes that state PUCs possess regulatory tools that the FCC either lacks or has decided to forbear from using, including: 1) evidentiary hearings, with discovery;⁷⁶ 2) service quality data reported by ILECs and evaluated against performance benchmarks;⁷⁷ 3) direct input from consumers via phone contact or written complaints and

⁷⁶ Baldwin Declaration at ¶ 16.

⁷⁷ Id.

experience resolving these complaints;⁷⁸ and 4) greater familiarity with local conditions, including competitive conditions and their impact on service quality (as well as rates).⁷⁹

As Ms. Baldwin attests, the evidence from various state proceedings raises serious concerns about the extent of de facto copper retirement occurring without compliance with FCC or state service quality and consumer protection requirements.⁸⁰ Another frequent consumer complaint concerns unauthorized migration of consumers to IP-based voice service (unregulated in many states) or high-pressure tactics that leave the consumer feeling that he has no choice but to migrate to the new service (unwittingly losing certain regulatory protections).⁸¹

VI. THE FUNCTIONAL TEST STANDARD IS NECESSARY TO ENSURE THAT ALL CONSUMERS CONTINUE TO RECEIVE ADEQUATE SERVICE AND SHOULD BE RETAINED.

In the “Request for Comment,” the Commission addresses concepts relevant to its administration of the Section 214(a) certificate process.⁸² Describing the “functional test” that the Commission adopted in its November 2014 Declaratory Ruling,⁸³ the Commission now states:

We seek comment on whether we should revisit, and ultimately the proper scope of, the Commission’s 2014 Declaratory Ruling and subsequent 2015 Order on Reconsideration expanding what constitutes a “service” for purposes of Section 214(a) discontinuance review. Specifically, we seek comment on “the functional test,” an interpretation of Section 214(a) that obligates the Commission to look beyond the terms of a carrier’s tariff and instead consider the totality of the circumstances from the perspective of the relevant community when analyzing whether a service is discontinued, reduced, or impaired under Section 214.⁸⁴

⁷⁸ Id. at ¶ 18.

⁷⁹ Id. at ¶ 17.

⁸⁰ See, e.g., Id., ¶¶ 17, 34-35, 41-46, 49-52, and 60-63.

⁸¹ Id., 41-44.

⁸² RFC, ¶¶ 115-123.

⁸³ See *2014 Tech Transitions NPRM/DO* ¶ 115.

⁸⁴ RFC, ¶ 115. The Commission notes that modification of the prior Declaratory Order would be in the nature of an adjudication, as opposed to a rulemaking.

From Consumer Advocates' perspective, the interpretation of Section 214 should always be driven by consumer impact. The functional approach to Section 214 will, most frequently, achieve this objective. A functional approach is completely consistent with technology transition, by ensuring that the substituted service gives consumers all of the attributes that they valued in the service being replaced. If there is a seamless transition in which none of the key attributes are affected, then the replacement of technology is a network change and should not trigger a Section 214(a) discontinuance review. However, once a service is proposed to be diminished, from the customer's perspective, then the public interest evaluation under Section 214(a) should occur. Section 214(a) explicitly requires Commission review and issuance of a certificate before a carrier may discontinue, reduce or impair services.

As described in the Baldwin Declaration,⁸⁵ a carrier's tariff may or may not specify all of the key attributes of a service from a customer's perspective. A case in point is the situation where, following Hurricane Sandy, Verizon declined to rebuild its wireline network on New York's Fire Island and the New Jersey Barrier Islands and chose instead to substitute its Voice Link fixed wireless offering. Many customers opposed this plan because Voice Link would not support many features and functions that were available from the wireline network, was incompatible with medical monitoring devices and alarm systems, and would become inoperable during prolonged power outages.⁸⁶ Taking the Fire Island example, the tariff for a basic TDM "voice" service might not specify that the service is compatible with various types of commonly-used customer equipment, or that it does not require an external power source. If the tariff simply says that the service is a communications channel that supports voice calls, then a

⁸⁵ Baldwin Declaration, ¶¶ 59, 64-68

⁸⁶ Id., ¶¶ 64-67

substitution to Voice Link could be described as “equivalent,” when clearly it is not.⁸⁷ On the other hand, there could be some situations in which the tariff description of a service specifies attributes that are material to the customer, even when the replacement service “functions” in an equivalent manner. This concern has been raised by enterprise customers with respect to migration from TDM-based special access services to various dedicated IP-based alternatives.

The Commission asks whether “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...”⁸⁸ and suggests that this proposed approach “will allow all parties to determine clearly when a discontinuance occurs based on objective criteria...”⁸⁹ Especially in the case of the customer service agreements that are rife in the industry today, “agreements” that are unilateral and not subject to any regulatory review are not “objective criteria”⁹⁰ and cannot help in the public interest test of whether discontinuance should be allowed.⁹¹

Likewise, it is unlikely that tariffs today receive substantial scrutiny, especially on the federal level, especially for consumer tariffs. The “filed rate doctrine” cited by the Commission⁹² implied regulatory review and approval; when, as today, neither review nor approval is present, allowing the tariff to govern whether an equivalent service is available does not adequately protect consumers and communities.⁹³

The functional test best protects consumers. It should be retained.

⁸⁷ Id.

⁸⁸ NPRM, ¶ 116.

⁸⁹ Id.

⁹⁰ Id.

⁹¹ See Id., ¶ 117, citing, e.g., Consumers Union Comments, GN Docket No. 14-28, at 7 (asserting that carriers “have unequal bargaining power and dominant market power over consumers.”).

⁹² Id., fns. 169, 171.

⁹³ Id., ¶ 117.

VII. THE PROPOSED ACTIONS ARE PREDICATED ON UNPROVEN CONJECTURE THAT ELIMINATING REGULATORY PROCESSES THAT PROTECT CONSUMERS WILL MAKE A SUBSTANTIAL DIFFERENCE IN EXPANDING INVESTMENT IN THE DEPLOYMENT OF NEXT GENERATION NETWORK FACILITIES AND SERVICES.

For as many times as the ILECs have raised the claim that they are investing more heavily in jurisdictions where rate regulation or exit regulation has been lessened or removed, they have not produced concrete evidence to substantiate this assertion. Over the past two decades, the ILECs have obtained many regulatory concessions in exchange for the promise of more investment, but the track record with respect to their follow-through is checkered at best.

For example, Pennsylvania amended its public utility laws in 1993 and 2004 to provide Pennsylvania ILECs with relaxed rate regulation for basic local service coupled with an obligation to make broadband service (a channel capable of 1.544 Mbps down and 128 kbps up) universally available by 2015 or earlier. According to the Pennsylvania PUC, “despite [Pennsylvania’s] very early broadband adopter status almost twenty-five years ago, the state still has unserved or underserved high cost rural areas.”⁹⁴ The offer of Connect America Fund Phase II support also did not incent Verizon to accept funds to improve the availability of wireline broadband service in eligible portions of Pennsylvania.⁹⁵

It is also important that the Commission recognize that investment in telecommunications infrastructure comes from diverse industry participants, not simply the ILECs.⁹⁶ The reductions in notice requirements that make it more difficult for competitors to create stable and predictable

⁹⁴ See, Pennsylvania Public Utility Commission and Pennsylvania Department of Economic Development Petition for Reconsideration, Modification and Waiver, WC Docket No. 10-90 (filed April 19, 2017), Petition at 4, 5-8. The Pennsylvania PUC and DCED request modification of the Commission’s 2017 CAF II Reverse Auction Order. See, In Re: Connect America Fund, WC Docket No. 10-90, Report and Order and Order upon Reconsideration, (rel. March 20, 2017)(“2017 CAF II Reverse Auction Order”).

⁹⁵ See, 2017 CAF II Revenue Auction Order., ¶¶ 8, 50.

⁹⁶ See Susan M. Gately and Helen E. Golding, S.M. Gately Consulting LLC, The Benefits of a Competitive Business Broadband Market (April 2013).

business plans for themselves and their customers will inevitably dampen their ability and incentive to invest.

Even if it could be demonstrated that ILECs' overall investment can be increased by permitting them to simply walk away from copper – which has not been demonstrated -- it is fundamentally anti-consumer to permit the ILEC to sacrifice the legitimate interests of customers who still rely on the integrity of their existing copper network, for the ostensible purpose of providing the ILEC with additional capital to invest *elsewhere*. If the ILEC actually intends to replace copper facilities in a community with a fiber network, then it has a perfectly adequate glide path to do so under the existing copper retirement and service discontinuance rules.

VIII CONCLUSION

As shown by Consumer Advocates' comments, neither the changes to the copper retirement process nor the changes to the service discontinuance process proposed in the NPRM are necessary or in the public interest. This is especially true given the brief period since the Commission adopted the 2015 Technology Transitions Order. The rules adopted in 2015 protect consumers, and do not discourage providers from investing in new technology or advanced services.

Respectfully submitted,

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