

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

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

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COMMENTS OF CORNING INCORPORATED

Corning Incorporated (“Corning”) hereby respectfully submits the following comments in response to the Commission’s Notice of Proposed Rulemaking in the above-captioned proceedings.¹

INTRODUCTION AND SUMMARY

In 1970, Corning invented the first commercially viable low-loss optical fiber, a breakthrough innovation that changed the world. Today, there are more than 1.5 billion

¹ *Ensuring Customer Premises Equip. Backup Power for Continuity of Communications; Technology Transitions*, Notice of Proposed Rulemaking and Declaratory Ruling, FCC 14-185, GN Docket No. 13-5 (Nov. 25, 2014) (“NPRM”).

kilometers of optical fiber installed around the globe.² Fiber networks have revolutionized data transmission, and in the process, brought millions of new jobs to the United States and added tens-of-billions of dollars to its GDP annually. The symbiotic relationship between fiber and Internet Protocol (“IP”) transmission has spurred the development of new, bandwidth-hungry applications that possess enormous promise. As a result, activities that were unimaginable just a few short years ago now occur every day—literally at the speed of light.

The regulatory environment created by the Commission has been essential to the success of this communications revolution. The assurance to service providers that they could invest in new technology free of the burdensome requirements applicable to legacy networks drove deployment and innovation. And it necessarily rested on the understanding that once new networks were deployed, old ones could be retired, yielding cost savings and other efficiencies.

Unfortunately, now that significant fiber has been deployed and the transition to IP-based networks is well underway, the Commission is threatening to undo the regulatory framework that realigned investment incentives to facilitate these deployments in the first place. Instead of celebrating the fact that millions of American consumers are now relying on new technology, the Commission appears to be focused on perceived losses resulting from the retirement of legacy technology—the very goal it sought to achieve just over a decade ago. The Commission should be focused on encouraging the adoption of next-generation packetized-fiber technology instead of trying to improve the legacy technology of the last century.

The proposed rules would harm consumers and slow investment. The proposal to require backup battery power in Consumer Premises Equipment (“CPE”) is grounded in a decades-old assumption that consumers run to their landline telephone in an emergency. In fact, more than

² Corning, *Get the Facts on Optical Fiber!* 3 (2012), available at <http://www.corning.com/opticalfiber/index.aspx>.

40 percent of households do not even have a landline installed, making the proposed rule useless for 40 percent of American homes. This proposed rule also ignores the increased costs to consumers from such an unnecessary requirement. Likewise, the proposal to require notification when copper networks are retired would impose significant costs on carriers and consumers. It would inundate consumers with useless information that is likely to overwhelm and confuse them and, in the case of State governments and the U.S. Department of Defense (“DoD”), is duplicative of other processes already in place. The proposal to condition the retirement of copper and Time-Division Multiplexed (“TDM”) networks on the incumbent local exchange carriers’ (“ILECs”) commitment to providing competitors with wholesale access to their fiber and IP networks would undo more than a decade of successful unbundling policies and discourage future investment.

The proposed rules are not only bad policy, they would also be unlawful. The Commission lacks subject matter jurisdiction to require CPE backup power because the agency would not be regulating these devices while they are engaged in communication by wire or radio. It also lacks statutory authority to require the ILECs to provide notice of copper retirement under Section 251(c)(5). The proposal to condition ILECs’ retirement of copper on the provision of wholesale access to fiber and IP networks would violate Section 251(c)(3). The Commission should reject each of these proposed rules.

DISCUSSION

I. THE PROPOSED RULES TO GOVERN THE TRANSITION FROM COPPER TO IP-BASED NETWORKS WILL HARM CONSUMERS AND REDUCE INVESTMENT IN BROADBAND INFRASTRUCTURE.

The Commission should not adopt any of its proposed rules because they will make it more difficult for ILECs to retire legacy copper networks and transition to packetized fiber networks. They will also increase costs for consumers. And, by making it more difficult for

incumbent carriers to retire legacy networks, the proposed rules will slow the adoption of new packetized fiber technology and discourage further investment in new broadband infrastructure. The Commission should abandon its misguided attempt to slow the transition to new fiber networks because the costs far outweigh any perceived benefits.

A. Requiring CPE Backup Power For IP-Based Voice Services Would Be Unnecessary and Costly.

Consumers today do not need backup power for the landline telephones in their homes. The Commission’s worry—that consumers caught in “catastrophic storms or other major disasters” will be unable “to communicate with public safety officers, first responders and other response workers in order to convey or receive lifesaving information”—is unfounded.³ The Commission assumes that consumers use their “residential landline phones” in an emergency,⁴ but this assumption does not accord with reality. Instead, as the Communications Security, Reliability and Interoperability Council (CSRIC) recently found, “consumers [are] increasingly rely[ing] on their cell phones and other portable devices for emergency communications during a commercial power outage.”⁵

The fact that consumers are relying on their cell phones during an emergency should not be surprising. Today, more than 90 percent of American adults have a cell phone.⁶ By contrast,

³ NPRM ¶ 31.

⁴ *Id.* ¶ 35.

⁵ See CSRIC IV Working Group 10B, *CPE Powering: Best Practices* 19 (Sept. 2014), available at <http://transition.fcc.gov/pshs/advisory/csric4/CSRIC%20WG10%20CPE%20Powering%20Best%20Practices%20Final%20Draft%20v2%20082014.pdf> (“*CSRIC CPE Powering Report*”).

⁶ Maeve Duggan, Pew Research Center, *Cell Phone Activities 2013* (Sept. 16, 2013), (“Fully 91% of American adults own a cell phone.”), available at <http://pewinternet.org/Reports/2013/Cell-Activities.aspx>.

fewer than 60 percent of American households have a landline,⁷ and more than a third of the households that do report that they seldom or never use it.⁸ The move away from landlines is even more pronounced among minorities and the poor.⁹ These data points suggest that many Americans today consider cell phones a necessity and landlines a luxury. It would be a mistake for the Commission to ground a new rule in assumptions from “the past,” instead of acknowledging and accounting for modern realities.¹⁰ The Commission should not try to improve the technology of yesterday; it should be focused on encouraging the adoption of tomorrow’s technology.

Likewise, it would be a mistake for the Commission to assume—without any evidence—that cell phones are somehow ill suited for emergencies. To the contrary, a recent study conducted by the Pew Research Center found that 70 percent of all cell phone owners and 86 percent of smartphone owners had used their phone in the previous 30 days to perform a “just-in-time” activity like “solv[ing] an unexpected problem” or “get[ting] help in an emergency.”¹¹ In

⁷ Stephen J. Blumberg and Julian V. Luke, CDC National Center for Health Statistics, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey 2* (July 2014), available at <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201407.pdf>.

⁸ See *id.* at 4 (“Among households with both landline and wireless telephones, 33.6% received all or almost all calls on wireless telephones.”).

⁹ According to CDC data, 53 percent of Hispanics and 43 percent of blacks live in households without landlines, compared to just 35 percent of whites. Similarly, 56 percent of adults living in poverty live in households without a landline. See *id.* at 3.

¹⁰ NPRM ¶ 35 (“In the past, consumers have relied upon service providers for backup power for their residential landline phones.”).

¹¹ Lee Rainie and Susannah Fox, Pew Research Center, *Just-in-time Information through Mobile Connections* 4 (May 7, 2012), available at <http://pewinternet.org/Reports/2012/Just-in-time.aspx>. Minority populations may be even more reliant on cell phones in certain types of emergencies. The study reported that “African-American cell owners are more likely than whites to have used their phones in the past month to get up-to-the-minute traffic or public transit information: 31% vs. 16%.” This suggests greater reliance on cell phones to obtain essential transit information—“like evacuation orders”—that enable proper action in an emergency. See NPRM ¶ 3.

short, the proposal to require backup power for CPE is a solution in search of a problem, and the Commission should reject it.

In addition to being unnecessary, imposing a backup power requirement would be costly—particularly to consumers. The NPRM acknowledges that imposing a backup power requirement will increase costs for consumers.¹² This is undoubtedly true. A battery backup adds approximately 33 percent to the cost of the Optical Network Terminal (ONT) installed at the customer premises in support of fiber-to-the-home connections. That figure does not include the cost of the additional mounting that the technician must perform during installation of the ONT.¹³ Nor does it include the cost of battery replacement and disposal.¹⁴ All of these costs are ultimately born by the consumer.¹⁵

These are not the only costs. Battery backups can also be inconvenient to consumers. Some may find the additional wiring to be unsightly. Others are bothered by the need to “reset” the unit once commercial power is restored.¹⁶ Still others find the warning indicators associated with the battery backups in some units—loud beeping noises indicating a low battery for

¹² *Id.* ¶ 35 n.109.

¹³ *See CSRIC CPE Powering Report* at 7 (noting that the most commonly used batteries “tend to be large and somewhat bulky”).

¹⁴ The lead-acid batteries used in most ONT installations typically have a life cycle of three-to-five years, and must be recycled at the end of their usable life. *See CSRIC CPE Powering Report* at 7; J.L. Sullivan & L. Gaines, U.S. Dep’t of Energy, Argonne National Laboratory, *A Review of Battery Life-Cycle Analysis: State of Knowledge and Critical Needs* 8-9, 19 (Oct. 1, 2010), available at https://greet.es.anl.gov/files/batteries_lca.

¹⁵ *See CSRIC CPE Powering Report* at 6 (finding that “the cost and maintenance of the UPS and batteries [is] the consumer’s responsibility”).

¹⁶ *See Verizon Support, Reset Battery Backup Unit (BBU) After Power Outage*, <http://www.verizon.com/support/residential/tv/fios/tv/troubleshooting/set+top+boxes+and+dvr/q/uestionsone/123258.htm#> (last visited Jan. 30, 2015).

example—to be an annoyance.¹⁷ In addition, the cost to the consumer to replace a depleted battery often exceeds any perceived benefit. Any of these factors would be reason enough for some consumers to opt-out of battery backups. This is especially so when, as the data above shows, a landline is viewed as a luxury and not the primary form of communication.

Instead of adopting the proposed rule, the Commission should promote the development and implementation of CPE backup power solutions in cooperation with industry, perhaps through the CSRIC. There are at least two advantages to this approach. First, a cooperative industry standard would be more flexible than a rule. Flexibility would allow the Commission to account for new challenges as consumers increasingly substitute wireless service for landlines. It would also allow the agency to better account for improvements in battery design by avoiding an unfortunate scenario where legacy technology is “locked in.”¹⁸ Second, a cooperative standard gives providers the ability to preserve consumer choice. Some consumers may demand long-lasting reliable backup power in their CPE. This could drive innovation through competition. Other consumers may decide that they do not need or want backup power in their CPE. Under a cooperative standard they could “opt-out” and purchase next generation services at lower cost. This would further accelerate adoption of broadband and advance the goals of the *National Broadband Plan*.

¹⁷ See, e.g., AT&T Community Forums, *Why is my back-up battery beeping? And how do I make it stop?!* (Oct. 8, 2013), <https://forums.att.com/t5/Receivers-Battery-Backup/Why-is-my-back-up-battery-beeping-And-how-do-I-make-it-stop/td-p/3601359> (last visited Jan. 30, 2015); Verizon Support, *FIOS box beeps!!!* (Dec. 20, 2012), <http://forums.verizon.com/t5/FiOS-TV-Technical-Assistance/FIOS-box-beeps/td-p/515195> (last visited Jan. 30, 2015).

¹⁸ See *CSRIC CPE Powering Report* at 19 (anticipating “[i]mprovements in battery technology”).

B. Requiring Carriers To Notify Consumers Of The Retirement Of Legacy Facilities Would Be Overwhelming, Confusing, And Unnecessary.

Consumers are inundated with information on a daily basis. Processing this surge of information is taxing and can “adversely affect not only personal well-being but also decision making, innovation, and productivity.”¹⁹ As a result, many consumers actively seek to limit unwanted or unnecessary information, and various federal agencies—including the FCC—try to assist consumers in these efforts.²⁰ As the Commission has observed in other contexts, receiving “unwanted messages . . . can be intrusive and costly.”²¹ The Commission has already recognized that potential in this context, seeking comment in the NPRM as to whether “retail subscribers may find notice to be unnecessary or confusing” and whether the notice would contribute to the “deluge” of consumer information.²²

The answer is yes. Requiring carriers “to provide notice of copper retirements to their retail customers who will be affected by the copper retirement” is unnecessary and would only add to the number of unwanted messages that consumers receive on a daily basis.²³ The vast majority of consumers do not care about the technology behind their residential voice service.²⁴

¹⁹ Paul Hemp, *Death by Information Overload*, Harvard Business Review (Sept. 2009), available at <https://hbr.org/2009/09/death-by-information-overload>.

²⁰ See, e.g., FTC, *Consumer Information: Stopping Unsolicited Mail, Phone Calls, and Email* (Mar. 2011), <http://www.consumer.ftc.gov/articles/0262-stopping-unsolicited-mail-phone-calls-and-email> (last visited Jan. 30, 2015); FCC Consumer Guide, *SPAM: Unwanted Email and Text Messages* (Jan. 22, 2015), available at <http://transition.fcc.gov/cgb/consumerfacts/canspam.pdf>.

²¹ *Id.* at 1.

²² NPRM ¶¶ 62-63.

²³ *Id.* ¶ 61.

²⁴ For the tiny subset of consumers who do care about the technology behind their voice service, information is readily available from carriers and other sources. See, e.g., Verizon, *Differences Between Traditional and FiOS Phone*, <http://www.verizon.com/support/residential/phone/homephone/general+support/fios+phone/ques>

They care only that they have voice service. The issues raised in the NPRM—for example, that LECs are allegedly misleading consumers about their options or failing to advise them about the availability of POTS—prove the point because they have nothing to do with the physical characteristics of the wires in the ground.²⁵ Requiring notice would do nothing to address them, and, in any event, copper retirement is not the proper occasion to attempt to do so. All the proposed rule would do is add to the number of unwanted messages that consumers receive on a daily basis. It is unwelcome and unnecessary.

Providing notice to consumers that nothing has changed could also be confusing. Experience in other contexts suggests that this is the likely result. For example, following a product safety recall, consumers with products that are not affected often worry about the need to do something. This feeling can be so intense that some manufacturers choose to replace items outside the scope of the recall.²⁶ Of course, the safety benefits associated with product recalls outweigh this consumer anxiety. But that is not the case here. The Commission should be careful not to induce unnecessary confusion, leading consumers to worry that their voice services are about to disappear.

The scope of the proposed notice requirement is also unduly burdensome. It contemplates extensive electronic and traditional mailings with content dictated by the

tions+and+answers/95508.htm (last visited Jan. 30, 2015); *Fiber Optic and VOIP Phone Systems*, Consumer Reports (Jan. 2012), <http://www.consumerreports.org/cro/2012/01/surprise-your-high-tech-home-phone-system-could-go-dead-in-an-emergency/index.htm> (last visited Jan. 30, 2015).

²⁵ See NPRM ¶ 19.

²⁶ See, e.g., Hannah Lutz, *Honda owners can request new airbags even if their cars weren't recalled*, Automotive News (Nov. 18, 2014), <http://www.autonews.com/article/20141118/OEM11/141119838/honda-owners-can-request-new-airbags-even-if-their-cars-werent>.

government.²⁷ This is clearly inappropriate in light of the Commission’s observation that the transition from copper to fiber “might have little to no practical impact on retail customers” except where “a technician [must] seek entry to a retail customer’s home.”²⁸ In any such visit, the technician would be available to answer any questions the customer might have. The degree of personalized service and attention that the technician would be able to provide is far superior to sending mass notifications that are likely to be ignored by—or worse confuse—consumers.

Finally, there is no reason for the Commission to require carriers to provide notice to the States or to the DoD.²⁹ State governments and the DoD are sophisticated entities that are more than capable of obtaining information on the retirement of legacy networks. As the NPRM acknowledges, this information is readily available “on the websites of carriers or the Commission.”³⁰ Moreover, these governmental entities are already well aware of relevant information regarding the transition to IP. Providers that replace copper with fiber must coordinate digging and other matters with state and local regulators. And providers participate in a number of bodies that apprise DoD of any national security impacts from changes in the telecommunications infrastructure. To name just one example, industry leaders comprising the National Security Telecommunications Advisory Committee (“NSTAC”) regularly advise the Executive Branch on security matters relating to the telecommunications infrastructure.³¹ There is simply no need to duplicate these functions by requiring additional notice to the States and the DOD.

²⁷ NPRM ¶¶ 63-67.

²⁸ *Id.* ¶ 62.

²⁹ *See id.* ¶ 79.

³⁰ *See id.* ¶ 61.

³¹ NSTAC, Fact Sheet, *The President’s National Security Telecommunications Advisory Committee* (July 2014), available at <http://www.dhs.gov/publication/nstac-fact-sheets>.

C. Requiring Incumbent LECs To Provide Their Competitors With Wholesale Access To IP Network Facilities Would Reverse A Decade Of Successful Policy And Harm Broadband Investment.

The Commission’s proposal to condition Section 214 approval on ILECs providing competitive carriers with “equivalent wholesale access”³² would undermine over a decade’s worth of policy judgments by the Commission that the best way to incentivize the deployment of next generation fiber and IP services is to deny unbundling of these services to competitors.³³ Beginning with the *Triennial Review Order*, the FCC declined to unbundle new fiber deployments and packet-switching technology, explaining that a “bright line” drawn between “legacy technology and newer technology” would accelerate broadband deployment.³⁴ The D.C. Circuit agreed with the Commission,³⁵ and subsequent decisions by the Commission have expressly “retain[ed] the unbundling framework . . . adopted in the *Triennial Review Order*,” including its bright line distinction between legacy and newer technologies.³⁶

This framework has been wildly successful. Since the *Triennial Review Order*, the total number of fixed broadband connections has more than quadrupled from 23 million to 94 million.³⁷ The total number of mobile broadband connections has exploded from 380,000 to

³² NPRM ¶ 110.

³³ *See id.* ¶ 29.

³⁴ *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 16978, ¶¶ 293, 288, 537 (2003) (“*Triennial Review Order*”).

³⁵ *See United States Telecom Ass’n v. FCC*, 359 F.3d 554, 585 (D.C. Cir. 2004) (“*USTA II*”).

³⁶ *See Unbundled Access to Network Elements*, 20 FCC Rcd 2533, ¶¶ 21-22, 33 (2005) (citing *Triennial Review Order* ¶ 293).

³⁷ FCC, Industry Analysis and Technology Division of the Wireline Competition Bureau, *Internet Access Services: Status as of June 30, 2013*, at 11 (June 2014), available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-327829A1.pdf.

more than 181 million.³⁸ Residential fiber connections have also reached an all-time high: as of 2014 more than 10 million homes were connected, and more than 22 million had access to a fiber connection.³⁹ These are not just impressive statistics. Economic studies confirm that these new broadband connections are adding tens-of-billions of dollars to U.S. GDP annually.⁴⁰

But now that “significant fiber deployment and the current technological transition [are] already underway,” the Commission is threatening to renege on the regulatory framework that incentivized these deployments in the first place.⁴¹ Conditioning the discontinuance of legacy service on the ILECs’ commitment to “provid[e] competitive carriers equivalent wholesale access on equivalent rates, terms, and conditions”⁴² would cause two-fold harm. First, it would lock carriers into maintaining legacy facilities that, as the Commission has recognized, have “higher expected operating expenses” than fiber.⁴³ These higher expenses are compounded when maintaining hybrid infrastructure.⁴⁴ Second, it would discourage new investment. As the Commission has explained, “unbundling requirements tend to undermine the incentives . . . to

³⁸ See *id.* at 24, Table 6; FCC, *Industry Analysis and Technology Division of the Wireline Competition Bureau, Internet Access Services: Status as of June 30, 2009*, at 6, Table 1 (Sept. 2010).

³⁹ See FTTH Council, *Fiber to the Home FAQ*, <http://www.ftthcouncil.org/d/do/1209> (last visited Jan. 29, 2015).

⁴⁰ See Executive Office of the President, *Community-Based Broadband Solutions: The Benefits of Competition and Choice for Community Development and Highspeed Internet Access* 5-6 (Jan. 2015), available at http://www.whitehouse.gov/sites/default/files/docs/community-based_broadband_report_by_executive_office_of_the_president.pdf.

⁴¹ NPRM ¶ 29.

⁴² *Id.* ¶ 110.

⁴³ *Connect America Fund*, 28 FCC Rcd 5301, 5315 (2013).

⁴⁴ For example, a carrier maintaining a hybrid network must maintain a workforce capable of servicing both technologies, as well as a back-office system capable of administering the parallel infrastructure.

invest in new facilities and deploy new technology.”⁴⁵ “The effect of unbundling on investment incentives is particularly critical in the area of broadband deployment, since incumbent LECs are unlikely to make the enormous investment required if their competitors can share in the benefits of these facilities without participating in the risk inherent in such large scale capital investment.”⁴⁶ The D.C. Circuit confirmed the Commission’s wisdom and foresight, explaining that “[i]f parties who have not shared the risks are able to come in as equal partners on the successes, and avoid payment for the losers, the incentive to invest plainly declines.”⁴⁷ The Commission should reject the temptation to go down this road and reopen a settled debate.

II. THE COMMISSION LACKS STATUTORY AUTHORITY TO ADOPT THE PROPOSED RULES TO GOVERN THE TRANSITION FROM COPPER TO IP-BASED NETWORKS.

The Commission also lacks the legal authority necessary to adopt the proposed rules to govern the transition from copper to IP-based networks. First, the Commission lacks subject matter jurisdiction to require CPE backup power because the Commission would not be regulating such devices while engaged in communication by wire or radio. Second, the Commission does not possess statutory authority under Section 251(c)(3) to require ILECs to provide notice of copper retirement to consumers and entities other than telecommunications carriers. Third, the Commission’s proposal to condition Section 214 approval on ILECs providing competitive carriers with wholesale access to their fiber and IP networks would violate Section 251 and the Commission’s unbundling regime.

⁴⁵ *Triennial Review Order* ¶ 3.

⁴⁶ *Id.*

⁴⁷ *U.S. Telecom Ass’n v. FCC*, 290 F.3d 415, 424 (D.C. Cir. 2002) (“*USTA I*”); *USTA II*, 359 F.3d at 584-85 (explaining that unbundling requirements are “likely to delay infrastructure investment, with CLECs tempted to wait for ILECs to deploy [broadband-capable loops] and ILECs fearful that CLEC access would undermine the investments’ potential return”).

A. The Commission Lacks Subject Matter Jurisdiction To Require CPE Backup Power.

The Commission has never before attempted to regulate the power source for consumer electronic devices. And for good reason. The Commission lacks statutory authority to regulate consumer electronic devices when they are not engaged in the process of communication by wire and radio. The Commission would plainly exceed the scope of its subject matter jurisdiction if it were to adopt a CPE backup power rule.⁴⁸

The Commission’s subject matter jurisdiction extends to interstate wire and radio communication,⁴⁹ “including . . . apparatus . . . incidental to such transmission.”⁵⁰ The D.C. Circuit has made clear that the Commission can only “regulate apparatus used for the receipt of radio or wire communication while those apparatus are engaged in communication.”⁵¹ In *American Library Association v. FCC*, the D.C. Circuit vacated the Commission’s broadcast flag rule because it regulated television receiver apparatus *after* the transmission of a DTV broadcast.⁵² As the court explained, the Commission’s “general jurisdictional grant does not encompass the regulation of consumer electronics products that can be used for receipt of wire or radio communication when those devices are not engaged in the process of radio or wire transmission.”⁵³ The court rejected the Commission’s argument that it could regulate television receivers “simply because they are apparatus used for the receipt of communications.”⁵⁴

⁴⁸ NPRM ¶ 45.

⁴⁹ 47 U.S.C. §§ 151, 152(a).

⁵⁰ *Id.* § 153(40), (59).

⁵¹ *Am. Library Ass’n v. FCC*, 406 F.3d 689, 704 (D.C. Cir. 2005).

⁵² *Id.* at 700.

⁵³ *Id.*

⁵⁴ *Id.* at 703.

The holding of *American Library Association* squarely applies here. The Commission could not regulate CPE *before* such devices are engaged in transmission by wire or radio any more than the FCC could regulate television receiver apparatus *after* the completion of broadcast transmissions. Like the broadcast flag rule, the CPE backup power rule would “not regulate the actual transmission” of a landline telephone call.⁵⁵ Instead, the rule would regulate CPE before the devices engage in wire transmission by ensuring the device could be used to make a call at some later time during a power outage. “In other words, the [proposed backup power rule] imposes regulations on devices that receive communications [before] those communications have occurred; it does not regulate the communications themselves.”⁵⁶ Because CPE “are not engaged in ‘communication by wire or radio’ when they are subject to regulation under” the proposed backup power rule, the Commission would “plainly exceed[] the scope of its general jurisdictional grant” if it were to mandate CPE backup power.⁵⁷

It is no answer to say that backup power is necessary for an emergency communication to be transmitted in the first place. Allowing the Commission to regulate the non-communications activities of regulated entities would lead to “no meaningful limits on the scope of the FCC’s general jurisdictional grant.”⁵⁸ If the Commission could regulate CPE backup power, there would be nothing to stop the Commission from regulating basic commercial power and the design of cell phone batteries. But the Commission “*never* has possessed . . . jurisdiction . . . to

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 703 (citation omitted).

regulate consumer electronic devices that can be used for receipt of wire or radio communication when those devices are not engaged in the process of radio or wire transmission.”⁵⁹

Rather, the D.C. Circuit has drawn a clear line between regulation “of the communications themselves,”⁶⁰ which fall within the Commission’s general jurisdiction, and the regulation of devices “affecting communications,”⁶¹ which do not. Although the CPE backup power rule may regulate devices “affecting communications,” it clearly would not regulate the transmission of communications themselves. As in *American Library Association*, the “insurmountable hurdle facing the FCC . . . is that the agency’s general jurisdictional grant does not encompass the regulation of consumer electronic products that can be used for receipt of wire or radio communication when those devices are not engaged in the process of radio or wire transmission.”⁶² Because the Commission lacks general jurisdiction over external power supplies, just as it lacked jurisdiction over consumer electronic products, the CPE backup power rule would be legally unsustainable.

Whether specific provisions of the Communications Act could reasonably be interpreted as providing direct authority for a CPE backup power rule is thus beside the point.⁶³ Even if the Commission had direct authority to adopt the CPE backup power rule, “the Commission may not . . . utilize that power in a manner that contravenes any specific prohibition contained in the Communications Act.”⁶⁴ As the D.C. Circuit explained in *Verizon v. FCC*, specific grants of direct authority “must be read in conjunction with other provisions of the Communications Act,

⁵⁹ *Id.* at 705.

⁶⁰ *Id.* at 703.

⁶¹ *Id.* at 704 (internal quotations omitted).

⁶² *Id.* at 700.

⁶³ NPRM ¶¶ 43-44.

⁶⁴ *Verizon v. FCC*, 740 F.3d 623, 649 (D.C. Cir. 2014).

including, most importantly, those limiting the Commission’s subject matter jurisdiction to ‘interstate and foreign communication by wire and radio.’”⁶⁵ “Any regulatory action authorized by [a specific provision] would thus have to fall within the Commission’s subject matter jurisdiction over such communications.”⁶⁶ At bottom, the Commission would exceed its subject matter jurisdiction if it were to adopt a CPE backup power rule, regardless of whether the Commission could find direct authority for a CPE backup power rule somewhere else in the Act.

B. The Commission Lacks Authority Under Section 251(c)(5) To Require ILECs To Notify Consumers And Other Governmental Entities Of The Retirement Of Legacy Facilities.

The Commission’s proposal to require ILECs to provide widespread notice of the retirement of legacy facilities—to consumers, States, and the DoD—also exceeds the Commission’s statutory authority.⁶⁷ The purported authority for requiring ILECs to provide such notice stems from Section 251(c)(5),⁶⁸ which states that ILECs have a “duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier’s facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.”⁶⁹

In keeping with the 1996 Act’s goal of promoting competition in local telephone markets,⁷⁰ each subsection in Section 251(c) proscribes ILECs’ duties with respect to interconnecting carriers.⁷¹ Subsection (c)(5) is no different in that it requires ILECs to notify

⁶⁵ *Id.* at 640 (quoting 47 U.S.C. § 152(a)).

⁶⁶ *Id.*

⁶⁷ NPRM ¶¶ 60-79.

⁶⁸ *Id.* ¶¶ 69, 79.

⁶⁹ 47 U.S.C. § 251(c)(5).

⁷⁰ *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999).

⁷¹ 47 U.S.C. § 251(c).

interconnecting carriers of information relevant to “the transmission and routing of services using that local exchange carrier’s facilities or networks.”⁷² As the Commission has explained, the statute was intended to require ILECs to provide notice of information that “affects a competing service provider’s performance or ability to provide either information or telecommunications services.”⁷³

The only plausible construction of Section 251(c)(5) is that ILECs have a duty to provide notice solely to other telecommunications carriers. Congress did not enact this statute for the benefit of consumers or governmental entities, none of which care about the “transmission and routing of services” on the ILECs’ networks. A rule extending the ILECs’ notice obligation to consumers and governmental entities would exceed the unambiguous language of the statute and thus the Commission’s authority.

Even if the Commission could lawfully require ILECs to provide notice to consumers, the proposed ban on “upselling” raises a serious First Amendment concern.⁷⁴ Like other businesses, ILECs have a First Amendment right to speak with their customers.⁷⁵ The proposed rule infringes upon ILECs’ protected speech by: (1) outlawing speech that proposes a commercial transaction, *i.e.*, communications in which ILECs “try to convince customers to purchase more profitable bundles of services;”⁷⁶ and (2) “requiring incumbent LECs to supply a neutral

⁷² *Id.* § 251(c)(5).

⁷³ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 19392, ¶ 17 (1996); *see also id.* ¶ 171 (“Section 251(c)(5) requires that information about network changes must be disclosed if it affects competing service providers’ performance or ability to provide service. Requiring disclosure about network changes promotes open and vigorous competition contemplated by the 1996 Act.”).

⁷⁴ NPRM ¶¶ 71-72.

⁷⁵ *See, e.g., Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

⁷⁶ NPRM ¶ 71.

statement of the various choices that the LEC makes available to retail customers affected by the planned network change.”⁷⁷

Because the proposed rule compels ILECs to supply a “neutral statement” and thus “alters the content” of ILECs’ communications with their customers, it is a “content-based regulation of speech” subject to strict scrutiny.⁷⁸ It makes no difference that ILECs are commercial speakers.⁷⁹ Compelling commercial speakers to engage in speech they would not otherwise make is subject to strict scrutiny.⁸⁰ The proposed rule could not possibly survive strict scrutiny because it is not “narrowly tailored to promote a compelling Government interest.”⁸¹

The proposed ban on upselling could not survive First Amendment scrutiny even under the standard generally applicable to commercial speech regulation.⁸² Under *Central Hudson*, the government must demonstrate that a restriction on non-misleading commercial speech regarding lawful activity “directly advances” a “substantial” government interest and is “not more extensive than is necessary to serve that interest.”⁸³ The existence of “less-burdensome alternatives to the restriction on commercial speech . . . is certainly a relevant consideration in determining whether the ‘fit’ between ends and means is reasonable.”⁸⁴ Even assuming the

⁷⁷ *Id.* ¶ 72.

⁷⁸ *Riley v. Nat’l Fed’n of Blind of N.C., Inc.*, 487 U.S. 781, 794-95 (1988); *see also Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

⁷⁹ *See Pac. Gas & Elec. Co. v. Pub. Util. Comm’n*, 475 U.S. 1, 16 (1986).

⁸⁰ *See Entm’t Software Ass’n v. Blagojevich*, 469 F.3d 641, 651-53 (7th Cir. 2006).

⁸¹ *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000).

⁸² *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557 (1980).

⁸³ *Id.* at 566; *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416 (1993) (explaining that there must be a “‘reasonable fit’ between” the government’s “legitimate interests” and “the means chosen to serve those interests” (internal quotation marks omitted)).

⁸⁴ *City of Cincinnati*, 507 U.S. at 418 n.13; *see also 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 529 (1996) (O’Connor, J., concurring).

Commission has a substantial interest in avoiding “customer confusion” from copper retirements,⁸⁵ which is doubtful, the “complete suppression” of truthful and non-misleading commercial speech between ILECs and their customers is far more burdensome than necessary to achieve that goal.⁸⁶ A far less burdensome means of accomplishing the purported goal would be for the Commission to, for example, use its existing powers to sanction false or misleading speech.

The proposal to require carriers to supply a “neutral statement” of various choices is also unconstitutionally vague.⁸⁷ “It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.”⁸⁸ “[W]here a vague statute ‘abut(s) upon sensitive areas of basic First Amendment freedoms,’ it ‘operates to inhibit the exercise of (those) freedoms.’ Uncertain meanings inevitably lead citizens to ‘steer far wider of the unlawful zone’ . . . than if the boundaries of the forbidden areas were clearly marked.”⁸⁹ A regulation requiring ILECs to provide their customers with a “neutral statement” of their various choices would not “provide explicit standards” for the ILECs to follow and would invite the Commission to give meaning to this vague standard “on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.”⁹⁰

⁸⁵ NPRM ¶ 71.

⁸⁶ *Central Hudson*, 447 U.S. at 569.

⁸⁷ NPRM ¶ 72.

⁸⁸ *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

⁸⁹ *Id.* at 109.

⁹⁰ *Id.*

C. The Commission Lacks Authority Under Section 214 To Require ILECs To Provide Wholesale Access To Their Fiber And IP Networks.

The Commission’s proposal to condition Section 214 approval on ILECs providing competitive carriers with “equivalent wholesale access”⁹¹ to their next-generation fiber and IP networks is a transparent attempt to “do indirectly what it could not do directly.”⁹² The Commission cannot circumvent Section 251(c)(3) by coercing ILECs to unbundle their fiber and IP networks as a condition of discontinuing their copper and TDM networks.⁹³

Congress has “directly spoken to the precise question” of how and when the Commission can impose unbundling obligations on ILECs.⁹⁴ Under Section 251, the Commission can require ILECs to provide any requesting telecommunications carrier “nondiscriminatory access to network elements on an unbundled basis” when, “at a minimum,” “failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.”⁹⁵ When Congress enacted Section 251, it “made ‘impairment’ the touchstone” of any unbundling decision.⁹⁶ Without a showing of impairment on substantial evidence, the Commission may not require unbundling.⁹⁷ “Congress did not authorize [an] open-ended . . . judgment” because the Commission “must point to something a bit more concrete than its belief in the beneficence of the widest unbundling possible.”⁹⁸ Under the Commission’s rules, a CLEC is not impaired unless “lack of access to [a network] element

⁹¹ NPRM ¶ 110.

⁹² *Altamont Gas Transmission Co. v. FERC*, 92 F.3d 1239, 1248 (D.C. Cir. 1996).

⁹³ NPRM ¶¶ 106-13.

⁹⁴ *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

⁹⁵ 47 U.S.C. § 251(c)(3), (d)(2)(B).

⁹⁶ *USTA I*, 290 F.3d at 425.

⁹⁷ *See* 47 U.S.C. § 251(d)(2); *USTA II*, 359 F.3d at 582 (requiring substantial evidence).

⁹⁸ *USTA I*, 290 F.3d at 425.

poses a barrier or barriers to entry . . . that are likely to make entry into a market by a reasonably efficient competitor uneconomic.”⁹⁹

In the *Triennial Review Order*, the Commission expressly declined to impose unbundling requirements on certain broadband technologies, such as fiber, and packet switching capabilities.¹⁰⁰ The Commission concluded that not unbundling fiber networks and IP transmission would promote the goals of Section 706 by maintaining incentives for *both* ILECs and CLECs to invest in and deploy broadband infrastructure.¹⁰¹ The D.C. Circuit upheld this aspect of the *Triennial Review Order*,¹⁰² explaining that “limiting access to the fiber portion of the hybrid loops . . . give[s] ILECs incentives to deploy fiber . . . [and] stimulates [CLECs] to seek innovative access options for broadband, including self-deployment.”¹⁰³ As a result, the Commission’s unbundling rules expressly deny unbundled access to packet-based and fiber technologies.¹⁰⁴

The Commission could not lawfully circumvent the entire unbundling regime—including its own rules and the statutory impairment standard—through a clever use of its Section 214 authority.¹⁰⁵ As explained above, even if the Commission could interpret Section 214 as authorizing such an unbundling condition, “the Commission may not . . . utilize that power in a manner that contravenes any specific prohibition contained in the Communications Act.”¹⁰⁶

⁹⁹ 47 C.F.R. § 51.317(b).

¹⁰⁰ See *Triennial Review Order* ¶¶ 213, 234, 273, 288, 537.

¹⁰¹ *Id.* ¶ 538.

¹⁰² See *USTA II*, 359 F.3d at 585.

¹⁰³ *Id.* at 580.

¹⁰⁴ 47 C.F.R. § 51.319(a)(3)(ii), (iii); *id.* § 51.319(a)(2)(i).

¹⁰⁵ NPRM ¶¶ 108-09.

¹⁰⁶ *Verizon*, 740 F.3d at 649.

Section 214 “must be read in conjunction with other provisions of the Communications Act,”¹⁰⁷ such as Section 251(c)(3), which speaks directly to the question at issue. The Commission would plainly exceed its statutory authority if it attempts to impose backdoor unbundling obligations on ILECs through its Section 214 authority.

CONCLUSION

For all these reasons, the Commission should abandon the proposed rules because the costs far outweigh the benefits. The proposals in the NPRM are not the way to achieve the investment in telecommunication infrastructure that is necessary to keep America competitive in the 21st Century. The proposed rules will harm consumers and reduce investment in broadband, and the Commission lacks the statutory authority to adopt them. The Commission should remain focused on encouraging next-generation packetized-fiber technology instead of proposing rules that will slow broadband deployment and discourage investment in tomorrow’s technology.

Respectfully Submitted,

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¹⁰⁷ *Id.* at 640 (quoting 47 U.S.C. § 152(a)).