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
	)	
	)	

PUBLIC KNOWLEDGE PETITION FOR RECONSIDERATION AND MOTION TO HOLD IN ABEYANCE

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EXECUTIVE SUMMARY

Public Knowledge urges the Commission to reconsider the section 214(a) discontinuance rules promulgated in the 2018 Report and Order, and to hold this Order in abeyance until the U.S. Court of Appeals for the Ninth Circuit issues a judgment in the pending litigation involving the interpretation of section 214 has been resolved. Namely, the Commission should eliminate the alternative options test and rely solely to the adequate replacement test to determine whether to grant applications for discontinuance, and to reinstate the 180-day comment period for customers of discontinued services.

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I. INTRODUCTION

Pursuant to section 405 of the Communications Act of 1934, as amended, and section 1.429 of the Commission's rules,[1] Public Knowledge hereby seeks reconsideration of the *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Second Report and Order* ("*Order*") adopted by the Federal Communications Commission ("FCC" or "Commission") on June 7, 2018.[2]

The Commission's haste to eliminate consumer protections in the procedures that telecommunications carriers use to discontinue legacy voice services and transition to IP networks under section 214(a) of its rules led the FCC to adopt rules contrary to the "public convenience and necessity" duty it is charged to uphold in the Communications Act.[3] As the Executive Branch has recently made clear, the Commission's changes to its rules and procedures regarding copper retirement and discontinuation of legacy telecommunications services pose a threat to the ability of federal agencies to complete their missions, particularly agency offices and federal installations in remote and sparsely populated areas of the country.[4]

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[1] 47 U.S.C. § 405, 47 C.F.R. § 1.429.
[2] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, *Second Report and Order*, FCC 18-74 (adopted June 7, 2018) ("*Order"*).
[3] 47 U.S.C. § 214(c).
[4] Letter from David J. Redl, Assistant Secretary for Communication and Information and Administrator, National Telecommunications and Information Administration, U.S. Department of Commerce, to Ajit Pai, Chairman, Federal Communications Commission, WC Docket No. 17-84 (filed July 18, 2018) ("NTIA Letter") *available at* https://ecfsapi.fcc.gov/file/10719966416025/NTIA%207-19-18%20Letter%20(Redl%20to%20Pai)%20re%20WC%20Dkt%20No.%2017-84.pdf.

The Commission's prior copper retirement rules served the public interest, carefully balancing the needs and expectations of consumers with the interests of telecommunications service providers, by protecting consumers while also facilitating deployment of next-generation networks.[5] In contrast, the *Order* ignores the record, eviscerating the consumer safeguards the Commission previously established to ensure that no American loses access to critical communications when carriers discontinue legacy networks and transition to new technology. In promulgating the *Order*, the Commission ignored its prior findings of fact, giving credence solely to comments in line with its favored predetermined outcome, without adequately explaining why the agency disregarded the facts and presentations that it previously found to be persuasive.

The Commission should reconsider the *Order* in light of concerns by the National Telecommunications and Information Administration ("NTIA"), expressing that the agency's new section 214 network discontinuation procedures could compromise critical federal agency missions. Additionally, the Commission should reconsider the *Order* because the alternative options test is wholly inadequate to ensure consumers have adequate, reliable, replacement service, and because the adoption of the alternative options test is entirely unsupported by the record before the agency.

Specifically, the Commission should reconsider the complete dearth of performance standards in the new "alternative options" test,[6] the shortened timeframe during which affected

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[5] *See* Technology Transitions, et al., GN Docket No. 13-5, WC Docket No. 13-3, RM-11358, *Declaratory Ruling, Second Report and Order, and Order on Reconsideration*, 31 FCC Rcd 8283 (2016) ("*2016 Technology Transitions Order*"); Technology Transitions, et al., 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*, 30 FCC Rcd 9372 (2015) ("*2015 Technology Transitions Order*").

[6] *See Order* at 13-17 ¶¶ 29-34.

consumers may comment and appeal,[7] and the faulty and unsupported premise that market-based incentives are sufficient to ensure that carriers provide suitable replacement services. [8]

II. THE COMMISSION MUST RECONSIDER THE ORDER IN LIGHT OF THE HARM THE ALTERNATIVE OPTIONS TEST IS LIKELY TO CAUSE TO FEDERAL AGENCIES AND CONSUMERS IN RURAL COMMUNITIES.

A. The Alternative Options Test is Likely to Jeopardize Federal Government National Security and Public Safety Functions.

As NTIA recently explained, the *Order's* discontinuance procedure is likely to have an adverse effect on the missions of various federal agencies. This is particularly true in less-populated areas that are likely to be negatively impacted by the fact that the *Order*'s discontinuance process does not require carriers to prove that replacement services will provide service substantially similar those being discontinued:

> "NTIA remains concerned… that streamlined regulatory requirements may place federal departments and agencies that rely on services subject to discontinuance in the untenable position of losing access to critical national security and public safety communications functionality…. NTIA encourages the Commission to put in place a process to enable expanding as necessary the list of protected key applications and functionalities." [9]

NTIA also expressed concern that market-based incentives may be insufficient to compel carriers to ensure adequate replacement services, acknowledging that "oftentimes, carriers in [remote or less populated] areas lack the incentives that exist in more populated areas and, thus, negotiation alone may not produce contractual provisions that adequately serve federal users' needs."[10] Taken as a whole, this letter should lead the Commission to reconsider the alternative options test, which is predicated upon the flawed idea of market-based incentives, because use of

[7] *See Id*. at 4 ¶ 7
[8] *Id.* at 10 ¶ 22
[9] NTIA Letter at 1-2.
[10] *Id*. at 2.

the alternative options test has great potential to harm both consumers and compromise critical federal missions and national readiness in areas of public safety and national security.

Specifically, NTIA noted that any replacement test without quantifiable performance standards has inherent shortcomings in its ability to ensure adequate replacement services, and that market-based incentives may be insufficient to compel carriers to provide sufficient replacement services.[11] Federal government work involving "critical national security and public safety functions" could be gravely impacted if the Commission allows carriers to discontinue service without ensuring that replacement services meet *specific* performance metrics.[12] Thus, the Commission should reconsider the *Order* in light of the concerns raised by NTIA.

B. Reliance on the Commission's Inaccurate Broadband Availability Maps is Likely to Harm Consumers in Rural Communities.

The Commission should also reconsider the *Order* because it has become clear that that under the alternative options test, consumers whose provider chooses to discontinue legacy services could be left completely unserved by a facilities-based voice service provider. Under the alternative options test, a discontinuing service provider is entitled to an expedited application process if it demonstrates that:

> "(1) it provides stand-alone interconnected VoIP service throughout the affected service area, and (2) at least one other stand-alone facilities-based voice service is available from another provider throughout the affected service area"[12]

However, the Commission's broadband maps, which would presumably guide its analysis regarding whether another stand-alone facilities-based service is available in the affected service area, have been demonstrated to be woefully inaccurate and downplay the extent of the digital divide and the dearth of broadband choices available to consumers.

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[11] *Id*. at 2-3.
[12] *Id*. at 3.
[12] *Order* at 14 ¶ 30 (internal citations omitted).

The fact that the FCC's broadband maps are an inaccurate reflection of the actual services available to consumers, particularly in rural areas, is well known. Earlier this year, Congress enacted the Consolidated Appropriations Act, 2018, which allocated $7.5 million to the NTIA to update the national broadband availability map.[13] In March, a bipartisan group of ten senators wrote to Chairman Pai to express "serious concerns" about the inaccuracy of the Commission's broadband availability map, that the map fails to recognize numerous gaps in coverage areas, and mischaracterizes rural areas throughout many states as served by 4G LTE mobile service where that service is not actually available.[14] In May, a bipartisan group of thirty senators reiterated their frustration with the inaccuracy of the Commission's broadband availability maps.[15]

Because the Commission's broadband availability maps are outdated and inaccurate, the maps must not be used as a basis for the Commission's decision making regarding the availability of alternative providers serving customers whose carrier files a 214(a) discontinuance application. Thus, the Commission must reconsider the *Order* and its alternative options test to ensure that customers are not left without a provider if their existing carrier applies to discontinue service.

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[13] Consolidated Appropriations Act, 2018, Pub. L. No. 115-141

[14] Letter from Senator Roger Wicker, et al. to to Ajit Pai, Chairman, Federal Communications Commission (Mar. 8, 2018), *available at* https://www.wicker.senate.gov/public/_cache/files/f03ebd53-a4fe-4b5d-b21e-594a3180d0f5/letter-to-fcc-re-mf-ii.pdf

[15] Letter from Senator Roger Wicker, et al. to Ajit Pai, Chairman, Federal Communications Commission (May 30, 2018), *available at* https://www.wicker.senate.gov/public/_cache/files/96625dc0-cbc9-456f-a529-4c6d27fc6424/053018wickerhassanmoranmfiiletter-final.pdf.

III. THE COMMISSION MUST RECONSIDER THE ORDER BECAUSE THE RULEMAKING PROCESS AND PRODUCT IS INCONSISTENT WITH THE PUBLIC INTEREST AND THE RECORD.

A. The Alternative Options Test and Brief Period for Consumer Comments on Discontinuations is Arbitrary, Inconsistent with the Record, and Does Not Serve the Public Interest.

The Commission must reconsider its inconsistent rulemaking in regard to three matters: first, the Commission must reconsider the inconsistency between the *2016 Technology Transition Order's* stringent performance standards for replacement services and the *Order*'s complete lack thereof. Second, the Commission must reconsider its inconsistent approach rulemaking in regard to the amount of time consumers have to file comment. These arbitrary and unexplained decisions are contrary to the record and warrant reconsideration.

In 2016, the Commission created specific rules to ensure that no American consumer would be left behind and unconnected when carriers discontinued legacy services. Among these rules is the adequate replacement test, which includes specific performance metrics to ensure that consumers would not be left without access to vital services when carriers discontinue legacy copper networks. Under the adequate replacement test, applicants for discontinuance were required to demonstrate that there is at least one other service in the affected area that provided: (1) substantially similar network performance as the service being discontinued, (2) substantially similar service availability as the service being discontinued, and (3) coverage to the entire affected geographic service area, with each prong of the test having quantifiable metrics for carriers to prove adequacy.[16] The *2016 Technology Transitions Order* made clear that it intended not only to protect consumers and competition, "but also to do so in a manner that facilitates the benefits of technology transitions and promotes their occurrence with all reasonable

[16] *2016 Technology Transitions Order* at 8313-8329 ¶¶ 88-125.

efficiency."[17] The process adopted prior to and in 2016 ensured "that the technology transitions broadly benefit consumers, including those who still value certain applications and functionalities associated with legacy voice services"[18] while still "provid[ing] the appropriate balance of allowing for public comment and objections while retaining the opportunity for speedy and effective resolutions" [19] The *2016 Technology Transitions Order* was a compromise;[20] the Commission adopted suggestions from carriers that allowed them to qualify for streamlined discontinuance treatment if a previous service from that carrier had already qualified, while simultaneously enshrining consumer protections in the form of the three-prong adequate replacement test.[21]

The new alternative options test, however, is little more than a blank check for carriers to discontinue service without regard to the impact on consumers. The alternative options test allows carriers to point to a third-party legacy voice service in the affected area as an adequate replacement. In terms of important metrics like network performance and data latency, the new test lacks any metrics to ensure that replacement services will adequately replace those proposed for discontinuance. The *2016 Technology Transitions Order* called these aforementioned performance metrics "an objective tool for determining when an application will be eligible for automatic grant"[22] and disagreed with commenters who asserted that "imposing any new adequate replacement test will be harmful to the success of technology transitions."[23] The *Order* adopted the alternative options test as though the Commission's 2016 fact-finding never

[17] *Id*. at 8309 ¶ 76.
[18] *Id*. at 8343 ¶ 163.
[19] *Id*. at 8309 ¶ 76
[20] *Id*. at 8336 ¶ 152
[21] *Id*. at 8304-05 ¶ 64.
[22] *2016 Technology Transitions Order* at 8320 ¶ 103.
[23] *Id*. at 8310 ¶ 80.

occurred. The Commission also abdicated its statutory duty to promote the public interest; the alternative options test considers only at carrier interests—antithetical to the record of facts developed by the record in the *2016 Technology Transitions Order*. Where the Commission previously looked to carriers to demonstrate that a third-party service is an adequate replacement, the *Order* shifts the burden onto American consumers to flag inadequate replacement services—all without justification on the record.

Without any performance standards whatsoever enshrined into the new alternative options test, the universe of possible consumer harms is vast. The *2016 Technology Transitions Order* and record clearly demonstrate that the Commission found it necessary to institute specific performance metrics:

> "…our public interest analysis demands that applicants provide objective evidence showing a replacement service will provide quality service and access to needed applications and functionalities. We agree with commenters that IP-based and other new services should demonstrate that they meet consumers' and providers' fundamental needs through satisfaction of performance standards, compliance with Commission rules, and harmony with key legacy functionalities and applications *before we grant permission to remove existing voice services from the marketplace*." [24]

But with the alternative options test, the Commission has effectively abandoned its public interest analysis by dropping requirements that carrier applicants provide objective evidence showing that a replacement service will meet consumer's needs in the event of legacy discontinuance. It is predictable that if carriers can satisfy one of two replacement tests, and the alternative options test is less stringent, carriers will uniformly choose the alternative options test over the adequate replacement test every time. The Commission is not complementing[25] its well-crafted, effective adequate replacement test—it is undermining it and effectively *eliminating* it by offering a more carrier-friendly version. Moreover, the Commission has not explained why it

[24] *Id*. at 8309 ¶ 75.
[25] *Order* at 14 ¶ 31.

chose to ignore the previous record and should reconsider its adoption of the alternative options test in light of the full factual record. Specifically, the Commission should return to the adequate replacement test framework from the *2016 Technology Transitions Order* and abandon the alternative options test.

The Commission must also reconsider the condensed ten day timeframe the *Order* established for consumers have to file comments in opposition to discontinuance[26]. Again, the *Order*'s conclusion stands in stark contrast *2016 Technology Transitions Order* and is unsupported by the record. In giving consumers affected by discontinued services—overwhelmingly likely to be consumers in less-populated areas—so little time to find a discontinuance alert (which is unlikely in and of itself) and make themselves heard, the Commission has not only undoubtedly provided a downgrade in service, but has adopted rules inconsistent with facts in the 2016 record and consumer needs and expectations.

Millions of rural Americans still rely on the copper network and will be at risk of losing adequate communication with the outside world should the Commission allow carriers to discontinue services without a sufficient period for comment and appeal. This Commission has already eliminated protections for consumers when it stopped requiring carriers to inform end-users of the discontinuance of traditional copper-wire services; now, it is doing further disservice to these consumers by only giving them a brief ten day window to comment and appeal (if they are fortunate enough to even receive a notice of discontinuance.) Carriers insist—and the Commission seems to believe—that the switch from copper infrastructure has been compelled by

[26] *Id*. at 3-4 ¶ 7.

consumers themselves, however, "it's not clear how much of the transition has been voluntary, and how much has been customers pushed to the new technology."[27]

This Commission has previously found that mandating notice and comment rules is necessary, stating that "the record reflects numerous instances in which notice has been unreliable absent a regulatory mandate,"[28] and agreed with commenters who said that "at a minimum, consumers should have a well-publicized method of contacting human beings who can answer these questions. A single mailed letter or online FAQ is unable to answer the specific and often individualized questions that consumers will have during the transition." [29] The *Order* has disregards these previous findings of fact by and slashes the likelihood that consumers will receive meaningful notice and opportunity to comment.

There are also instances of specific harm that the Commission appeared to purposefully overlook during its 2018 rulemaking. Copper infrastructure supports a variety of applications that newer, more advanced technology either cannot support or cannot support reliably, and consumers still depend on access to this infrastructure for critical functions like medical device support, fire alarms, and connecting credit card readers for small businesses. For instance, a New Jersey man had to rely on a friend's network connection for his pacemaker, which needed to be checked by phone.[30] Hurricane Sandy took out the copper infrastructure in parts of New Jersey in 2012, and carriers have lagged in replacing it, largely because it is more profitable for them not to. Other areas affected by the storm, like New York's Fire Island, house small, seasonal

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[27] Carrie Wells, *Your Old Landline Could Get an Early* Retirement, Baltimore Sun, Jan. 31, 2015, http://www.baltimoresun.com/business/bs-bz-cutting-landlines-20150131-story.html
[28] *2015 Technology Transitions Order* at 9397 ¶ 41.
[29] *2016 Technology Transitions Order* at 8351 n.476 (quoting Public Knowledge et al. Comments).
[30] *Telephone Companies Are Abandoning Copper Phone Lines*, The Plain Dealer, July 8, 2013, https://www.cleveland.com/business/index.ssf/2013/07/telephone_companies_are_abando.html

businesses that depend on copper infrastructure simply to run credit cards.[31] These consumers had little recourse, and have been left on the wrong side of the digital divide due to their service provider's decision not to adequately replace the legacy network—and these occurances are not an anomaly of the past: American consumers left in the devastation of recent natural disasters like Hurricane Maria in Puerto Rico, Hurricane Harvey in Texas, and wildfires in California also face additional burdens to connectivity (with less recourse as discontinuances proceed) if the Commission moves forward and implement's the *Order*'s roll back of key consumer protections. The Commission should reinstate the 180-day notice period for customers of discontinued services in order to adequately provide notice and comment opportunities and to fulfill the Commission's statutory duties to serve the public interest.

B. The Commission's Reliance on Market Incentives to Ensure Adequate Replacement Service and Notice of Discontinued Networks is Misguided and Unsupported by Evidence.

The Commission must reconsider its unproven overriding assumption that market-based incentives are sufficient to ensure that customers will retain access to adequate service and have sufficient notice of a pending discontinuation of service. The record in the *2016 Technology Transitions Order* and NTIA's recent letter have amply demonstrated the inadequacy of the logic guiding the *Order*'s conclusions. The Commission's prior section 214 discontinuance rules were established on a full and comprehensive record from prior proceedings that established the necessity of the guardrails the Commission adopted in 2015 and 2016 to protect consumers from being stranded without access to adequate and reliable communications service. The contents of those records that demonstrate why the Commission its adopted the service discontinuance rules

[31] *Id.*

in the *2016 Technology Transitions Order* and should have been considered as the Commission eviscerated and undermined the agency's prior consumer protections.

The Commission must reconsider its belief that market-based incentives are sufficient to ensure that carriers provide adequate replacement services to consumers in the event of a service discontinuance. NTIA acknowledged the fact that market-based incentives may not be sufficient to ensure satisfactory service replacement in the event of a discontinuance.[32]

Fire Island serves as a model example of failed market incentives of telecommunications service providers. Carriers like Verizon, guided by the market, decided that the aftermath of Hurricane Sandy presented the perfect opportunity to entirely abandon their copper infrastructure in those place and test out new technologies. Verizon then provided consumers on New York's Fire Island with VoiceLink, an experimental service that could not handle basic telephone service traffic, including services like fax, DSL, and reliable e911 applications.[33] Customers filed comments with the New York Department of Public Services that they were "extremely disappointed," "horrified," "very frustrated," and had "grave distress and dissatisfaction" about Verizon's plan to stop fixing their legacy lines and giving them an inferior wireless replacement.[34] As the Commission has consistently found, Congress' intent in prohibiting

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[32] *See* NTIA Letter at 2.

[33] Verizon Voice Link Terms of Service, *available at http://www.verizon.com/cs/groups/public/documents/adacct/ccf12092_voicelink_tos_3_4_13.pdf*

[34] *See generally* Keith H. Gordon, Assistant Attorney General, New York Office of the Attorney General, *Letter to Jeffery Cohen, Secretary of the New York State Public Service Commission* (May 15, 2013), http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={6BA6CC48-2D06-4B1D-81BA-D1E1F88DE6A3}; Thomas F. Barraga, Suffolk County Legislator, *Letter to Jeffery Cohen, Secretary of the New York State Public Service Commission* (May 16, 2013), http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={F1D6CCAD-ADDA-4141-AB5C-8F9F3860A9DA; Harold Feld, *Verizon: Sandy Victims Should Be Customers, Not Guinea Pigs*, Public Knowledge (May 9, 2013), https://www.publicknowledge.org/news-blog/blogs/verizon-sandy-victims-should-be-customers-not.

carriers from discontinuing service without authorization was expressly to prevent the sort of disruption that occurred on Fire Island after Hurricane Sandy, when Verizon sought to replace legacy copper-line service with insufficient and unreliable VoiceLink service.[35]

It is also clear that relying exclusively on market incentives to ensure that carriers provide adequate replacement services has not worked and cannot serve as the silver bullet solution the Commission has presented it as. Merely adopting the favored proposals of the largest telephone companies and their trade associations and flatly asserting that those policies best serve the public interest, as occurred here, is inappropriate. Without a robust consideration of the consumer protections previously adopted by the Commission and the shortcomings of the *Order*'s approach that have been demonstrated in the records of multiple proceedings makes clear that the Commission ignored the record of evidence before it and adopted policies that are likely to leave many consumers behind.

IV. MOTION TO HOLD THE SECOND REPORT AND ORDER IN ABEYANCE UNTIL THE RESOLUTION OF PENDING LITIGATION.

Litigation is currently pending in the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit")[36] challenging the Commission's *Wireline Infrastructure Order*,[37] the outcome of which is crucial to all rulemakings under section 214 of the Communications Act. Public Knowledge therefore moves to hold *Order* in abeyance until pending litigation is resolved.

With this case still pending, the definition of a term foundational to section 214 discontinuance procedures is at issue. The Court's consideration of the meaning of the term

[35] See Comments of Verizon, WC Docket No. 17-84, at 30-32 (filed June 15, 2017).
[36] *Greenlining Inst., et. al v. FCC*, No. 17-73283 (9th Cir.) (filed Dec. 18, 2017).
[37] Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84, *Report and Order, Declaratory Rulemaking, and Further Notice of Proposed Rulemaking*, 32 FCC Rcd 11128 (2017).

"service" within section 214 has direct bearing on the *Order*. Further, the Ninth Circuit's is also considering whether the Commission acted in an arbitrary and capricious manner in violation of the Administrative Procedure Act when it promulgated the *Wireline Infrastructure Order*. The Commission should therefore hold this proceeding in abeyance to avoid the implementation of the *Order*, which may soon become unlawful in light of the Court's decision.

V. CONCLUSION

For the foregoing reasons, the Commission should grant this Petition for Recosideration and Motion to hold its *Order* in abeyance.

Respectfully submitted,

/s/_____
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