STATEMENT OF
COMMISSIONER AJIT PAI,
CONCURRING IN PART AND DISSENTING IN PART

Re: *Ensuring Customer Premises Equipment Backup Power for Continuity of Communications*, PS Docket No, 14-174, *Technology Transitions*, GN Docket No. 13-5, *Policies and Rules Governing Retirement Of Copper Loops by Incumbent Local Exchange Carriers*, RM-11358, *Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, *AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593.

In the story of Chicken Little, an acorn falls on a young hen's head, and she becomes convinced that the sky is falling. Some in Washington have had that same reaction to the IP Transition. They evidently believe that the replacement of aging twisted pairs of copper with fiber and IP-based services presages disaster.

But I believe we must act on concrete evidence, not hypothetical harms. And the fact is that the IP Transition promises all Americans a brighter future. Fiber provides better service quality and increased network capacity. IP networks hold the promise of more effective emergency response through Next Generation 911, better healthcare through telemedicine, and improved educational outcomes through distance learning. Judging from the 40 million residential landlines shed in the last five years, consumers prefer these new services because they offer more bang for fewer bucks. Indeed, more residential consumers now subscribe to interconnected VoIP than plain old telephone service.[1]

Given this context, I have serious reservations about today's item. I worry that we are well on our way to becoming like Ducky Lucky, Goosey Loosey, and the other characters who join in Chicken Little's hysteria. All too much ink is spilled in this item discussing every conceivable harm that might come with the IP Transition. Not enough mention is made of its benefits or of ways to incentivize companies to upgrade their networks and roll out new services. I am therefore concerned that the end result of this proceeding will be rules that frustrate rather than further the IP Transition, regulations that deter rather than promote fiber deployment, and requirements that slow rather than expedite the availability of high-speed broadband throughout our nation.

Nonetheless, some of the questions asked here are questions that must be asked—so I am glad that we are asking them. I also appreciate my colleagues' willingness to temper the harsher edges of the *Notice* and include questions I suggested. For example, I am grateful that the item now includes my simple alternative to more invasive battery backup mandates: a straightforward requirement that all telephone companies make available at least one phone that can use commercially available batteries in case of power outages.[2] Similarly, I am pleased that we ask about the costs of compliance and the benefits of mandates given consumer usage patterns.[3] For instance, now that most consumers have mobile phones, I doubt all of them will want to pay the cost of a new carrier-installed battery backup for their landline. And Commissioner O'Rielly deserves credit for leading the charge against a proposal for carriers to supply batteries to Walmarts and 7-Elevens in disaster-stricken areas. For all of these reasons, I will vote, with some trepidation, to concur with the *Notice*.

But I must dissent from today's *Declaratory Ruling*, which expands the scope of section 214 of

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[1] *See* FCC, Local Telephone Competition: Status as of December 31, 2013, at Figure 2 (Wireline Comp. Bur. Oct. 2014) (noting 37,683,000 residential interconnected VoIP lines versus 37,572,000 residential switched access lines in 2013); FCC, Local Telephone Competition: Status as of December 31, 2008, at Figure 1 (Wireline Comp. Bur. June 2010) (noting there were 78,174,000 residential switched access lines in 2008).

[2] *Notice* at para. 42.

[3] *Notice* at para. 41.

the Communications Act. For those not steeped in telecom arcana, section 214 is the mother-may-I provision of Title II. If a carrier wants to sell its lines, discontinue a legacy service that's no longer of use to most consumers, or exit the business entirely, it must first ask the FCC for permission. It isn't a speedy process. The FCC sometimes sits on these requests for months or even years.

By its very nature, Section 214 is about as close to governmental central planning as you can get in free-market America. Perhaps for this reason, the FCC until today interpreted it judiciously. For example, it's been hornbook law for 35 years that "use of the Section 214 discontinuance process to challenge changes in rates, terms, and conditions of service would be inappropriate."[4] Similarly, even if a network change means someone "will no longer be able to use [certain] equipment"—say, a fax machine—that does "not present a Section 214 question."[5] In other words, it's only necessary for a carrier to invoke the section 214 process when it seeks to discontinue entirely a particular service—not changes to the features of that service.[6]

But the Commission now decides to require carriers to seek permission from the FCC before discontinuing almost "every [network] feature no matter how little-used or old-fashioned."[7] This abrupt reversal of decades-old policy is unnecessary and counterproductive.[8] The Commission has no business micromanaging each and every change that a carrier makes to its network.

To get a sense of how intrusive this decision is, consider these comparisons from the application layer. Imagine if Google had to seek regulatory permission to change features on Gmail or transition to

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[4] *Western Union Telegraph Company Petition for Order to Require the Bell System to Continue to Provide Group/Supergroup Facilities*, Memorandum Opinion and Order, 74 FCC.2d 293, 295, para. 6 (1979) (*Western Union*).

[5] *Id.* at 297, para. 9.

[6] *Id.* at 295, n.4 (noting that Congress's main concern in passing section 214 was loss of service during wartime, such as "abandonment of existing telegraph offices" or "discontinuance of service to military establishments and industries"). Instead, the features, terms, and conditions of service are supposed to be "established through the tariffing process." *Id.* at 295, para. 6.

[7] *Declaratory Ruling* at para. 118. This may be the test. But it's hard to say for sure since it's restated several different ways throughout: "The relevant task . . . is to identify the service the carrier actually provides to end users. In doing so, the Commission takes a functional approach that evaluates the totality of the circumstances." "[A] carrier's tariff definition . . . is important evidence." "Also relevant is what the 'community or part of a community' reasonably would view as the service provided by the carrier." "An important factor in this analysis is the extent to which the functionality traditionally has been relied upon by the community." "If relevant evidence indicates that the 'service' provided includes features outside of the tariff definition, the Commission must under section 214(a) treat those features as part of the 'service' for which prior approval to discontinue must be sought." The Commission "applies a functional test that takes into account the totality of the circumstances from the perspective of the relevant community or part of a community." "[N]or are we saying that section 214(a) always will be triggered by proposed changes to . . . prior features." *Declaratory Ruling*, *passim*.

[8] The Declaratory Ruling asserts that the "decision here is [not] a departure from *Western Union*" because the "discussion and analysis [cited above] is specific to the carrier-to-carrier context." *Declaratory Ruling* at note 227. This is a rather odd charge given that all three citations offered by the ruling in that same footnote are specifically from the carrier-to-carrier context. *See id.* (citing *Graphnet, Inc. v. AT&T Corp.*, File No. E-94-41, Memorandum Opinion and Order, 17 FCC Rcd 1131 (2002) (adjudicating a dispute between two carriers); *Southwestern Bell Telephone Company et al. Applications for Authority Pursuant to Section 214 of the Communications Act to Cease Providing Dark Fiber Service*, File Nos. W-P-C-6670, W-P-D-364, Memorandum Opinion and Order, 8 FCC Rcd 2589, 2597, para. 42 (1993) (discussing "carrier-to-carrier interconnection relationships"); *Western Union*, 74 FCC.2d at 296, para. 7 (discussing "carrier-to-carrier service offerings")). And it falls flat for anyone who actually reads *Western Union* given that the language I cite discusses the "relationship between Sections 201–205 and Section 214(a) of the Act" generally (and applies that relationship to the facts at hand), whereas the discussion of "carrier-to-carrier service offerings" is "[a]nother matter." *Compare Western Union*, 74 FCC.2d at 296–97, paras. 6, 9 & n.4, *with id.* at 296, para. 7.

Google Inbox. Or if Facebook had to beg permission before changing the layout of users' NewsFeeds. Or if Twitter couldn't make its mobile platform more user-friendly without the FCC's say-so. Currently, nobody would countenance that level of government intrusion into technology companies' business decisions (although watch out if the Commission heads down the Title II path). But that's exactly what the Commission does today with respect to transmission services.

Dramatically expanding the scope of the section 214 permission-seeking process means that carriers will have to keep investing in legacy copper networks to support service features that may be used by few if any actual consumers. This *Hotel California*-style regulatory approach condemns carriers to checking out of copper any time they like, but never being able to leave.

And ultimately, this will be very bad for the American consumer. Every dollar wasted maintaining last century's fading technology is by definition a dollar that cannot go to next-generation networks. You can't have it both ways, making carriers connect using copper but then decrying their failure to invest in fiber. You can't complain about the alleged broadband bottleneck held by one part of the industry when you prevent a would-be competitor from transitioning fully to IP-based networks. All this means that areas with the lowest profit margins—low-income areas, rural areas, and others—must wait that much longer for 21st century service.

There's another problem here: We never asked the public to weigh in on this issue. That's not how we are supposed to operate. Usually, if there's a matter of substantial public concern, we solicit public comment so that all stakeholders—from consumers to carriers—have an opportunity to let us know what they think. But when I asked to transform these conclusions into questions as part of today's *Notice*, I was told that the sky was falling, that carriers might upgrade their networks without FCC permission, and those upgrades might affect someone somewhere. Such hypothetical harms on the horizon are no reason to disregard the well-established process for getting public input.

At the end of the most common version of Chicken Little, a fox lures the title character and her friends into his lair and eats them. The moral of the story, of course, is to make decisions logically and not to succumb to panic and hysteria. The Commission would do well to heed that lesson as we move forward in this proceeding and others impacting the IP Transition. For if we don't, it will be the Commission that is standing in the way of progress that would benefit the American people.